New Brunswick Board of Commissioners of Public Utilities

In the Matter of a Hearing to review Section 2.1 of the Open Access Transmission Tariff (OATT) approved by the Board on June 19, 2003 and to Review the Board's "Open Season" direction contained in its March 13, 2003 Decision with respect to the said Tariff

Delta Hotel, Saint John, N.B.
February 10th 2004, 10:00 a.m.

CHAIRMAN: David C. Nicholson, Q.C.

COMMISSIONERS: J. Cowan-McGuigan
Ken F. Sollows
Robert Richardson
Leon C. Bremner

BOARD COUNSEL: Peter MacNutt, Q.C.

BOARD SECRETARY: Lorraine Légère

CHAIRMAN: Good morning, ladies and gentlemen. I'm going to ask for appearances on the record for the applicant NB Power.

MR. HASHEY: Thank you, Mr. Chairman. Myself David Hashey, Terry Morrison, accompanied by the panel members, being Panel B and one of Panel C and also -- and of course our support staff.

CHAIRMAN: Okay. Thank you, Mr. Hashey. The Public Intervenor?

MR. ANDERSON: Mr. Chairman, William Anderson as Public Intervenor.

CHAIRMAN: Thank you. Anybody here from Bayside Power LP today? Emera?

MR. ZED: Peter Zed here appearing on behalf of Emera Energy. And with me is Jim Connors.

CHAIRMAN: And you both are appearing as well for Nova Scotia Power?

MR. ZED: Yes, sir.

CHAIRMAN: Great. Thank you. J.D. Irving, Limited?

MR. MCCARTHY: Yes, Mr. Chairman. Kevin McCarthy on behalf of J.D. Irving.

CHAIRMAN: Thank you, Mr. McCarthy. The Municipal Utilities?

MR. YOUNG: Yes, Mr. Chairman. Dana Young, Tony Furness, Eric Marr.

CHAIRMAN: And WPS Energy Services Inc.?

MR. MACDOUGALL: Mr. Chair, David MacDougall. And

Mr. Howard would like to send his apologies. But he was unable to be in attendance today.

CHAIRMAN: Good. Thanks, Mr. MacDougall. And here on behalf of the Board?

MR. MACNUTT: Peter MacNutt on behalf of the Board. And I have with me Doug Goss, Gaye

Drescher and Isabel Fagan.

CHAIRMAN: Thank you, Mr. MacNutt. Are there any informal intervenors? HQ Energy Marketing

Inc.? Hydro Quebec,

Trans Energie? Canadian Manufacturers and Exporters, New Brunswick Division? Maritime Electric? Prince Edward Island Energy Corporation?

We canvassed all of the informal intervenors and gave them the opportunity to make a presentation to the Board. The only informal intervenor who took us up on the offer was Canadian Manufacturers, New Brunswick Division. And they have submitted a written presentation to us. We have made certain that all of the parties have received a copy of that.

Mr. Zed is shaking his head.

MR. ZED: I haven't seen it, sir. I don't know how it was circulated or when, but --

MR. MACDOUGALL: Neither have I, Mr. Chair.

CHAIRMAN: Well, we will get you now, Mr. Zed. Anyway, counsel can make any comments on it. We will simply accept it and give it the weight that we believe it deserves.

Now the record is still open. There are a couple of undertakings still to come?

MR. MORRISON: Yes, Mr. Chairman. Copies have already been given to the Board Secretary. The first undertaking which is marked -- we have it marked as undertaking number 1, which was a response to a question by Mr. MacNutt, Board

Counsel dealing with savings in staffing costs.

And those numbers have been prepared and copies of that undertaking number 1 have been given to the Board and have been circulated, so --

CHAIRMAN: That will be marked as exhibit A-12. That is the response to undertaking number 1.

Anything else,

Mr. Morrison?

MR. MORRISON: Yes, Mr. Chairman. There is also -- you will recall NB Power was asked to rework the numbers that were originally found in exhibit A-11, I believe. And that was the subject of the technical conference call on Friday afternoon.

And we have it designated as undertaking number 2. Copies have been given to the Board Secretary and have been circulated to the parties.

CHAIRMAN: That will be exhibit number A-13. Anything else, Mr. Morrison?

MR. MORRISON: That is it for preliminary matters,

Mr. Chairman.

CHAIRMAN: Okay. Mr. Hashey, the Board would like to ask Mr. Bishop and the other witness on Panel B --

MR. HASHEY: Mr. Marshall?

CHAIRMAN: -- Mr. Marshall to perhaps take the stand for a moment. And it has to do with exhibit A-12, that is

undertaking number 1. And what we would like to have done is an explanation of the $900,000 estimate for a reduction in staff.

And it is our understanding that that is applicable to all of the sales on the MEPCO line, rather than looking at the 188 which has been the focus of the hearing.

Now when to do that -- why don't we just do that right now. And then we will come back to other preliminary matters and get that over with.

MR. HASHEY: Fine, Mr. Chairman. I would ask the two gentlemen to take the stand, Mr. Bishop and Mr. Marshall.

(MESSRS. BISHOP and MARSHALL)

BY THE CHAIRMAN:

Q.240 - The Board considers you are still under oath from the adjourned date of the hearing. You understand my query?

MR. BISHOP: Yes, Mr. Chairman, I do. I would be pleased to give you an explanation of these cost reductions.

If I may then to start, to arrive at these cost reductions we actually looked back at the history that NB Power has had when in fact through the early '90's when some of the export reductions or export quantities were lower, just quite frankly what the experience at the Coleson Cove station was.

Now first just to emphasize the narrative in the

response, should we lose 700 megawatts of capacity on the Coleson tie, the effect would essentially be to shut down, or it could be as much as to shut down two of the three 350-megawatt Coleson Cove units for the summer period. And by summer period I would suggest May through September or April through October.

To do that, what -- and the way that we arrive at the first line of $200,000 is that we would not use our own staff, our operating staff overtime, of that staff during outages. Because we actually have much more time that we would do the outages in.

In fact we have three to four months per unit to do the outage work. So any overtime reductions we have actually gone back and looked at the amount of overtime over the last few years, suggesting that that would go totally.

In addition we would use additional operating people or use operating people and some of our maintenance people who would otherwise be doing routine maintenance on operating units, move them over to the outages of these particular units during the maintenance period.

We believe that we can save $250,000 in essentially replacing labour that we would otherwise bring in. The fact of the matter is that most of the labour that we do

during outages on these units is with hired labour.

And finally -- this is a bit of an assumption, but we think it is a good one, is that we may in fact be able to reduce the minor, what I will refer to as the minor maintenance outages on the unit from yearly to every second year.

And in that case we are suggesting that there is simply just not -- we are spreading the NMA labour over two years rather than one year to arrive at the $450,000. Our NMA labour cost is roughly a million dollars. So we have replaced some of it in the first line -- in the second line.

And we have also suggested that at one year we wouldn't have that NMA labour for one unit, and we would keep deferring unit outages to two years rather than one year. The summation of which then is $900,000.

Q.241 - My question is we have been dealing with -- the figures that we have been dealing with on margins, et cetera all deal with the 188 megawatts that are in play in reference to the MEPCO tie line.

So this would be as if, you know, any sales over the MEPCO tie line. That is my understanding.

MR. BISHOP: That's correct, Mr. Chairman.

Q.242 - What is an appropriate or fair portion of this to be

attributable to the 188 megawatts that are in play?

MR. BISHOP: It certainly isn't proportionate. And the reason it isn't proportionate -- I'm going to say zero is the closest number. There may be some overtime savings in our own staff. And we think that is the only saving that would result from the 188 megawatts of loss of the tie.

The reason being of course is that we would continue. Because we still have opportunities. And as we pointed out, we will try and mitigate this. So we would not alter significantly the amount of operation of the Coleson Cove station.

Admittedly we may lose as much as a terawatt-hour of energy. But that just simply means that the units would be there and either ready to run or they would be running at reduced load, which effectively gives very little incremental cost savings in maintenance or in the staff associated with maintenance.

So I would suggest that probably less than $100,000 is as good an answer as I can give you now.

I'm sorry. Mr. Marshall has just pointed out for clarification, we wouldn't change maintenance schedules on these units as a result of that. We would continue to use the same maintenance schedules as we do now.

So I'm not going to defer one to a two-year schedule.

I mean, matter of fact, we are attempting to do that as much as we can in the units as they are now. But this would not be the determinate factor.

BY MR. SOLLOWS:

Q.243 - Thank you. I just -- as you were answering I was looking at this. And in the preamble it says most of the 3,000 3,500 gigawatt hours of export energy is generated at Coleson Cove.

And that is really all of the energy going over the MEPCO tie line is what we are talking about there I guess pretty much?

MR. BISHOP: That's exactly, sir, yes.

Q.244 - That is relevant to which year? All of the forecast years or -- I mean, we are expecting that as your marginal fuel price comes down your exports would go up. So is this history or future?

MR. BISHOP: It is future. And it of course excepts those years when Point Lepreau was out for refurbishment. But this is what we would forecast. And in fact we have in the past generated up to 3,500 gigawatt hours from Coleson Cove for export.

Q.245 - And this 188 megawatts we are talking about is about -- well, it is a little less than a third of that?

MR. BISHOP: That is correct. Yes.

MR. SOLLOWS: Okay. Thank you.

CHAIRMAN: I'm going to ask any of the intervenors, et cetera if they have any questions arising out of the questions we have just asked of this panel. Then I will go around the room.

I think as well if there is something that arose in the technical conference telephone call on Friday as well that you might have a clarification question on, this would be a good time to ask it before we close the record.

So Mr. Anderson, do you have any questions of this panel?

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

CHAIRMAN: Thank you. Mr. Zed?

MR. ZED: I have one. If I could just have a second. We are fine. Thank you.

CHAIRMAN: Thanks, Mr. Zed. Mr. McCarthy?

MR. MCCARTHY: We have no questions, thank you, Mr. Chairman.

CHAIRMAN: Thank you. Mr. Young.

MR. YOUNG: No questions, Mr. Chairman.

CHAIRMAN: Mr. MacDougall?

MR. MACDOUGALL: No questions, Mr. Chair.

CHAIRMAN: Thanks. Mr. Hashey, anything you wanted to ask to clear up any confusion we may have brought to the

matter?

MR. HASHEY: Everything seems abundantly clear. Thank you.

CHAIRMAN: Thank you, Mr. Hashey. Again you are excused and thank you, gentlemen, for A, being here and, B, giving us that additional testimony. Thanks.

MR. ZED: Thank you, Mr. Chairman.

CHAIRMAN: Mr. Hashey/Mr. Morrison, Commissioner Cowan-McGuigan has what may be an error or typo in the transcript that she will direct your attention to, and perhaps you could review the transcript and if it is an error we will let the shorthand reporter know. What day was it? Perhaps you could --

MS. COWAN-MCGUIGAN: Actually it was -- the date I'm not sure.

MR. MORRISON: Page number is fine?

MS. COWAN-MCGUIGAN: The date is February 3rd, 2004. I would like to draw attention to an error which appears in the transcript on page 332, lines 5 to 7. Either it's a typo or I misread the quote provided for Mr. Hoecker's evidence. It should read, "first endeavoured, however, not to upset legitimate existing business arrangements." Somehow the word "accept" appears in place of the correct word "upset". Also the word "arrangements" is plural as opposed to the singular found in the transcript. I

believe Mr. Hoecker's response to my question does not reflect the errors found in the transcript and this is the -- and that his answer to my question stands. Thank you.

CHAIRMAN: Okay. Do you want to address that now or you want to wait until after the break.

MR. MORRISON: It appears that the Commissioner is correct but if we could just have a chance to look at it at the break --

CHAIRMAN: Okay.

MR. MORRISON: -- but I suspect that she is absolutely correct and that the answer was responsive to the question that has been clarified today.

CHAIRMAN: Okay. Great. We will wait and you can let us know after the next break.

The method of proceeding for the rest of the day is that we will call upon the applicant to sum up first and then in alphabetical order the intervenors. The Board would like to have a bit of a break between summation and reply, so that if we have some questions that are nagging at us we can share that with counsel and they can address it in their reply to us. And then we will go through the reply and that will be the intervenors in alphabetical order, concluding with the applicant at the end.

Any comments on that? Mr. Zed, you look worried.

MR. ZED: Not about this, sir. Thank you.

CHAIRMAN: Okay. Are there any other matters that any of the parties would like to bring up before we begin summation? If not, Mr. Hashey/Mr. Morrison?

MR. HASHEY: Thank you, Mr. Chairman. I will address the issues that we believe are important in this matter. Hopefully will do it in a way that is succinct and in summary fashion and make our points so that they are understood by the Board. We obviously welcome any questions. I never have a problem with anyone that interrupts me. In fact it seems to give me a better train of thought at times.

But I would like to thank the Board for hearing us and giving us the courtesy of presenting our evidence in this matter and I will give you a copy of our remarks following the remarks, if that would be satisfactory. I will be ignoring as I make my remarks a number of references to transcripts and possibly exhibits that would be included in the written submission, if anyone wants to check or confirm what I am saying has accuracy or not. There is always the chance that something might go off the line a little bit. We have tried to do as best we could in the time we had to check these things.

In any event, I would begin by maybe just taking a

very brief review of why we were here. I don't -- I won't go into great detail there. We all know that there was a -- Section 61.1 of the Public Utilities Act the Lieutenant Governor requested the Board to do this review of Section 2.1 of the open access tariff and also directed to review the decision of March 13, 2003, in respect of the open access transmission tariff in the area -- the question which we really here are addressing, whether all transmission capacity is not subject to a firm contract where the party is not affiliated with NB Power should be subject to open season bidding no later than the fourth calendar of 2003. Of course that has been postponed.

And then the Board was requested to determine if it is in the public interest, and we will be saying an awful lot about what we see the public interest to be, to preserve the transmission reservations which are not subject to this firm contract involving the third party who is not affiliated with NB Power.

As a result of that, NB Power was asked to file an application which we did. Subsequent to that application filed in August extensive evidence was filed. There were 135 interrogatories including supplementals that were responded to. And I think it's a clear issue here that is known, that the only opponent to what is being requested

here is Emera Energy Inc., which we will be referring to as Emera. And that reminding us back to where we were before when we were done the last hearing. Truly the only proponent or opponent concerning the release of these what we say were third party agreements was Emera.

Now I think to go next it's worth reminding the Board, and I do this respectfully, and I know that NB Power does and I think we have shown great respect for the wide powers that this Board has. However there is an overriding principle that governs the Board's decisions and that's the New Brunswick Telephone Company case in 1977 where I quote I think it was at that time Chief Justice Hughes that says, "While the powers given to the Board are principally given for the purpose of protecting the public interest, the Board is also required to safeguard the financial position of the utility." And really that's the overriding principle from which we will be making our case here.

And we suggest as well that the idea of safeguarding the financial position of the utility is not just an additional responsibility, but really that does blend in with the public interest.

Now I will now move on to the areas -- and I will try to divide this in a manner than can be I hope followed and

understood and will address certain issues quite in summary fashion.

We have asked the Board to revise the decision in only the wording of 2.1 which was presented at the previous hearing. Now our rationale for that is really threefold. We say that it is clearly in the interest of the ratepaying public of the province of New Brunswick and the Province of New Brunswick and the utility to do so.

Secondly we are suggesting strongly that this Board was misinformed on grandfathering of agreements in relation to the FERC 888 compliant open access transmission tariff. And I will be addressing that in some detail later. And I think that had to be of considerable significance since we are trying to follow a tariff and the rationale behind it, which we argue that the Board should really respect and give significant credence to.

And then the third point that we will be addressing is the -- Emera's representation on the reasons for supporting the March 13th decision, and we are saying that they simply are not relevant.

Now on issue number 1, issue 1 is the issue that we say that it is clearly in the interest of the ratepaying public, the Province of New Brunswick and NB Power to make

this amendment. And I will be dealing with in segments as well.

But first we will state that we believe that this evidence that you have heard has overwhelmingly demonstrated that it is in the public interest to protect the firm transmission reservations on the MEPCO line that were established following the open season in 1988 -- sorry -- 1998.

We find absolutely no evidence, none, to show that New Brunswick ratepayers would benefit if these reservations were taken away and obtained by others. There is no benefit to New Brunswick. We will be emphasizing that. And I think that's what this is about. I mean the Board here is to protect the public New Brunswick. And we are suggesting that the public interest is influenced by three factors, and I will deal with these three factors.

First of all the loss of economic benefit to New Brunswick, the second is the impacts of regulatory uncertainty and the third is the advancement of a competitive market, which is the White Paper issues that we have heard so much about.

First of all on the issue of loss of economic benefit to New Brunswick. We suggest that the evidence demonstrates that NB Power will suffer loss of export

benefits should it lose all or any portion of its firm transmission rights on the MEPCO line. Both NB Power and Emera set forth methods to mitigate the undisputed loss of benefits. NB Power set forth with results from its production model one mitigating technique of selling to Hydro Quebec, and that technique we suggest is derived from natural experience.

Emera has suggested three techniques which we think are answerable. One is -- number one was to sell to Nova Scotia. And this is of course one of the issues we have. This would result in a substantial transfer of wealth to Nova Scotia. B, suggesting that transmit through Quebec to New England. In that one, NB Power would obviously include additional transmission charges resulting in the transfer of wealth to Quebec, if it was possible. And C, sale in New Brunswick. I think the evidence showed that this is very highly unlikely. The requiring the loss of 188 megawatts I think the comparison was shown that to find a market for that in New Brunswick would effectively be a load the size of the city of Saint John, and that load just simply doesn't exist.

Now for the loss of the 188 megawatts of firm transmission reservations, the loss of export benefits, even assuming Emera's mitigation techniques, we suggest is

in the vicinity of $10,000,000 a year. This is approximate. It's based upon a number of figures that go in many directions, but when you really get right down to the numbers we never get down to zero. There always is going to be a loss to this utility and something that is going to be effectively taken over by the ratepayers.

I mean, we can argue numbers until they are coming out our ears, but the fact is there is going to be a loss and there is going to be a significant loss to New Brunswickers if we do not have this line secured by the way that it has been done.

To say the impact --

MR. SOLLOWS: If I may, Mr. Hashey, you invited the interruption.

MR. HASHEY: Yes, sir.

MR. SOLLOWS: You used the words significant loss. I would like you to pursue that a little bit further and tell me what is significant? What -- when would the loss be insignificant and what criteria are you applying?

MR. HASHEY: I would say the loss is never insignificant. As long as there is a loss to New Brunswickers I think that's a significant loss. You know, we have talked about numbers, we have talked about numbers all over the place, anywhere from five, ten, 18,000,000, and you have seen the

numbers. And we have talked about percentages. And the percentages are anywhere from one to two to three to five, whatever. But don't be misled by percentages. They can be extremely misleading. What we are talking about here is a significant number of dollars. And when you look at the actual profit of Genco and what Genco needs really to achieve, and when you look at the actual earnings of NB Power, numbers like that are significant. And I think that's where the -- I would roll into the significance, Commissioner Sollows.

Now the other issue here is it is important and it is not insignificant to disregard an important public interest obligation of the Board and the fact that NB Power has relied on this transmission reservation in its planning and investment decisions. I will be coming further to that. And again on the insignificance, I have covered that as far as the percentages go.

Now one of the issues, and we are talking about the importance of planning, the importance of business, the payback period on the Coleson Cove Refurbishment Project, which was approved by the Board here in 2002, would be extended significantly as a result of the loss of assured exports. And that would add nothing but risk to NB Power.

In fact, you know, there is no -- the key point here

as well is that there is no offsetting value. There is nothing that can say -- and that comes to the issue of creating new generation, et cetera.

But the fact is that this wealth, whatever this would be, would be gone if this went to one of our utilities in the provinces. Quebec, Nova Scotia seems to be the only players. And we don't have no Quebec here raising any problems whatsoever.

Now the next issue I would like to deal with if I might is the issue of regulatory uncertainty. Now Mr. Hoecker explained how the FERC concerned itself with risk to businesses which could arise if the FERC interfered with legitimate business relations.

NB Power has taken the risk of a substantial investment commitment in the refurbishment of the Coleson Cove generating station for the benefit of New Brunswick ratepayers.

The major commitment was based on a reasonable assurance of having its firm transmission access to the New England market via the MEPCO line. This assumption was in evidence before this Board when the Coleson Cove project was reviewed and subsequently recommended.

Now regulatory certainty, what is it? Regulatory certainty is the ability to rely on the established

precedent to be able to plan and predict risks when evaluating projects and investments.

If contracts can be abrogated, there is a great risk that a bond-rating agency might react. And of course there is a lengthy response in the PUB IR-9 on that, and also in Mr. Hoecker's evidence.

Nowhere else in Canada or the United States, we suggest, the evidence is clear that there has been no evidence that anywhere have such contracts been abrogated.
A market where contracts are at risk is a market that is going to be more expensive in which to do business.

Now the Board has attempted in our view to inject an equitable judgment or a sense of fairness into a past transaction over which it had no jurisdiction initially.

We respectfully submit that what was created was even a bigger unfairness with a real world financial consequence that goes beyond merely shifting costs onto ratepayers that would otherwise be borne by the export business.

And we are now into the world of investment. Investors could view the Board's decision with deep concern if willingness is shown to upset business arrangements that have been relied on over a period of time.

And to complete this section I would say why should New Brunswickers bear this risk when there is no apparent benefit to anyone but extraprovincial interests which do not qualify for this Board's protection.

Now I would then move on very briefly to the next issue of the three that I have outlined. And that is the advancement of a competitive market.

Now it has been suggested by Emera in its evidence that 188 megawatts in question is tied to the development of the market in New Brunswick and will encourage new generation to develop in the province.

Emera referenced the White Paper in stating its position. The White Paper does support the creation of a market. But it also recommends maintaining access to the export market.

It has been definitely shown, particularly in answers to questions posed by Mr. Anderson for the Province, that there is no possibility of new generation being developed based on the 188 megawatts becoming available through an open season.

What will in fact happen, if new bids are sought, is that one of two potential competitors, namely Hydro Quebec or Emera or possibly NB Power will bid and acquire the transmission capacity of the line once again.

The idea of having two interested parties being more conducive to the development of new generation has no foundation. The 188 megawatts under consideration at this hearing and the market developing in the province are mutually exclusive.

Having this transmission capacity on the MEPCO tie preserved by NB Power does not preclude others from obtaining rights to the capacity, as Emera has pointed out in its evidence.

NB Power did in fact negotiate and make available to Bayside export opportunities when it constructed the new gas-fired plant in Saint John that you have heard about.

The fact that clearly came out in this hearing is that if New Brunswick is to attract new generation, it is the second tie, the planning of which is well advanced in cooperation with Emera subsidiary is truly the true answer.

A new generator could economically compete with NB Power and therefore bid for the 300-megawatt capacity, knowing that there would be export opportunity.

The Board should also bear in mind the time it takes to construct a new generation plant which would fall well in line with the completion of the second tie.

We are suggesting that if this generation was to be

created, it would take time to plan. And I guess we all know that right now there is no current plans and certainly none that Emera have been able to demonstrate.

So that would complete what we would like to say and leave with you in relation to the very, very important point, I think the most important point here, which is the interest, the public interest of New Brunswick.

MR. SOLLOWS: If I could just clarify --

MR. HASHEY: Yes, sir.

MR. SOLLOWS: -- you started by saying this was in the interest of the ratepaying public. And you ended by saying it was the interest of the public.

As you understand, those are very different groups in this province. And I'm wondering where did it switch in your presentation from the ratepaying public to the general public?

MR. HASHEY: I didn't really intend to shift much. I think the ratepaying public is number 1, where it would be affected. But I think we have also discussed the possibility of losses that might come to the public of new Brunswick. And I could deal with that as I see it. And my people with me might disagree.

But as I see it, we are also getting into the situation of New Brunswick generation business -- other

business, sorry, having to raise money, to have to go to the markets. And I think then you get into the shareholder side of things. A lot of the costs admittedly would be passed into the new corporation that would be dealing with the rate situation.

But in relation to the other, and regulatory certainty, there is the taxpayer. There is the bit of having to raise money that also we feel is very significant. And if there isn't that certainty, that could be significant.

And that possibly I suppose could go directly to the taxpayers, since the Province of New Brunswick will be, as we understand it, the shareholder that will own the utility.

Follow what I'm saying? I think there is that aspect, potential aspect as well, okay. Thank you, sir.

The next area that we would like to get into, and I don't want to belabor this, but it was an area that deals with the issue which we say that the Board did have misinformation on the grandfathering of agreements in relation to FERC 888 Compliant Open Access Transmission Tariff.

Now this is an area that we had brought a lot of evidence in, the tariff that we submitted. We had of

course the idea of having it FERC compliant, and this happened.

And I would suggest the tariff which was submitted to the Board in July of 2002 for review was derived from and was compatible with FERC Order 888 pro forma tariff.

In its decision the Board amended the wording of Section 2.1 to preserve transmission reservations only if they were subject to a firm contract with a party that is not affiliated with the transmission provider.

This language of course is not in the FERC pro forma. And it is inconsistent with FERC cases and policy. The evidence presented by NB Power demonstrated that the file language was consistent with and supported by the FERC. The question then arises as to why the Board made such an amendment. And we believe that there is a reason.

During the hearing Emera misrepresented the FERC's position. In its responses to interrogatories, Emera now acknowledges that it was no longer its position that a transmission agreement could only be grandfathered by the FERC if a third party energy contract had existed in support of this agreement.

Now I think the timing, when we had those interrogatories, was like a week before we appeared here. And so up till that time, at no time had Emera ever come

back to this Board and said look, this was incorrect.

There was never any attempt to correct that until the interrogatory. Then in cross examination at this hearing Mr. Connors acknowledged that the evidence which he had previously given was incorrect and the FERC position had been misstated.

In the transcript, December 9, 2002 the Open Access Transmission Tariff, I will remind you, it was stated by Mr. Connors, and I quote: "I won't argue the point other than to say most strenuously that what FERC is talking about in all these orders are independent third party contracts."

It is respectfully submitted that the evidence which was the foundation of the Board's decision to amend the pro forma language had been misstated and misrepresented and was presumably the reason the Board made the amendment.

Due to this misrepresentation on this crucial point, NB Power found it necessary to call expert witness evidence in this hearing. In this regard Mr. James Hoecker, who is the former Chairman of FERC and a longtime member of the Commission was called as a witness to explain how the FERC do grandfathered contracts between business units.

Mr. Hoecker's evidence is uncontradicted. And Emera has now retreated to other arguments which will be dealt with later. These arguments in the view of Mr. Hoecker do not support in any way the proposition that established and beneficial agreements between the business units that were entered into after a fair process should be abrogated.

Emera contends illogically that these agreements are invalid because there was no Regulator in place to oversee the open season, and NB Power had not completed its restructuring.

If the arguments advanced by Emera are correct, which we say they clearly are not, then all firm transmission reservations since 1998 should be abrogated. This to us makes absolutely no sense.

Mr. Hoecker in his evidence has clearly and carefully explained the logic and rationale behind the grandfathered contracts, which logic applies clearly to the situation in New Brunswick.

Mr. Hoecker explained that the claim that the FERC would have overthrown these agreements goes against everything that the FERC has decided in its decisions and orders.

Emera, in its cross examination of Mr. Hoecker,

attempted to demonstrate that there were cases referenced in FERC Order 2000 that would suggest that FERC had abrogated and modified agreements.

Now those contracts were not given to Mr. Hoecker at the time. As you noted probably at the time, he was quite surprised to hear that.

Well, these orders are available. I have them if you would like to read them. But I would make a point on them again, I suggest that that type of cross examination and what was attempted to be shown in relation to those contracts so-called under the Order 2000 point that was brought up by my friend just do not stand for any abrogation nor amendment of any contract.

And I will deal briefly with that. That groundless impression was left that there was an intrusion into contracts by FERC. In none of the cases cited did FERC modify or abrogate a private bilateral agreement.

When Wisconsin Power & Light was found to have withheld transmission capacity from the market by calculating ATC as to reserve capacity for a network service it could not provide, the FERC ordered the capacity released. Unlike the NB Power case, there was a violation of an established rule that amounted to a hoarding capacity.

Secondly, there was no bilateral agreement affected other than to force the company to provide service it was obligated to provide. Thirdly, the FERC used its investigative and enforcement authority to cover the problem without undoing any commercial relationship or agreement. And fourthly, FERC imposed no restrictions on the ability of Wisconsin Power & Light affiliate to acquire the released capacity.

Some other cases cited in the footnote on the Order 2000 involved more egregious conduct than this. Nowhere did the FERC abrogate or even modify a private agreement.

In contrast with WP&L, NB Power volunteered to make capacity available to the market and is not shown to be engaged in any hoarding capacity. The Board's action in the NB Power case is totally out of the mainstream.

Mr. Hoecker in his evidence further explained that the FERC made it abundantly clear that deals between business units of utilities, which are very common, must be engaged in and enforced as if the parties were affiliates or even nonaffiliates. To the FERC these would be agreements like any others.

And I think it is worth giving a couple of quotes from Mr. Hoecker's evidence, if I might. And just toward the end of this section, at page 10 of Mr. Hoecker's filed

evidence he states -- and the question was "Did FERC treat existing contracts for transmission capacity differently when the parties to the contracts were affiliates?"

His answer was "No. Order number 888 made no distinction between existing transmission capacity contracts between affiliates and non-affiliated third parties. Even with regard to the agreements entered into after Order number 888 went into effect, the Commission did not limit the ability of affiliates to contract with one another."

At page 29 Mr. Hoecker further states in the evidence "But I would say that the FERC would regard this as perfectly appropriate. They would regard this -- and that is NB Power's firm transmission reservations -- agreement as binding. And as a matter of fact they are obligated by federal law in the States to ensure that there is no undue preference. So they would have no choice but to make sure that this agreement was treated as if it were a contract between two different corporations."

Now it is indeed unfortunate this representation was made at the very end of the previous hearing when really there was no opportunity to review that. And that is the necessity of bringing in the evidence at this time.

And in conclusion on this point, we strongly submit to

the Board when approving a tariff based upon the FERC Order 888 pro forma tariff should be guided by and follow the rationale and reasoning of the FERC in grandfathering the transmission reservations, which evidence has been clearly set out by Chairman Hoecker.

Now the third issue and my final issue that I wish to address is the issue of Emera's representation on the reasons for supporting the 13th March decision. And we say it is not relevant.

Emera has backed away from its argument that the FERC only grandfathered third party contracts and has reverted in this hearing to an argument concerning "the environment".

For its rationale for abrogation, Emera is arguing the failure of the lack of regulatory authority, the lack of a code of conduct and the fact that there was not a complete functional unbundling. NB Power submits, as if fully supported by Mr. Hoecker, that these arguments are irrelevant.

It is submitted that the expert evidence of James Hoecker should be preferred over that of Mr. Trabandt. Mr. Hoecker was a FERC Commissioner and later Chairman at the very time FERC was dealing with restructuring the electricity industry and when Orders 888 and 889 were

issued. Mr. Trabandt's evidence at FERC predates this area.

And I think one of the most telling points is the interrogatory that was given to Mr. Trabandt which is in IR-2 -- EE IR-2. And that is very telling.

When asked to provide specific support for many of his opinions and statements contained in the evidence, Mr. Trabandt simply makes a general reference to FERC orders. It is submitted that Mr. Trabandt's evidence is bare and is unsubstantiated opinion.

In other words we tested that opinion. We asked him to show us authority for the opinion. And if you look at that IR you will see a great list of questions and all answered, "Please refer to the orders", which was completely unresponsive in our view.

NB Power then submits that the environment is irrelevant as stated. The position is supported by

Mr. Hoecker's evidence. And we have given you, in the documents that we will hand out, the transcript references to that.

The fact is that NB Power was a leader in the opening of its transmission and did so when it could as easily have maintained a protective position. Why not? It set up an OASIS, it posted the terms of expiring commitments

and it established a process to sell available capacity.

When Hydro Quebec raised issues, they were responded to promptly. And as indicated by the response, which is an exhibit here, the commitment to a firm rate was published on the OASIS.

Regarding this point the Board should not be influenced by the inference of Mr. Connors that a commitment to capping the tariff rate was provided only to Hydro Quebec and not communicated to the parties. In fact as stated in that very letter, which is an exhibit here, it was posted on the OASIS prior to sending that letter to Hydro Quebec.

NB Power was cognizant of the fact that the Board did not have regulatory authority over the tariff, but did file a copy of the 1998 tariff with the Board for its information. NB Power of course had no authority to create any regulatory body, but continually acted openly and fairly. The lack of regulatory responsibility for NB Power's tariff cast no reflection on the Board for the legitimacy of what this company was doing during that period.

Emera further argues that in the absence of regulatory jurisdiction over the tariff, business arrangements between duly established NB Power business units are

invalid.

Mr. Hoecker has pointed out that this is abnormal regulatory practice and does not make sense. In fact it is both unfair and uneconomic to businesses which seek to adopt a competitive model while fulfilling obligations entered into while they were vertically integrated.

Following the logic of Emera's argument, NB Power would not have been able to bid in the original open season. The result would have been sole discrimination against NB Power. Again it makes no sense.

In the United States where FERC had not previously had jurisdiction over the transmission of non-public utilities, its new authority under Order 888 did not cause the FERC to throw out the existing capacity arrangements. As well, the uncontradicted evidence of Mr. Marshall is that in Canada there is no example where business arrangements have been abrogated when transmission tariffs were implemented and more competitive markets promoted.

It should be noted Emera now acknowledges in its cross examination that business units would be able to bid and enter into binding agreements. They have readily acknowledged that this is not the issue.

There is no issue of conflict of interest nor an issue dealing with common law contracts. This has been

explained by Mr. Hoecker, who has clearly demonstrated how business arrangements and agreements are dealt with in a regulatory sense and fully respected.

What I have stated there for clarity is Emera has now stated very clearly in the evidence and the transcripts which we have noted that there is no problem with this issue, is there at common law, is there at contract or not? They are saying that NB Power now could bid, their business unit could bid. So I think that is a non-issue now.

Under the terms of the 1998 tariff it is clear that the NB Power transmission system, including the MEPCO tie, is open to full third party access.

Under this tariff NB Power bid on and acquired transmission reservations on the MEPCO line. Emera has argued about the environment that existed when the original tariff was implemented and that it did not recognize the 1998 tariff. However, Emera acknowledges that NB Power transmission system was open. In fact, Emera has very extensively used this access since 1998. And we are saying they were aware that there was a tariff and they have used the access. And I think a check of IR-9 would be well worthwhile, that has the listing of pages that shows where Nova Scotia Power have used it, showing

where Hydro Quebec has used it and in recent times where Emera has used it when this was made available.

Emera is attempting to use the regulatory process, we suggest, to enhance its competitive position. If Emera were able to acquire firm transmission reservations on a portion of the MEPCO line then NB Power of course would not have assured access to the New England market. What then would it do?

NB Power then would be forced to sell at a lower price its surplus energy to Emera. Emera would then be gaining the generation at a low cost and making the profit which otherwise would have been available to help New Brunswick Power keep its rates at the lower level in New Brunswick.

Emera, we suggest, has truly one interest and one interest alone in taking its position of attempting to lead the Board away from its role in protecting New Brunswick ratepayers, because we can't blame them for trying to make money off us, but I don't think that that is something that this Board should permit.

I would then like to have a very short conclusion just to summarize our position.

CHAIRMAN: Mr. Hashey, just before you do, excuse me --

MR. HASHEY: Yes, sir.

CHAIRMAN: -- I just want to be clear. Are you indicating

to us that at the time that the open season occurred in 1998 that the through tariff had been adjusted, i.e., was down to a comparable level with the out tariff? I thought I heard you say something that --

MR. HASHEY: No.

CHAIRMAN: Okay.

MR. HASHEY: No, I don't think I said that. I didn't intend to. I think Mr. Marshall has helped me there. The tariff was capped. So it wouldn't be increased indiscriminately, you know, these --

CHAIRMAN: That was the use of the terminology capped, but at the actual time of the open bidding, the through tariff was considerably higher than the out tariff.

MR. HASHEY: That's true.

CHAIRMAN: Yes. Thank you. I just wanted to clear that up.

MR. HASHEY: Sorry. I didn't mean to mislead there.

CHAIRMAN: Go ahead.

MR. HASHEY: Now in conclusion we are suggesting the following, just to summarize our position.

One, no matter how the evidence is analyzed there is a loss to NB Power. The evidence demonstrates that even with mitigation there is a loss of about $10,000,000 a year. We should not be misled by Emera's argument that this is not -- insignificant. No one can demonstrate or

has demonstrated or qualified any value that will accrue to New Brunswick by abrogation of the transmission reservations.

Secondly, the expert evidence of Mr. Hoecker is clear. Transmission reservations would have been preserved by the FERC. There is no substance to the argument that third party contracts are required. In addition there is no evidence to suggest the 1998 open season process was flawed. Emera argues that the environment, not the process, was unfair. And we suggest that's not relevant.

Thirdly, should the Board not preserve NB Power's transmission reservations, this could result in regulatory uncertainty. Evidence indicates that this will have a negative effect on the economics of the Coleson Cove project, the financing of the newly created NB Power companies and the new third party developers in New Brunswick, which comes to the possibility of generators.

Finally, we respectfully request that this Board should amend Section 2.1 of the Open Access Transmission Tariff to protect these reservations of NB Power generation. The evidence is clear and uncontradicted that the potential loss of this reservation cannot be in the public interest of New Brunswick, its ratepayers and its utility, all of which must be protected by this Board.

Thank you, Mr. Chairman, thank you, Commissioners.

CHAIRMAN: Thank you, Mr. Hashey. We are going to take a ten minute recess now and, Mr. Anderson, I would ask that you would be the first of the intervenors to present to the Board. If you would move up to the front I would appreciate that, and thereafter, and Mr. Zed can stay where he is, but basically we want to see the whites of your eyes.

MR. HASHEY: Mr. Chairman, would it be appropriate to hand out copies of my remarks to everyone so they have them at this time?

CHAIRMAN: Certainly. Go ahead, Mr. Hashey.

MR. HASHEY: Thank you. And we will deliver copies to the secretary as well. Thank you.

(Recess)

CHAIRMAN: Mr. Hashey, did you have an opportunity to look at the transcript for Commissioner Cowan-McGuigan's spotted error?

MR. MORRISON: Yes, we did, Mr. Chairman, and we agree with the Commissioner.

CHAIRMAN: Okay. So you can speak to the shorthand reporter to make that correction.

Mr. Anderson, go ahead, sir.

MR. ANDERSON: Thank you, Mr. Chairman. And again thank you

for the invitation to sit up front. I have no problem about sitting so close to the Board. It's only that I'm sitting in front of Mr. Zed or Mr. Zed is sitting behind me, which makes me uncomfortable. Nothing personal to Mr. Zed. It's simply that we have a different sort of view.

Firstly, I wanted to address very briefly and make clear that as the agent of the Attorney General the representations that I am about to make are those -- my representations as the agent. They are not representations of the Province of New Brunswick. I have not received instructions, I have not received direction from the Province of New Brunswick or a person associated with the Province of New Brunswick as to the approach, perspective or submissions that I am going to make, nor have I received instructions or direction from the applicant. These are my arguments and my analysis.

The arguments which I will make are I hope they are going to be quite reflective of the direct examination which I conducted of the applicant and the cross examination I conducted of the panel of Emera. I am going to be focusing principally upon the issues of competition and whether there is a benefit accruing to New Brunswick consumers were Emera to succeed, and of course my position is there are none. But I'm going to be focusing on that

analysis.

I'm not going to address the issue which was addressed by Mr. Hashey and Mr. Hoecker of grandfathering or the process which unfolded in 1998, the open season. My position or the Attorney General's position is that the task of the Board at this hearing is set forth in the Order-in-Council and at the request of the Lieutenant Governor in Council this Board accepted to review the open access -- or open season 2.1, and in doing so it is the request of -- contained in the Order-in-Council which was accepted by this Board to conduct a review of that, to determine if it is in the public interest to preserve the transmission reservations which were not subject to a firm contract involving a third party who was not affiliated with NB Power.

In answering that question I believe the central focus is to examine the impact of loss of the reservation by Genco and most pointedly to Emera, what impact will there be on the public interest which I believe clearly is the consumer. There are secondary issues of public interest, but I think clearly in this case what are the impacts upon the consumer in the event that the transmission reservations are not reserved. What impact will occur if Emera were to succeed in gaining some or all of the

transmission access.

And in measuring that I am a little surprised by the nature of the evidence here. I am a little surprised that Emera, as I understand their position, has said, we accept the premise that were Genco to lose the transmission reservations it would suffer a loss. We will now debate the quantum of the loss.

Starting from that proposition, the task of Emera becomes quite difficult. Having admitted a loss will occur it seems to me incumbent upon Emera to say, but there is a corresponding benefit if we succeed. There must be a balancing. There must be a measure. And I believe in questions earlier to Mr. Hashey, Commissioner Sollows asked what would be an insignificant loss to Genco or the applicant? And I say, well without a corresponding benefit on the other side, it's not necessary to ask that question I don't think.

And so I challenge Emera to say what is the benefit that will accrue to the public interest of consumers of the province of New Brunswick were it to succeed, because we have already debated for two-and-a-half days the quantum of the loss of Genco and, I submit, reasonably the likelihood of loss or disadvantage to New Brunswick consumers.

What is the offsetting benefit? There are none. And I will pursue that later. But quite clearly that -- if I was able to make any points with cross examination of the Emera panel, my purpose was to show that there is no corresponding benefit.

As an aside, and I'm sorry to do this now, I looked at the Canadian Manufacturers & Exporters submission and I think that in large measure the Attorney General agrees with the submission here. I think it captures some of the points that I was about to make.

Emera attempts to invoke the competitive model in aid of its position. It says, well we are going to embrace the competitive model and say, we sit on the side of fairness and openness and justice and we all -- as we know we embrace the notion of free competition and the benefits that will accrue from that, and we sit on the right side of this issue.

And my position is that clearly with respect to this line, the MEPCO 188 megawatts, that issue is not relevant. That is whoever obtains the access reservation on this line, the impact upon competition within New Brunswick is neutral. It doesn't matter.

This as we know is about whether Genco will retain the benefit of export sales which accrue, and have in the

past, accrued to New Brunswick consumers. This is not about opening up New Brunswick markets, the wholesale market in New Brunswick, allowing more competition within New Brunswick. This is about who will obtain the benefit of export sales.

And that is not an issue of competition or opening up markets in New Brunswick. And I will come back to that in a little bit.

And nor is this a case in which could invoke the competitive argument that benefits free and open competition attacking a monopoly which is moribund and which is not efficient and which is protecting its interest at the expense of consumers. That's not what this case is about.

It appears by all evidence that Genco is the most cost-effective producer of power. And that the benefit of the export sales again have accrued to our consumers. This is not about opening up our markets so as to attack this moribund monopoly which is acting to the detriment of consumers in New Brunswick and protecting its interest and investments. In this case on this line removing the reservations will detrimentally affect our consumers.

So from my perspective this is not about opening up competitive markets and attacking this moribund monopoly

which is acting to our detriment. That is not the case.

From -- we spent -- I spent some time looking at the White Paper and the rationale for developing more integration and closer ties with New England, and I'm not going to review that, but what I say this case is about is not about the current market in New Brunswick and opening the market for benefit to consumers. It's about what is going to happen in the future?

What will -- we are not taking about competing with NB Power or Genco for current customers in this case. We are saying, how can we make a competitive market in New Brunswick work so that when we need incremental power to serve our needs that we can encourage generation of that incremental power at cost-effective amounts? And how will we have a competitive market for that future incremental needs?

And I think the White Paper has said, you are going to best achieve that by making sure that you have open markets with the United States, encourage the 300 megawatt line going south and the 400 megawatt line coming back. And hopefully by the year 2007, as I understand it when incremental power generation will be necessary in New Brunswick, the conditions of the environment at that time will be such as to encourage new productive capacity

because the new generator of power, the entrepreneur, can look at a New Brunswick market of additional transmission capacity not served by Genco, the most efficient producer now, they don't have to compete with Genco. The question is, can new power generation be encouraged to meet the needs in 2007, and can we preserve the business model that New Brunswick has had for many years which is selling your surplus power in the summer time to New England.

With the construction of 300 megawatts going south we can say, the future market in New Brunswick can provide that -- preserve that same business model to new power generators. And that has nothing to do with who has 188 megawatts because whoever has -- whoever is going to build a new productive facility is not going to compete for this 188 because Genco is going to serve it no matter who has the reservations because they are the most effective least cost producer of power.

What we are talking about is how do we create an environment in the future to meet our future demands for power which will be most cost-effective. And in doing that we have said we have to open the markets and preserve -- we have to preserve and enhance the markets in the United States.

In answer I believe to Commissioner Richardson, I

think you had asked at one point during the hearing, what good does this 400 megawatt line coming north do enhancing competition in New Brunswick, because if New England doesn't have **cost-effective power to compete in New Brunswick how is that exposing New Brunswick to competition?

I think the answer to that is again we are not looking at the current market for power in New Brunswick. We are saying where in the future are we going to get cost-efficient power? And we are going to tie more closely with New England, recognizing that perhaps the new generation of power in the future will be more expensive than it is now, and we may have to have the power coming from New England and it will be more expensive.

And our market for power in 2008 and '10 will be such that the new cost power will be more expensive than the current cost, but the question is, where are you going to get the power? And we are saying, yes, it's going to come from New England and its more efficient recently developed power generation facilities down there, and hopefully we are going to encourage by enhancing or preserving our access to the United States and making a 300 watt line going south, we are going to make the conditions in the environment of New Brunswick hospitable for new power

generation here, but not to compete with the current cost of Genco because you can't do it.

I will leave the Board with references to two portions of the evidence. That is firstly with respect to the answers given by Mr. Bishop on wealth transfer. I thought that captured the essence of the detriment to NB Power or Genco and the consumers of New Brunswick and the benefits to Emera.

And those were the questions -- I think was posed by Mr. Gorman. The question was "Give us some insight with respect to what may happen if Emera were to succeed." And his evidence was at Question 77 and 78 at pages 171 to 177.

What he said of course was well, if Emera were to succeed then the most likely result is that since we are still the low-cost producer of power, they will purchase the power from us, but it is going to be 25 percent give or take, less than what we would otherwise get.

And the differential will be a transfer of wealth from Genco, which will find its way to our consumers, to Emera or Nova Scotia Power. And perhaps to the benefit of Nova Scotia consumers.

But the transfer of wealth, and Mr. Hashey also addressed it, of 8' or $10,000,000 a year, is going to go

from Genco to Emera. And I don't see how you get around that with again no corresponding benefit.

And -- on a question of the potential benefit, the questioning that I had of the Emera panel, which was at Question 50 to Question 83 at pages 373 to 387, captures my perspective of the failure for Emera to show any benefit were they to succeed.

And indeed what I say is essentially a hollow argument which comes down to nothing but two things. We invoke the notion of -- call it free and open competition which we all embrace, but without relating that to this fact situation.

And secondly the notion that well, if we have two or more persons who hold reservations, somehow that will encourage production of power in the province of New Brunswick.

And that second issue I again, at the sake of being redundant, say nothing is going to create power in the province of New Brunswick until 300 megawatts is open going south.

No one can create a business model simply because there are two or more transmission holders on 188 megawatts going south, no one can create a business model that says oh, I'm going to invest money, get bankers and

investors to build a power generating facility, if I'm going to try to gain access to that 188 megawatts going south, because NB Power, Genco, the least cost producer already has enough capacity to serve that, and you can't compete with them.

We are talking about competing -- creating a market, a competitive market for new power generation when we need incremental power in New Brunswick. Who is going to supply it? Are we going to get it from New England, neighboring jurisdictions or create it here?

And we are trying to have a market condition, a competitive market condition with open access, preserving that access to the United States to make sure there is a business plan which is feasible for that new power construction.

And that is my remarks.

CHAIRMAN: Mr. Anderson, I didn't write down your quote. But it is in the public interest to protect the benefits that accrue to N.B. consumers as a result of export sales. And I think that was at the crux of what you were saying as to what defines the public interest.

I look at exhibit A-13 which is what was filed this morning. And it is recast with Hydro Quebec mitigation in it. NB Power's own worst case scenario there is that the

margin foregone in the 2004, '5 year is $5.3 million.

The taxes which will have to be -- the payment in lieu of taxes that will have to be made to the shareholder is 3.7. My math says that is 1.6 million.

Now we have heard varying figures over the years as to what export sales contributes to keeping rates down in New Brunswick, all the way from 15 percent to, in the evidence which was filed here, was 8 percent, in this evidence. That's my recollection of it. We are down to 1.6 million which, you know, is less than 1 percent of the sales of NB Power.

And I have to caution, and I do, and I want your thoughts on it. But these are all estimates on a go forward basis. They have had a very short time in the New England market since it has become locationally marginally priced, et cetera or locationally priced, that sort of thing. And whether or not that will accrue or not is a real question, after looking at the evidence that has flowed here.

So I would just like your thoughts on my ramblings. And is it a benefit for, on the best estimates that the applicant has given, they come up with effectively to the consumers of New Brunswick a cross subsidy of $1.6 million?

MR. ANDERSON: Certainly that gets back to the initial question I believe of Commissioner Sollows. Is there a threshold minimum which has to be established in order for the public interest to be served or for that balance of public interest to be established?

I'm saying well, you know, it is pretty simplistic, my position, but very essential. What benefit does Emera offer? I don't understand it. And their case has not even been constructed on the premise that we can show an offsetting benefit. If we have success, then something will happen which will accrue to the benefit of the consumers. They are simply saying no, let us try to minimize the impact upon Genco and thereafter the consumers.

So you know, I appreciate you -- one could make the case, worst case for Genco or the applicant, that it is -- let's try to drive this down as much as possible. But where are you going? I mean, unless you get to zero.

And I appreciate that one could argue well, based upon hypotheses and assumptions that maybe we can get to zero. I don't -- you presented the strongest case I think against the applicant.

What is there to measure that against? What are we balancing here in terms of public interest? There is no

benefit, simple as that.

And the notion that, you know, we have to move to competitive market, we should. But it is being somewhat redundant. But the competitive market we are talking about is what are we going to do for creation of new power when Genco doesn't have enough capacity to serve the future? We have to create the conditions such that we can have encouraging power generation in New Brunswick. We have to do that by making sure they have access to the New England market. They are going to compete for power generation cost with New England, not with current costs but with the incremental cost for new power generation. And it's going to be with New England. Whether Emera has this reservation or not is relevant to that.

So the answer to your question is clearly I just -- it was you I think, Mr. Chairman, you asked a question of one of the panel of Emera and said, you know, you haven't adduced evidence on some of the questions or the assertions that were put forward by the applicant.

Do I -- should I interpret your silence as meaning that you accept their position? And the answer was yes.

So you are left with saying well -- how do you move from the fact that there is an acknowledged detriment and no corresponding benefit? I just have a very great

difficulty.

CHAIRMAN: Thank you, Mr. Anderson. Do you want to keep Mr. Zed behind you while he makes his presentation? Or would you prefer to move back?

MR. ZED: The question, sir, is whether I feel comfortable with him behind me, but -- and I do.

Mr. Chairman, Commissioners, thank you for the opportunity today to address you in support of your decision originally rendered March 13th, last year.

As matters have evolved since the original hearing, which began I believe in the summer of 2002, you have heard a significant amount of evidence and argument with respect to matters in issue. Notwithstanding this, the material evidence on which you based your decision has not changed.

That part of your decision with NB Power's request to sanction their 1998 unregulated process noted, and I'm quoting from your decision, "Prior to this time, a completely fair and non-discriminatory environment for bidding on transmission capacity did not exist. The Board believes that an open season should be held for all transmission capacity that is not subject to a firm contract involving a party who is not affiliated with NB Power."

That, sir, is what this hearing is about in our humble submission.

There was evidence before the first hearing which clearly allowed the Board to make this determination. Indeed, we would suggest it was the only logical conclusion you could have arrived it. So why are we here?

We are here only as a result of the Order-in-Council requiring a review of 2.1 of the tariff to determine if it is in the public interest to preserve all of the NB Power transmission reservations on the MEPCO tie. We submit that in order for this Board to make such a public interest determination, this Board would have to find that the original transmission capacity allocation process was in fact open and was in fact fair. The evidence in the record of this proceeding overwhelmingly supports a determination otherwise. Therefore it would not be in the public interest to preserve all of those reservations. And I say that for three reasons.

The first reason is that the evidence here demonstrates clearly that the allocation process was not open and was not fair.

Secondly, that undeniably unfair process led inevitably to the anti-competitive result of a perpetual NB Power monopoly on almost all of the MEPCO capacity and

therefore on export sales to New England.

Thirdly, the applicant has failed entirely to prove that there would be any likely prudent, verifiable and unmitigatible negative impact to the applicant, let alone to the broader public interest in this province.

We submit that the Board's original decision was a proper exercise of its regulatory discretion to fashion a balanced remedy for the unfair process and the resulting anti-competitive effect of this perpetual NB Power monopoly on the MEPCO line.

The Board's discretion to cure the unfairness of the process which resulted in this anti-competitive result is unquestioned. The record in this proceeding has served to buttress the breadth and depth of the unfairness of the process and the severity of the anti-competitive monopoly, without having adduced one shred of evidence to support any conceivable countervailing public policy consideration for NB Power or more generally the Province.

We are here because NB Power says your original decision was wrong and was able to convince government to issue an Order-in-Council to have you re-hear the matter. We are here before you today as a result of an Order-in-Council which this Board has accepted as its statutory direction to proceed with a re-hearing. We objected to

this proceeding at the pre-hearing and we suggested at the pre-hearing that the onus would be on the applicant to show this Board that a material change had occurred between the time of the first decision and this re-hearing.

Notwithstanding our argument, we understood that the Board felt it was obligated because of the statute to proceed, given the nature of the Order-in-Council issued. However having done so, we submit that the applicant bears a significant burden in this hearing to establish on the evidence that your original decision was wrong. Alternatively they would have to show that there has been a material change in circumstance to cause you to reconsider. There is no such material change alleged in the present case. There is not even the pretense of such a change. The have, with respect, not discharged their burden.

The only other way we would submit the applicant could successfully argue that the Board should reconsider its earlier decision is if there were new evidence that was not available at the time of the earlier hearing and that the public interest would not be served by the Board's earlier decision. The evidence in this hearing is the same. More detail may have been provided but it is

essentially the same evidence. With the result that it is absolutely clear that the original decision was correct. The applicant bears the burden of proving your original decision wrong. They have not met this burden.

Finally the applicant might argue that even if the Board were correct in its March 13th decision that there is a countervailing public policy argument that on balance might require you to change your decision. In other words, yes, Board, we agree you were right, but there is a countervailing public policy why you should reconsider.

They have in our view unsuccessfully attempted to adduce evidence to establish that the Board's decision will negatively affect NB Power and the ratepayers, which would be presumably contrary to the public interest. Their evidence falls far short of this. With the speculative nature of their evidence, once again they have not discharged their burden.

Now my comments have been general, introductory in nature. I would like to deal with the issues in more detail to illustrate the conclusions I have just drawn.

Firstly, what evidence did the applicant adduce to establish that the Board's original decision was wrong? Put another way, did they establish that the 1998 process was a completely fair and non-discriminatory environment

for bidding on transmission capacity.

In the interest of time I will not address the issue of the necessity of the MEPCO tie being open to competitive bidding. My learned friends have sought to digress into that issue but we would suggest it is beyond debate and has been affirmed, even if reluctantly, by the applicant themselves during the course of their testimony. Government sources, the Market Design Committee, Emera's evidence and that of the applicant, all recognize the importance of the access to NEPOOL to establish the benefits of a competitive market in this province. The desirability of this is beyond question.

So let us review the evidence regarding how the potential market participants viewed the '98 process. At the previous hearing Emera raised a number of objections it had to the '98 process, which were repeated in our evidence, and I will read them.

The tariff for out and through point-to-point service in January '98 was not approved by a regulatory body.

The existing tariff which was introduced in '98 was offered at a time when the position of the NB government with respect to restructuring was still unclear.

Given that the tariff was not approved by a regulatory authority, it was impossible for a third party to

accurately bid on transmission given the extent of regulatory uncertainty.

Many of the existing agreements listed in the appendix to the '98 tariff no longer existed.

When the "Existing Agreements" referenced in that tariff expired, the 1998 preserved transmission capacity was renewed.

All parties should be given a chance to fairly make offers on available transmission once the tariff has been approved in this process.

And the lack of clear regulatory oversight in the initial tariff was of concern to other third parties such as Hydro Quebec.

What were Hydro Quebec's views? To begin with, let's look at the testimony of Mr. Scott. Not withstanding his assertions to the contrary in his written evidence, upon cross-examination his explanations of the exact state of affairs in existence in February of '98 is most instructive. He acknowledged receipt of the Hydro Quebec letter marked as exhibit EEI-3. This letter clearly sets out why Hydro Quebec was not interested in participating in the process. And they set out their reasons. Because of the absence of a tariff that is cost based and non-discriminatory, and under that heading they specifically

referenced a different set of rates that supply to out and through transactions, penalizing third parties that will try to compete with NB Power. The absence of a regulatory environment to protect the customer. The absence of functional separation between the transmission and the marketing arm of NB Power. And the lack of reciprocity and comparability of service offered.

Mr. Scott agreed that the foregoing was accurate. They had received the letter and those concerns accurately were stated. He also agreed that the issues were material to Hydro Quebec's decision not to participate. But then the applicant responded, and that letter was put in evidence as EEI-4, to explain why NB Power could not comply with the requested protections.

And the most instructive part of that response I would suggest was on page 2 of the letter NB Power wrote, "NB Power at this time has not implemented specific procedures to protect the confidentiality of information given by customers to its transmission arm. While it has functionally separated the marketing and transmission organizations, NB Power has not developed a code of conduct to provide confidentiality of information."

So regardless of what other evidence we have heard about people trying to remember what was or wasn't in

place in 1998, there was a letter that addressed a specific concern in close approximate time to the letter from Hydro Quebec. They just turned around and responded and said, we agree with you. We agree with you.

Notwithstanding Mr. Scott's evidence to the contrary indicating that perhaps an informal code was in place, an informal code, which we might remind this Board there was no written record, the evidence is clear that at the time no such code was being followed. Whatever this informal code was, it was not written down and there was no evidence that all in NB Power who ought to have been bound to observe its principles were even aware of them, nor was there any indication of any process of sanction should this informal code be breached.

The applicant knew this was an issue at the last hearing. They had that advantage. They brought no such evidence to this hearing, instead relying on the bare assertion that there was an informal code in place.

Furthermore the applicant's evidence clearly stated that a code was not adopted until January 1, 2000. This was confirmed in NB Power EE response to supplemental IR-23(c).

Now what is the importance of this issue? It is of fundamental importance for it has been our position and

clearly the position of Hydro Quebec that in the words of the Board, a completely fair and non-discriminatory environment did not exist. Sufficient safeguards and protection to encourage third parties to enter a bidding process were not in place. This we suggest was fundamental to your decision on March 13th last year and we suggest is just as fundamental today.

Moreover, even if there were nominally some aspects of functional unbundling, the applicant conducted its business internally for its own benefit, ignoring OASIS and ignoring the details of a code of conduct.

There is evidence offered by Mr. Scott himself and confirmed in the IRs that in fact transmission personnel were engaged in marketing functions up to January 2000. What could be more offensive? There is further the whole scenario evidenced in WPS IR-13 and confirmed with Mr. Bishop's testimony in which NB Power Generation placed a bid for 200 megawatts of power to support the Hydro Quebec sale. Mr. Bishop stated that only 169 megawatts was originally available, but NB Power Generation did obtain an additional 31 megawatts later for the full 200 megawatts. This transaction occurred as a result of discussions between Messrs. Scott, Bishop and Trenholme on an informal basis without any public posting on OASIS.

Mr. Scott's evidence documents that he told Mr. Bishop that NB Generation could only get 169 megawatts as of April 1st because of other reservations for existing power sales. But the additional 31 megawatts would be available at the end of September when other agreements expire.

Indeed NB Power Generation did get the additional 31 megawatts at that later time. These were internal discussions documented in internal memos without any OASIS posting, thus the reservation would have violated formal FERC standards of conduct and the OASIS posting requirements.

It would also appear that Mr. Scott's group routinely notified NB Power Generation by internal e-mail whenever Genco needed to exercise an extension, again without any OASIS posting of the information. Clearly the transmission unit of NB Power was giving preferential treatment to the marketing unit of NB Power. If NB Power's Transmission unit were also sending such information and off-OASIS reminders of capacity opportunities to independent users of the transmission system we have seen no evidence of it. Favouring your own affiliated business unit is completely contrary to the requirements that the transmission system be operated in a non-discriminatory way. How in the face of such

transgressions can the applicant now assert that the process was fair? How can they now assert that the process was non-discriminatory?

Now in an apparent attempt to add some credibility to the '98 process and to chiefly take issue with your decision, the applicant engaged the services of Mr. Hoecker, a former FERC Commissioner and Chairman. Although Emera has always considered the issue before you as being within your exclusive jurisdiction, the applicant has sought to introduce the concept that this Board should be deferential to FERC precedent. This is as a prelude to the introduction of Mr. Hoecker's evidence.

In general terms he seems to suggest that FERC would have done differently than you did when you decided that prior to the transmission tariff being regulated by you a completely fair and non-discriminatory environment for bidding did not exist. With all due respect to his direct evidence, that flowing from his lengthy introductory comments, and followed by his additional direct testimony in response to counsel's questions, what is most instructive we would suggest are his answers to questions put to him on cross examination.

From his direct testimony he acknowledged the importance of functional unbundling without which you

could not have a fair and open non-discriminatory process. That's what he said. More importantly, on cross examination he agreed that without a strong code of conduct in place it was virtually impossible to have a fair and non-discriminatory process take place. He agreed that the operative FERC requirement to achieve functional unbundling were threefold, and I will read them, because they were a direct quote from FERC Order 888. "That a public utility must take transmission services, including ancillary services, for all of its new wholesale sales and purchases of energy under the same tariff of general applicability as do others. Secondly, a public utility must state separate rates for wholesale generation transmission and ancillary services. Thirdly, a public utility must rely on the same electronic information at work that its transmission customers rely on to obtain information about its transmission system when buying or selling power."

These were referenced to Mr. Hoecker as direct quotes as I said from FERC Order 888.

And then the following quote was put to him from page 58 of FERC Order 888, and I'm quoting, however, we recognize that additional safeguards are necessary to protect against market abuses. Functional unbundling will

work only if a strong code of conduct, including a requirement to separate employees involved in transmission functions from those involved in wholesale power market functions is in place.

After being provided a copy of Order 888 Mr. Hoecker agreed that the preceding was an accurate extract and further testified that he agreed with that statement. This directly contradicts his response to our supplemental IR-34 where he states that a code of conduct was not essential. So despite any assertions or inferences we may draw from his earlier testimony about the New Brunswick process being FERC compliant, his testimony on cross examination clearly recognized that that 1998 process was flawed. As a result his evidence and conclusions must be re-examined in that light.

Additionally on cross examination he agreed that this Board has the authority, as would FERC, to do what you have done in your March 13th decision. His reluctant acknowledgement of the contracts FERC abrogated in their Order 2000 is telling. At page 315 of the transcript Mr. Hoecker is questioned on the power of FERC to abrogate contracts. When responding to a question as to whether or not FERC exercised those powers he said, "I can't think of an instance but I wouldn't be surprised."

I then confronted him with a passage from FERC Order 2000 at page 66 which refers to four such cases at footnote 91. Mr. Hoecker was not only a Commission member but the Chairman of that panel. He then agreed that FERC did in fact abrogate some contracts.

Now that's very interesting because Mr. Hashey seems to suggest otherwise today in his submission. So I would like to just digress for a moment and read the Board a passage from page 317 of the transcript. It's question 64. This is my question to Mr. Hoecker.

So then you don't take issue with my statement that FERC has in fact has in fact used its power to modify or abrogate existing contracts through the complaint process.

Mr. Hoecker's response: "Through the complaints investigations where sufficient showings were made, yes, I think that is exactly right."

There isn't much equivocation there. So Mr. Hashey appears to be putting a little bit of a different spin with respect on Mr. Hoecker's evidence. His evidence was clearly that FERC had indeed abrogated or modified those contracts referred to in my cross examination.

Additionally Mr. Hoecker attempted at equivocating his earlier response to our Supplemental IR-30 respecting whether or not the March 13th tariff, as you have ordered,

is or is not FERC compliant.

And I would suggest that all of that goes to the weight and the conclusions that you would feel comfortable drawing from his testimony.

Now before leaving this issue of the unfair and discriminatory 1998 process, perhaps it is instructive to review the applicant's rationale for not complying with the code of conduct.

Mr. Scott protested as to why it wasn't possible to be completely functionally unbundled and to have a formal code of conduct in place in 1998.

With respect, he missed the point. Even if they had a code of conduct, which they clearly did not, there is evidence of significant violations of such a code, with the frank admissions that the transmission personnel were engaged in marketing functions.

Furthermore, the ready exchange of such information appears to have occurred routinely between Marketing and Transmission personnel. The fact that an OASIS is in place is irrelevant if its intent was being violated.

Not only, to paraphrase the old legal maxim, not only did the process appear to be unfair and discriminatory, which would be enough to call it into question, but in fact it was unfair and discriminatory.

Now at the first hearing we took the position that this process was unfair and discriminatory. However we did not introduce any direct evidence of FERC. We didn't frankly feel it was necessary. We felt that this Board could make a determination of what was fair, what was discriminatory, what was anti-competitive.

Frankly I don't believe, subject to correction, that the applicant introduced any evidence with respect to FERC, as part of its direct evidence. It was only through the applicant's cross examination of our witnesses where excerpts of FERC rulings came into play and such were dealt with.

Now I bring this up primarily because of the characterization of Mr. Connors' testimony as being a misrepresentation.

Firstly Mr. Connors testified at this hearing as to how those questions were put to him. They were put to him for the first time on the stand. He qualified his answer to say he was not an expert in FERC, he was not a FERC lawyer, he was generally familiar with the Order.

And on the plain reading of the words put to him, there was no evidence to suggest that they were anything other than third party contracts. That is the extent of Mr. Connors' evidence when viewed fairly.

We were and remain of the view that the Board, based on its own sense of fair play, without FERC, is within its jurisdiction to make the decision it did. The applicant through Mr. Hoecker on cross examination agreed.

However given the introduction of FERC testimony, we felt compelled to counter that with the testimony of

Mr. Trabandt. His experience with the issue raised by

Mr. Hoecker is noted in detail in his curriculum vitae which was filed with his evidence.

Before serving as a FERC Commissioner from 1985 to 1993, he served as Counsel to the Senate Committee on Energy and Natural Resources from 1977 to 1984, right up until he joined FERC, and Chief Counsel for a period of time.

Since leaving FERC in 1993 he had significant, varied and relevant experience in the energy sector throughout North America and indeed throughout the world. His testimony in all material respects contradicts that of Mr. Hoecker, yet he was not cross examined.

Now I heard an interesting submission from my learned friend to suggest that his testimony should somehow be disregarded because it wasn't subjected to the rigors of cross examination.

Well, that, sir, would be a completely novel approach

to viewing the evidence. He was put on the stand. His evidence was filed. IR's were asked. And not one question was put to him on cross examination. His evidence is unchallenged.

What did his evidence state? In his direct evidence filed on behalf of Emera Energy, Mr. Trabandt has said clearly and unequivocally that what this Board found was consistent both in approach and result with FERC principles. His examination of the issues and his conclusions are best summarized -- and I will read you a brief summary from his direct evidence.

"In my judgment the present Section 2.1 of the OATT is FERC compliant. The applicant was not in compliance with Order 888 at the time of the bidding for the transmission capacity. The process at the time of the bidding was not completely open and fair. Given the same set of facts before it, FERC would likely have reached the same decision as the Board. And the decision of the Board to not grandfather a portion of the transmission capacity was correct and in the public interest."

He further acknowledged that this matter was one within this Board's exclusive jurisdiction and that FERC would consider it so.

Now having reviewed why the Board's original decision

was correct, insofar that any additional evidence adduced at this hearing only serves to affirm the correctness of your original order, one must ask on what basis could the applicant possibly be asking you to declare yourselves wrong and reverse yourselves?

What has materially changed since last year that would cause this Board to say, I guess, sorry, we goofed, we were wrong, we need to rethink the reasonable and rational approach which resulted in our March 13th ruling? There is no such change, material or otherwise, nor does the applicant even pretend there is one.

Instead the applicant relies almost entirely on an argument that the Board's order will result in a significant financial harm to NB Power and to the ratepayers of the province and therefore it is not in the public interest.

If that assertion is true, how then can Mr. MacPherson indicate that first time around the applicant considered this to be a side issue? He actually said that.

And one of the things I must tell you as counsel I was wrestling with, is when we are talking about losses, whether they be a million dollars or half a million dollars or $10,000,000, how do you characterize those as being irrelevant when everybody realizes that is a lot of

money?

I didn't have to wrestle with that problem for very long. Because Mr. MacPherson, in his own words, told you what they thought about it. It is a side issue to them. We were here for the seven or eight months over which the first hearing was held. We filed evidence and treated it with the importance the issue deserves. In our view it is a critical issue with respect to establishing a competitive market in this province.

The numbers used by the applicant in this hearing were available to them last year. If it was a side issue then, how has it materialized into a matter contrary to the public interest in the space of a very few months; a few months during which there has been no activity which assists the applicant in establishing any materiality.

Now before dealing with the fundamental flaws in the applicant's argument, one might ask: "What is the relevance of their speculative evidence with respect to lost profit margins?" Even if their margin losses are in the view of the Board significant, what effect does that have on the Board's decision-making process?

We are here before you under Section 62 (1) of the Public Utilities Act. We are dealing with a tariff pertaining to transmission services.

62 (1) says you shall base your order or decision on all of the projected revenues and all of the projected costs of the provision of transmission services.

Now if you go to Section 8.6, 8.6 says that on any such application you may grant all or part of that order. And basically the first time around that is exactly what you did. That statutory authority is sufficient for you to have made your March 13th ruling. The effect of your ruling was to approve a tariff based on the cost of transmission services. And in the course of so doing you did not grant all of the tariff requested by the applicant. This was clearly within your statutory mandate.

However in this re-application, in relying on the Order-in-Council's direction the applicant is asking the Board to base its decision on a consideration not statutorily authorized. Rates to consumers are relevant in your deliberations under Part II. There is no statutory nexus between Part II and Part III.

While admittedly there are some general provisions which give the Board wide latitude to make orders n the public interest, and admittedly there may be some inherent jurisdiction of this Board, the right must be read as incidental to the order and the application before it.

While it would be within your jurisdiction for you to make an order in the public interest in a transmission rate application, the public interest must relate to the transmission tariff and not the cost of service. If this were a cost of service application under Part II you could clearly deal with their argument. It is not. And I will say nothing further about that argument.

However, if you decide as a Board to look at the numbers generated by the applicant, we submit that those numbers and the results obtained are so flawed they do not assist the applicant in establishing that the public interest is harmed.

It is our submission that given the over $1.2 billion of revenue generated by NB Power in its last reported fiscal year, the alleged margin losses used as evidence in this hearing are truly in Mr. MacPherson's words a side issue when compared with the magnitude of revenues and expenses evidenced in NB Power's financial statements.

And I have learned long ago you don't usually correct members of this panel. But sir, your math is a little bit out in the sense that 1.6 million would be something closer to a tenth of 1 percent I believe as a percentage. And that is really the magnitude of what we are dealing with today.

In the normal course of operations nobody with any knowledge of the utility would assume that a dollar in forecast lost revenue, lost margin would find its way into rates to consumers.

So let's look at their assumptions surrounding their margin losses a little more carefully. NB Power's numbers clearly are based on the unlikely event that they lose all of the 188 megawatts they say are in play, going to lose all of it. The sky has fallen. While they rather inexplicably maintain that they bid aggressively during the 1998 process against themselves, they seem reluctant to admit the obvious.

When this Board lifts its suspension of the March 13th decision and the open season is eventually held, it is an inescapable conclusion that NB Power as the dominant player in this market will most likely secure the lion's share of the released capacity.

Where is the Hydro Quebec bogeyman? Has anybody seen Hydro Quebec or any of its representatives here? Is there any reason to believe that the veiled reference to the fear of Hydro Quebec's domination of the New Brunswick market has any basis in fact?

The truth of the matter is that the common sense view it is most likely that the applicant will end up with the

largest share of the capacity. If it is as valuable to them as they say and as necessary to their current operations, they will end up with an amount to reflect its value and their needs. They acknowledge they will bid.

We cannot determine how much they will obtain but even if it is something in the order of 50 percent, all of a sudden the projected margin losses are cut in half. Their projected losses assume they will lose all of the capacity in play.

What if they acquire substantially all of it? As Emera's evidence clearly shows, this will result conceivably in no lost margins. If they get 90 percent then all of a sudden their 90 percent margin losses are out the window.

So you know, it is great to throw numbers around like 13,000,000, 14,000,000, 15,000,000. And when asked by I believe the Board Chairman -- we don't take issue with their calculations. They have added the numbers correctly. But the assumptions underlining those numbers are flawed. Those numbers are based on them losing all of their capacity. That is not going to happen.

If in addition to acquiring some of the auction capacity the applicant employs the other mitigation strategies suggested by Emera, their projected margin

losses will be reduced even further.

Mr. Bishop quite candidly admits that his numbers, other than with respect to the Quebec mitigation strategy employed, do not reflect any other mitigation strategies. The Quebec strategy is not as effective as those suggested by Emera. However, even using this one, which in our view is an inefficient strategy, the mitigation produces, as we have seen, very low loss figures when compared to the earlier numbers floating around.

Mr. Bishop confirms that those mitigation strategies suggested by Emera are reasonable and will reasonably result in further margin losses -- further reduced margin losses. He has agreed that Emera's numbers are accurate in our evidence. What is the number when all is said and done? What is the true measure of their loss? All we can say is for the foregoing reasons it is significantly less than that which they allege.

Emera's evidence, which was not questioned regarding this issue, can be summarized as follows: The applicant's numbers represent a worst case scenario in which they assume they will lose all of the capacity and there is no ability to mitigate. Both of these assumptions are wrong. The applicant's numbers assume that they cannot export unless they own the capacity. That is wrong. The

applicant's projections are necessarily inaccurate given the nature of the market and the influence of external factors. The applicant's projections to date have been inaccurate, perhaps partly because of the lack of planning to date with respect to, in particular, export sales. Remember they bid in 1998 without having done any financial analysis, and that is confirmed in the IR's, and have testified that only now have they hired a market consultant with respect to the export market. The market mitigation strategies of Emera are set out in our evidence and acknowledged by Mr. Bishop to be relevant and accurate. These strategies provide for larger savings than their "Quebec" strategy. If in the unlikely event NB Power lost a significant amount of the capacity there are also financial and operational mitigation strategies that can be employed. They are set out in our evidence. These too are acknowledged as reasonable by Mr. Bishop. Emera's strategies can be employed in various combinations to effectively reduce losses still further.

Additionally, one must ask when given the uncertainties regarding the availability and price of the Orimulsion fuel supply for Coleson Cove and the operational capacity or refurbishment at Point Lepreau how much excess power will NB Power have for the export

market?

If the applicant acquires half of the available capacity and properly employs mitigation techniques then the margin loss would be significantly less than 1 percent of revenues. If they acquire substantially all of it, the losses will be non-existent.

Now even if we are wrong in these assertions, where is the logical connection between lost margins of whatever magnitude and the ratepayers save for the evidence, if we can call it that, around the vesting contract?

How can this Board be asked to make a decision on that basis? In effect you are being asked to make a decision on rates without a rate hearing or evidence, indeed without even an application before you. Don't concern yourself with that, we are told by the applicant.

The Minister, in consultation with the applicant, is negotiating a vesting contract. What do we know about it? What can we rely on? All we really know is that there are discussions around the relationship between Genco and Disco and certain terms have been agreed to, or have they.

All we really know is that the Minister has the ultimate authority and that what he says goes. We are not privy to these discussions, nor are we privy to any of the details.

There are indications that certain things have been discussed and among those indications are that the applicant and the Minister, notwithstanding your March 13th decision, based pricing on the assumption that the applicant will retain all of its existing capacity.

Recognizing that this Board might reaffirm its earlier decision, they have discussed a mechanism for adjusting the price Genco would charge to Disco. This is a very interesting mechanism.

Without any public discussion and, I think we can safely assume that without any discussion with the regulator, there appears to be a mechanism which has the effect of Disco assuming all of the energy forecast accuracy risk and all of the fuel supply risk with Genco being essentially assured to make a rate of return based upon their capital structure.

Mr. Marshall's testimony we say makes it clear that Disco bears the risk if they overestimate the requirements for capacity as once they have contracted with Genco they are obligated to make fixed payments. All of this may be interesting but it is fundamentally flawed.

This proposed mechanism appears to have made public policy determinations without public debate; notwithstanding this we would suggest that it is more

properly the topic for another venue. This Board in our respectful submission cannot rely on such speculative information on which to base a decision.

Now before concluding with a brief summary, I would like to briefly digress and deal with a recurrent theme of the applicant's. They base a part of their case on the notion that there is need for regulatory certainty. The principle they espouse is a good one. We also embrace the principle of regulatory certainty.

However, in our submission the regulatory certainty that is required and desirable is that which would flow from this Board affirming your earlier decision. How can the applicant take the position that regulatory certainty applies to their situation when in fact the very allocations they are seeking to perpetualize were in themselves not subject to any regulatory regime and resulted from an unfair and discriminatory process.

Regulatory certainty refers to the importance that ratepayers, investors, utilities, businesses and others affected by regulatory decisions place in those decisions being predictable and consistently enforced.

The arbitrary overturning of an earlier regulatory decision, especially with no change whatsoever in circumstance, under the circumstances of this Board's

original order, injects great uncertainty in the regulatory process. It creates risk to participants who are no longer able to count upon a stable regulatory environment in which to do business.

Now in closing I will try to summarize the position in support of affirming your earlier decision in point form.

To perpetuate the applicant's monopoly on the MEPCO tie, which monopoly was created by an unfair and discriminatory process, is contrary to the public interest. That is the public interest issue that we say you should concern yourselves with.

To insist that a fair and non-discriminatory process take place with respect to all capacity not subject to a firm contract involving a third party not affiliated with NB Power strikes the proper balance between allowing essential access to the New England Market and respecting the legitimate business arrangements of third parties.

The applicant has not met its burden of establishing that the original decision was wrong. In fact, they have only given us more specific and substantial evidence to show why it was correct.

The applicant has not put forth any evidence other than its speculative portrayal of lost profits using a worst case scenario. They have not attempted to apply any

reasonable mitigation assumptions or strategies to their calculations, save of course for the Quebec strategy. Those strategies we are suggesting would substantially reduce the potential for loss.

There is a real issue as to whether this Board should be concerned with the numbers, given their vagueness and lack of materiality. There is a real issue as to whether this Board should concern itself with the numbers given that this is not a rate hearing. There is a real issue as to whether or nor this Board should be concerned with the numbers given that the impact on rates is not clear in any event.

NB Power has failed to establish that it will suffer any loss that it cannot reasonably mitigate or that customers in any event will pay more. NB Power has consistently ignored all the other offsetting benefits of competition as referred to in numerous government reports.

For the foregoing reasons, Emera requests that the Board affirm its original decision and order the open season be held within a reasonable time.

In conclusion I would like to thank you very much for your attention and would be pleased to respond to any questions you might have. Thank you.

CHAIRMAN: Thank you, Mr. Zed. All right. We will take a

luncheon recess and return at quarter to 2:00.

MR. ZED: Sir, I will circulate a written copy with the citations attached.

CHAIRMAN: Yes. Fine. Thank you.

(Recess - 12:30 p.m. - 1:45 p.m.)

CHAIRMAN: Mr. McCarthy, do you want to come up front here, sir?

MR. MCCARTHY: Thank you, Mr. Chairman.

CHAIRMAN: Go ahead, sir.

MR. MCCARTHY: Mr. Chairman, Commissioners of the Board, thank you for allowing me to address you. I have a brief statement on behalf of J.D. Irving and I am at your disposal after that.

Electricity is a critical component of New Brunswick's economy and our every day lives. J.D. Irving is a large industrial consumer in the province and electricity matters are very important to us.

A lot of time and effort has gone into implementing change in the power industry in New Brunswick through the regulatory process. At times the task seems onerous and often confusing. However, it is necessary to make an effort to get to the right decision in the end.

As a result we have established an exhaustive record on the issue before the Board, which has helped J.D.

Irving Limited clarify our position.

We believe that the record shows that New Brunswick Power should retain the transmission capacity acquired in the 1998 open season, that it was obtained in an open and fair process among parties acting at arms-length, and was conducted in a manner consistent with FERC practices. By retaining the capacity New Brunswick Power will earn profits from exports of seasonally surplus power, for the benefit of all New Brunswickers, that would otherwise be sold in poorer markets or squandered.

At this stage we do not see value in relinquishing the transmission capacity to parties with a lesser interest in our province's electricity investments than NB Power, given the supply risks, the existing transmission capacity constraints, and the early stage of development of a fully functioning open market in our region.

Respectfully submitted. Thank you.

CHAIRMAN: Good. Thanks Mr. McCarthy. Mr. Young, would you like to come forward. You should never hand these things out before you give your address. People will drown you out with flipping pages.

MR. YOUNG: That's all right, sir.

CHAIRMAN: Go ahead, sir.

MR. YOUNG: Good afternoon, Mr. Chairman and Board members.

My name is Dana Young representing the Municipal Utilities. I am an employee of Saint John Energy and I have been in attendance throughout the hearing on behalf of all three New Brunswick municipal utilities, Perth-Andover Light Commission, Edmundston Energy and Saint John Energy.

I would like to begin by thanking the Board for the opportunity to participate in the process and voice our position on the Open Access Transmission Tariff Section 2.1 review and the Open Season decision review.

The municipal utilities became full intervenors in this proceeding primarily for the purpose of addressing the implications of this application to our customers, the taxpayers and ratepayers of our communities. We believe, however, that the implications of your decision will equally affect all taxpayers and ratepayers in New Brunswick.

The municipal utilities were supportive of the original OATT Section 2.1 brought forward in the first OATT hearing application as applied for by NB Power on June 21st 2002, and we continue that support. We strongly believe that allowing a second open season to occur is not in the best interest of New Brunswickers.

The governing principle for the Board in this

proceeding is set out in Section 58 of the Public Utilities Act which states that, All tariffs shall be just and reasonable. The municipal utilities fully support that ideal and are greatly concerned about the impact the second open season may have on their customers.

Mr. Chairman and Board members, we note the common position of both NB Power as the applicant and Emera that a possible loss of use of 188 megawatts on the MEPCO line to a second open season will immediately impact all electricity customers in New Brunswick negatively. Neither NB Power nor Emera dispute this. The only factual issue is the extent of the immediate impact. Will it require a two percent rate increase or will it be more in the order of five to eight percent.

A decision that results in rate increases could have significant financial effects on the electricity customers in the province. In contrast, a decision made in the context of putting New Brunswickers first will be one that is beneficial to all electricity customers in New Brunswick. Being beneficial to all customers such a decision would meet the test of all just and reasonable set out in the Public Utilities Act. This includes not only our customers but those of the New Brunswick Power distribution company. Our interest today is therefore to

ensure the customers' interests are served and our suggestions and recommendations to you are from that perspective.

I would like first to address some of the issues involved. We see three major issues and I will address them in turn. They are, number 1, the importance of NB Power's exports to New Brunswick, number 2, the limited importance of New Brunswick -- to New Brunswick of changes being made to the electricity industry in Nova Scotia, and 3, the limits to compliance with FERC requirements that arise in practice.

So first I will address the importance of NB Power's exports.

It appears that for many years NB Power's electricity exports were reduced -- have reduced the amount of revenue NB Power has needed to collect from New Brunswick electricity users by some 10 to 15 percent. Under the previous electricity supply arrangements that were in effect prior to last year's passage of Bill 30 this benefit was realized through electricity rates that were 10 to 15 percent lower than they might otherwise have been had NB Power not earned the export revenue that it did.

Today it is not clear whether the future export sales benefits will he hard wired directly to electricity rates,

but there is lack of certainty that those benefits will flow in some form to all residents and businesses of New Brunswick. For example, they could flow to the province in the form of increased taxes and dividends on NB Power by virtue of its increased profitability. We therefore submit that NB Power's continued ability to export is a matter of significant importance to the provincial economy, and that electricity rates continue to be lowered by the revenues from export sales.

To put the economic impact in context it is interesting to note the amount of electricity involved in the open season issue before you is equivalent to the requirements of the City of Saint John. Today Saint John Energy has energy sales of over 1,000 gigawatt hours, one terawatt hour, per year, the approximate energy -- the approximate amount of energy represented by the 188 megawatts capacity in debate. This energy serves more that 36,000 residential, commercial and industrial customers in a geographic area of over 323 square kilometres. We suggest to the Board that this parallel between the City of Saint John and the export capacity subject to open season competition is a useful one. It is our opinion that a loss of this magnitude cannot be easily mitigated.

Now I will turn to our understanding of what is happening under electricity restructuring policy in Nova Scotia and its related impacts on New Brunswick.

It has been suggested to the Board during these hearings that the opening up of competition in the Nova Scotia electricity market could be used by NB Power to offset any losses of access to the US market. However, the evidence at this hearing indicates that restructuring the Nova Scotia market will be limited both in scope and in time frame. Barely over one percent of the market is to be opened. Therefore the Nova Scotia market is in no way comparable to the size of the export market that has for many years been accessed by NB Power to the benefits of all New Brunswickers.

While we therefore believe the Board will not see any merit in the argument of policy reciprocity with Nova Scotia, we also believe that the Board should not be swayed by potential arguments based on the rights of Emera, or any other business located outside of New Brunswick under New Brunswick regulations. Quite simply, New Brunswick's motivation for changing its electricity structure and the provisions of the open access transmission tariff that the Board has already approved is, as it should be, intended to benefit New Brunswickers.

Emera is not one of the 43 wholesale and industrial customers with the right to participate in New Brunswick's electricity market. Rather it is a business located outside of the province that is not prohibited from participating in the provincial market.

The final issue I want to mention relates to FERC's jurisdiction and the practical application of its requirements.

The Board has heard much about FERC and the compliance with FERC practices, policies and regulations. While we believe that FERC precedents and practices are useful and interesting, we find ourselves forced to state the obvious fact that New Brunswick's transmission tariff does not fall under FERC jurisdiction and is in fact entirely under the jurisdiction of your Board, Mr. Chairman. While the New Brunswick transmission tariff is very similar to the FERC tariff, we see this as being only a common sense approach of simplifying operation by reducing what the electricity industry calls seams between adjacent market areas.

We do not believe that the value of having similarity between the New Brunswick tariff and the FERC tariff should be extrapolated to the point of disadvantaging New Brunswick's electricity users. This is a belief that is

apparently recognized even within the United States where FERC's views might be expected to have greater sway than in any neighbouring sovereign nation. In response to one of your questions, Mr. Chairman, Mr. Hoecker indicated that the Bonneville Power Administration, an electrical utility owned by the US federal government and that is responsible to the American people through the same Secretary of Energy as FERC, had all its transmission contracts grandparented when arrangements were made for open access transmission in its region of operation.

As you know, Mr. Hoecker speaks on such matters with some authority since he was chairman of the US FERC from 1997 to 2001 and was a member of the commission beginning in 1993. In addition, Mr. Hoecker has practiced energy and administrative law in Washington for over 20 years. Emera's witness on the matter, Mr. Trabandt, effectively confirmed that NB Power's proposal to honor all existing contractual arrangements for transmission capacity is strongly supported by US practice. When asked to identify any and all instances where the FERC had abrogated an existing transmission agreement as part of restructuring an electricity utility or the approval of an open access transmission tariff, Mr. Trabandt indicated that he was not aware of any such instance.

Mr. Chairman, I would also like to underline some issues of public interest that the Board has heard during the hearing. Here are two specific points we will address. Firstly, the importance of a careful approach to the transitions involved when implementing a new structure for electricity supply, and secondly, the importance of certainty in making the changes.

I am sure you agree with us that the Board has an important role to play in protecting the interests of consumers. In fact, at its highest level and simplest form that is what we understand the Board's role to be, ensuring that the best interests of consumers of electricity in the province of New Brunswick are served. In keeping with that philosophy we note that the Public Utilities Act requires that all tariffs shall be just and reasonable. That is the result sought by the municipal utilities.

As we said in our summary comments to the original open access transmission tariff hearings before the Board in late 2002, early 2003, the municipal utilities are active in restructuring the province's electricity system because we want to guard the interests of our customers. We believe that changes can be made to the system and that all New Brunswick consumers can benefit, but we believe

very strongly that the changes must be made in a deliberate and controlled process. This is just as the government has consistently said beginning with the call for a deliberate and controlled approach in the White Paper.

One of the reasons we should all respect the commitment to a deliberate and controlled approach to electricity restructuring is that it is essential to minimizing any adverse impacts on electricity users. Changes made in haste without adequate forethought or changes made over time frames that are too short to accommodate the practicalities of adjusting lifestyles and business operations have negative effects on electricity customers. While some negative impacts are perhaps unavoidable, we believe it is quite unnecessary to increase the negative impacts by accelerating the transition schedule or by terminating any arrangements which have traditionally benefited New Brunswickers.

What we are saying is that while the long term benefits of electricity restructuring may be the objective, this is not a good reason for creating unnecessary hardship in the transitional phases of implementing that long range policy. Far from defeating the ideal of a competitive electricity market in New

Brunswick as has been implied by Emera submissions, NB Power's proposal to respect existing transmission reservation contracts enhances the likelihood of long range success since it avoids unnecessary rate impacts on New Brunswick consumers during the transitional phases. Creating higher electricity rates through the changes that appear to benefit only outside the province may well be unacceptable to the general public and thereby risk longer term objectives.

In this regard we are disappointed by the short term perspective that Emera apparently has in attempting to enhance its business prospects at the expense of electricity rate payers and tax payers in New Brunswick. While we welcome the opportunity of a choice of suppliers from Emera and others, our motivation is the benefit to customers that could result and therefore we cannot support an implementation process that undermines customer benefits.

Under the heading of public interest, the municipal utilities would also like to mention the issue of certainty and predictability. Especially during times of change such as those in which the electricity supply industry is now embarked in New Brunswick, it is important to have some certainty on the way forward.

In this regard we agree with NB Power in their view that abrogating existing contracts for transmission capacity under Section 2.1 of the new tariff is not consistent with the public interest or best regulatory practices. Ending arrangements which were established in good faith and which already contain within them expiry provisions and schedules is not conducive to inspiring public confidence. The re-opening of existing contracts seems to be an easily avoidable complexity in the overall restructuring program which will have more than enough unavoidable complexities.

Just before summarizing our conclusions and recommendations, I would like to make a few comments on customer impacts.

From the very beginning of the open access transmission tariff hearings almost two years ago in 2002 we have expressed concern on the difficult position that electricity customers have been put by the sequence of events. Customers need to know first and foremost what their electricity costs will be and in our view that need would have been better served if NB Power had focused its energies first and foremost on the standard offer service arrangements and other retail matters rather than open access transmission and wholesale competition. Be that as

it may, here we are with a transmission tariff that is apparently almost ready and still no certainty on how it will impact the thousands of residential and commercial customers in New Brunswick. Given this context, we urge the Board to consider very seriously the probable impacts since these are the first of electricity restructuring, and their reception by customers will be critical to moving forward with the government's overall restructuring program.

In fairness, the province has moved forward since we first made this point two years ago. Since that time Bill 30 has been passed by the legislature. It does give the electricity industry and consumers more reliable information about the road ahead, but we are still left with considerable uncertainty. We feel for example that profits from export sales should continue to be used to reduce electricity costs. In coming to its decision on this application we urge the Board to recognize that the existence of this broad context of uncertainty will tend to heighten the level of customer's concerns and will always have -- they will always have whenever they are faced with higher costs.

As we said in our opening comments there appears to be no disagreement that changing the present transmission

rights agreements will negatively impact customers. Both NB Power and Emera have stated this in both their evidence and testimony. There is a debate on the size of the increase in wholesale prices that will result and forecasts range from between two and eight percent. We estimate that for one of our typical residential customers with an average monthly use of 1,350 kilowatt hours this corresponds to increased annual costs of 25 to $100. And what justification is being offered for this increase? Since the increase would result directly from the loss of earnings by NB Power and does not contribute in any way to rising costs experienced by NB Power or the embedded debt it has created, electricity customers will probably have great difficulty seeing any justification whatsoever.

And now, Mr. Chairman and Board members, I would like to briefly summarize for you the points that the municipal utilities have addressed here today.

We support NB Power's application and urge the Board to approve it. By so doing we believe the Board will be sending a strong message to the residents and businesses of New Brunswick that their interests are first and foremost in the Boards's considerations. Approval will also send a strong message about the Board's respect for contracts entered into in good faith. By approving this

application the Board is signalling that it is fully prepared to balance provincial interests while preserving existing electricity supply arrangements with New Brunswick's most important market for electricity exports.

Previously the Board has considered when rendering decisions the impacts on residential and small business customers in New Brunswick. I know you are used to ensuring the necessary balance between fiscal reality and the customer's preferences in your decisions. But we feel compelled to point out that you have not heard much from the perspective of thousands of small customers in New Brunswick who we feel to date have only been represented by the three municipal utilities.

This entire electricity restructuring process continues to be a learning experience for all potential market participants. For restructuring to succeed and its long term promises realized it is important to build and maintain the confidence of consumers. The premature termination of contracts which result in rate increases and which yield no benefit to New Brunswick will do nothing to build consumer confidence. In fact it will undermine that confidence and thereby jeopardize achieving the long term objectives of electricity restructuring.

In our summation to the initial tariff application we

pointed out the need for increased education and communication programs surrounding electricity restructuring. We suggested that NB Power should take initiatives in this regard. Frankly, it appears that nothing has changed. Once again therefore we urge the Board to require as part of its approval of this application that one or more of the NB Power butterflies take initiatives to provide educational sessions to distributors, system users and customers. These should cover not only its open access transmission tariff but also, and perhaps more importantly, arrangements for standard offer service and the way in which these two elements of New Brunswick's new electricity arrangements work together.

This concludes the summation on behalf of the municipal utilities. Again, Mr. Chairman and Board members, thank you for the opportunity to address these issues with you on behalf of our customers.

MR. SOLLOWS: Thank you very much. A couple of questions. As I was going through and listening to your presentation and going through it, I see at the start on page 4 you say -- you said that it appears that electricity exports have reduced the amount of revenue by 10 to 15 percent, twice in one paragraph.

Certainly that is not my understanding of the evidence before us. So I guess my question is what creates this impression?

MR. YOUNG: Sir, I would have to say that's probably from the hearing previous, reduced the amount of revenue by 10 to 15 percent.

MR. SOLLOWS: Okay. It is my understanding, if I recall correctly, the evidence before us says it is somewhere on the order of 8 percent or less?

MR. YOUNG: That's correct, sir.

MR. SOLLOWS: Okay. Fair enough. Then I was just looking at your numbers. 1,350 kilowatt hours corresponds to an increased annual cost of 25 to $100.

If I have done the math right, that is between 18 and $75 per megawatt-hour that would result as an increased charge to customers by this loss of what might be in the order of $15 million.

I'm just wondering how you got those numbers?

MR. YOUNG: Can you reference that in the --

MR. SOLLOWS: It is on page 8, the top of the page, just above your conclusions and recommendations. You said that for one of your typical residential customers with 1,350 kilowatt hours of monthly use an annual cost increase by some 25 to $100.

I guess I'm having a hard time seeing how you could get $75 per megawatt-hour increase charged to your customer by the pass-through of this charge?

MR. YOUNG: I think it was 1,350 kilowatt hours. And we took the 2 to 8 percent increase. And we just increased it straight through.

And when you do it just ball park wise, we didn't want to get into the nitty gritty of .001 percent or anything, hence 25 to $100.

MR. SOLLOWS: So you didn't do it on a marginal basis?

MR. YOUNG: No, sir.

MR. SOLLOWS: But your other costs would not have increased. This would just be an increase in your energy charges, not your other charges. So really we would have to look at what fraction of your energy.

So this would be a high estimate, wouldn't it, even at the 25 to 100? The range should be set lower if we take out your distribution and other cost?

MR. YOUNG: Yes, sir, a little bit lower.

MR. SOLLOWS: Okay. Thank you.

MS. COWAN-MCGUIGAN: My question, Mr. Young, is I'm a bit confused. I'm not an engineer. 1,350 kilowatt hours, this corresponds to an increased annual cost of some 25 to $100. After Mr. Ken Sollows' questions, you are now

saying that it is a bit less.

So what exactly are we talking about? Can someone answer this question before the end of the afternoon.

MR. YOUNG: Yes, ma'am, they can. Just from my perspective, 1,350 kilowatt hours, if you take the increased range that has been brought up in the evidence here from 2 to 8 percent, if that comes to us from NB Power, we can't absorb that.

That will be a flow-through to our customers. And in our perspective that 2 to 8 percent is $25 to $100. It's in that range. But I will get back to you on the specifics.

MS. COWAN-MCGUIGAN: I understood that that was your range. But I also understood you to just give information to Commissioner Sollows saying it is now a bit less, based on what you are saying.

So this is my question. Is it 25 to $100? Or is it 5 to $25? Are we going to have figures before the end of the day?

MR. YOUNG: You will have figures before the end of the day. But when I say 25 to 100, my response to Mr. Sollows would be not much of a difference.

MS. COWAN-MCGUIGAN: Thank you very much.

WITNESS: It would be very close.

MR. SOLLOWS: So just so that we are absolutely clear, you are telling us that the energy charge is the dominant fraction of your billing determinate to your customers.

So you are saying maybe 90 percent of your bill is energy charge and only 10 percent is distribution?

MR. YOUNG: Not quite that high.

MR. SOLLOWS: Could you give us a rough percentage then?

MR. YOUNG: I would say probably 85/15.

MR. SOLLOWS: 85 is energy. 15 percent is distribution. Okay. Thank you.

CHAIRMAN: Just one question. And that is what is 1 percent to any of your residential customers, 1 percent increase?

MR. YOUNG: Say that again, sir?

CHAIRMAN: 1 percent increase in their rates. In other words, you are using a range here of 2 to 8?

MR. YOUNG: Yes, sir.

CHAIRMAN: And you are saying it is 25 to 100. You are going to come back with figures.

My question simply is what is 1 percent increase to your average customer, how much does that equal on an annual basis?

MR. YOUNG: I could quickly come back with that answer for you, sir.

CHAIRMAN: That is great. Thank you, Mr. Young.

Mr. MacDougall, if you would like to switch places?

MR. MACDOUGALL: Mr. Chair, Commissioners, thank you for the opportunity to present WPS Energy Services' argument in this matter.

As you are aware, WPS Energy Services, and its sister company WPS Canada Generation Inc. are active participants in the New Brunswick Electricity market.

WPS Canada Generation currently owns a hydro-electric generating facility in Western New Brunswick which in part serves the community of Perth-Andover, and it also holds some transmission in the Province, which will soon be under the regulatory jurisdiction of this Board.

WPS Energy Services is in the energy marketing business, including providing energy marketing solutions in both New Brunswick and Maine. WPS Energy Services has been actively involved throughout the restructuring process in New Brunswick, and the hearing process on NB Power's Open Access Transmission Tariff.

Today, WPS hopes to assist you by summarizing where New Brunswick's electricity restructuring currently sits, where it is anticipated to go in the future, and why that is fundamental, in our view, for the Board's deliberations.

Before I do that however I would like to note that it

appears that the positions here are quite polarized. If I personally was a Board member, I would find that a difficult situation. Polarized positions are always the hardest to deal with.

However today WPS is going to put forward what we believe is a sensible, practical and the appropriate middle ground and one which is in the public interest.

It is undeniable that the evidence in this proceeding supports the contention that New Brunswick's current energy strategy calls for the development of a competitive marketplace for electricity in the province. Starting initially with wholesale customers, the three municipalities and approximately 40 large industrial customers, with consideration for a larger market opening based on the experience acquired over the next few years with respect to wholesale and large industrial customer competition.

In this regard, Mr. Anderson tendered as Exhibit AG-1 some page extracts from the White Paper: New Brunswick Energy Policy. At page (v) of that exhibit we find the Executive Summary of the White Paper. And this lists key statements included in the document. The first five key statements we believe are germane to the deliberations that you have to undertake. And I'm going to cite them as

follows:

First, the Province will proceed with a deliberate and controlled approach to electricity restructuring which will provide opportunity for New Brunswick to participate in a competitive market, gather experience, learn from other jurisdictions and set the stage for full retail competition while allowing time for the market to evolve.

A market design committee, with broad stakeholder representation, will be created to address development of the market design, structure and rules leading to a competitive electricity market. That was the second point.

The third point. Wholesale competition will be introduced, whereby the three existing municipal utilities may procure all or some of their power from the competitive market.

The fourth point. A wider range of non-utility electricity generation projects, which are often characterized by high energy conversion efficiency and relatively low capital costs, will be permitted.

And the fifth point. Retail competition, or the sale of electricity from competitive generators directly to end-use customers, will be gradually introduced, beginning with large industrial customers.

The terms of the new Electricity Act, which has been assented to by the Legislature, and announced by the government to be proclaimed April 1 of this year, creates a legislative regime which allows the competitive market to commence, consistent with the terms of the White Paper which I have just noted.

It is clear from the record that both NB Power and Emera Energy understand that access to the MEPCO tie is a significant factor in the development of new generation to serve New Brunswick. The MEPCO tie provides potential access to the New England market, which is particularly attractive for the sale of energy in the summer months, where peak load in the province of New Brunswick occurs in the winter time.

It is also clear from the record that the ratepayers, or potentially the taxpayers, of New Brunswick could be negatively impacted if NB Power Generation were to lose a portion of firm capacity which it now holds on the MEPCO tie. Clearly, there is debate as to the magnitude of the impact. And that remains clearly a question for you Commissioners based on the questions that I have heard today. There is debate on the opportunities for NB Power Generation to mitigate such an impact. And there is a debate on the extent of such mitigation strategies.

WPS is not here today to argue those figures. And other parties have made some representations in that regard. However we do accept the fact that loss of transmission reservations on the MEPCO tie by NB Power Generation will have some negative impact which will have to be addressed in some manner, whether through the so-called vesting contract or otherwise.

WPS is here today to suggest to you how it believes you should approach the question before you in light of the background which we have just summarized. At page 71 of the transcript of the continuation of the pre-hearing conference which was held on November 10, 2003, this Board found that while you did not have jurisdiction to deal with the letter application by NB Power, you did have jurisdiction to respond to the request to review contained in the Order-in-Council dated August 19, 2003. Mr. Hashey referred to the language of that Order-in-Council. And I won't repeat it now.

Suffice it to say the Board must determine if in its view it is in the public interest to preserve the transmission reservations which are not subject to a firm contract involving a third party who is not affiliated with NB Power.

What then would be in the public interest considering

the background to this present proceeding and the evidence before you? It is WPS' view that the public interest would be best served by a regulatory finding that would encourage a competitive market, the ultimate result of which is to hopefully lower electricity costs to ratepayers in New Brunswick. It is WPS' submission, that although this has not always been the ultimate result in electricity restructurings elsewhere, this has always been the intent and is clearly the intent of electricity restructuring in New Brunswick, to ultimately lower costs.

So how can this Board, in advancing the public interest, help achieve this goal through its findings in this proceeding. Will holding an open season for the 188 megawatts of capacity under discussion, or some portion thereof, achieve this goal? Unfortunately, Mr. Chair, Commissioners, WPS does not believe that the case for this has been made out at this time.

And the reason for this, is that this is truly an issue of timing. What is required to achieve the beginnings of a competitive market in New Brunswick, and to encourage non-utility generation, is the ability for non-utility generators to be able to access transmission at such time as they may propose a viable generation project to serve the competitive market sector, or at such

time as additional generating capacity is required in the New Brunswick marketplace by NB Power Distribution, the standard service provider. That is the crucial time.

As Mr. Marshall indicated under cross examination by Mr. MacNutt: "Now any party who wants to respond to that RFP, being the generation company or Emera or Hydro Quebec or any party in the marketplace, WPS, any party in the marketplace may choose to look at what the exports do in terms of influencing the bid price that they put to Disco in response for the capacity but it will not influence the capacity."

And further Mr. Marshall, in response to a question by Commissioner Sollows: "When it comes down to building a new power plant, having access to the export market can influence the decision on the economics of the power plant. So the type of power plant that would be built to respond to Disco's RFP in the future or for a large industrial or municipal customer to choose to contract with can be influenced by access to the U.S. market." Those are Mr. Marshall's words.

We have heard throughout this proceeding that potential applicants for the transmission capacity under consideration at this time are NB Power Generation, Emera Energy, and possibly Hydro Quebec. We have not seen nor

heard from any other parties interested in acquiring transmission at this time in support of a new generation project to serve the needs of customers in the province of New Brunswick.

The market has not yet even opened. There is no certainty that the municipalities or industrial customers will seek alternative suppliers in the near term. There is certainly no indication at this point in time that other parties could competitively compete with the price offerings to be offered by NB Power Distribution, the standard offer supplier.

So what will encourage independent power producers? Well, in WPS' view, they require the flexibility in the future to be able to obtain such access to transmission capacity to MEPCO as may be necessary and reasonable to support potential new generation projects which may serve New Brunswick customers. That is clearly the goal. And that is clearly the flexibility these parties need for there to be a competitive marketplace.

NB Power Generation has been, and WPS has some sense of certainty that it is willing in the future, to entertain negotiations with independent power producers to release firm MEPCO capacity on a long-term basis.

Under cross examination by WPS, Mr. Bishop, on behalf

of NB Power Generation, stated as follows: And I would like to state the question and Mr. Bishop's response.

"So my question is, is NB Power Generation willing to negotiate with parties for the release of firm transmission on a long-term basis?"

Mr. Bishop's response under oath: "The answer to that is yes. In fact, an example of that that I might put out is the negotiation that occurred with the Bayside Power Corporation when Bayside built the facility here at the Courtenay Bay station. There was an agreement reached for 260 megawatts of transmission capacity that allowed summer delivery over NB Power firm transmission."

My question: "Thank you very much. So parties wishing to compete in New Brunswick or to access MEPCO are not precluded from firm long-term transmission access to the MEPCO tie?"

Mr. Bishop: "That is correct.

Mr. Chair, Commissioners, if the 188 megawatts of transmission capacity on the MEPCO tie, or a portion of it, was made the subject of an open season at this time, any third party who acquires that transmission capacity is entitled, they are entitled, with the exception of the daily release mechanism, to hold that transmission capacity for the term of the reservation.

And I think you have to keep in mind how the transmission reservation system works and how the OATT works. In the present circumstances the only third parties that we have heard of as potential bidders are Emera Energy and Hydro Quebec. Both of these entities have significant generation resources held directly or through affiliated companies which are on either side of New Brunswick and for which the MEPCO tie is an important link to the New England market.

In Emera's case, it is the only link for generation situate in Nova Scotia. WPS is therefore concerned that the acquisition by Hydro Quebec or Emera Energy of this capacity could in fact lessen, not increase, the ability for independent power producers to negotiate for access to this transmission capacity.

And this is where we differ a little from Mr. Anderson, who felt or thought that this might be a neutral situation. WPS Energy is a player in the energy market. And their concern is that this may actually be a negative situation.

There are two primary reasons for this, that we believe it is important for the Board to keep in mind. If NB Power Generation was not successful in any open season that may be held to reacquire the transmission or some

portion thereof, then each of NB Power Generation and the successful bidder would hold a lesser amount of reserved capacity on the MEPCO tie line than if NB Power Generation were to retain that capacity. This could potentially limit the amount of transmission capacity which either of the entities would be willing to negotiate for release.

And secondly NB Power has shown a track record of releasing a portion of the reserved MEPCO capacity on a long-term firm basis. And that is what is required. And WPS believes, and the record supports, that this is likely to remain the case.

This is especially true considering the Province's goal of the development of a competitive market that includes independent power producers, since after restructuring, NB Power Generation will continue to be an indirectly-owned crown entity and therefore a vehicle which WPS believes will be expected to assist in fostering the competitive market in New Brunswick.

That being said, WPS acknowledges that under cross examination by them, Mr. Connors on behalf of Emera Energy did indicate if we held the transmission or some portion of it, we would be looking to maximize all the business opportunities. However, unfortunately, we do not have a track record with respect to Emera Energy regarding

transmission capacity on the MEPCO tie.

And Mr. Jessome confirmed, in response to cross examination by us, that Emera Energy has its own business development group who looks at generation opportunities throughout the Atlantic Canadian and northeast markets.

Hydro Quebec did not provide testimony in this proceeding, however again Mr. Jessome upon cross examination by WPS did indicate that we could not know for certain whether Hydro Quebec would provide transmission access to a new generator who wanted to compete in the province of New Brunswick, if Hydro Quebec held transmission capacity on the MEPCO tie, and he indicated that he certainly could not speculate on what Hydro Quebec may or may not do. And I don't think anyone in this room can speculate on what they may or may not do.

So, Mr. Chair, Commissioners, the question then is what is gained by an open season at this time? If NB Power Generation reacquires the transmission capacity, something that Emera Energy has indicated they may do, then the status quo is maintained. We have gone nowhere. If Hydro Quebec or Emera Energy obtain the transmission capacity how will this benefit New Brunswick? It will provide another outlet for power generated in each of Nova Scotia and Quebec to potentially enter the New England

marketplace and it may support some future plan for generation projects by Hydro Quebec or Emera Energy, but not necessarily by any other parties in the competitive power producing business.

Mr. Chair, Commissioners, WPS' position is therefore that since there is scant evidence that anything will be gained in the public interest of New Brunswick with the exception that some party other than NB Power Generation will hold reserve capacity on the MEPCO tie, weighing this against the potential for negative impact on the ratepayers or taxpayers of New Brunswick which we have suggested previously, this suggests that the appropriate course of action in the public interest is to maintain the status quo with respect to the MEPCO capacity in issue.

However, Mr. Chair, Commissioners, I indicated at the beginning that our position was one that we hoped would assist you in finding a middle ground, a decision that was in the public interest but that didn't polarize the positions.

So the question now remains, if there is no open season should the Board just stop there? WPS suggests that maintaining the status quo while helpful for the reasons indicated is in itself not sufficient. WPS strongly but respectfully urges this Board to indicate in

its decision that in light of government policy to create a competitive market NB Power Generation be required to negotiate in good faith with any third party generation project proponent for the release of capacity on the MEPCO tie which is not supported by a third party contract if and when such generation projects may arise. WPS believes this is clearly within the authority of this Board to determine in its order on this matter.

WPS further believes this is an appropriate middle ground between the positions espoused by each of NB POwer and Emera Energy. And it is one which will allow for a much greater deal of flexibility as the competitive market evolves in New Brunswick than would a full and final open season at this time for the capacity reservations in question. WPS believes this would clearly be in the public interest, especially considering the current status of restructuring in the province.

We hope that this will give you food for thought in your deliberations and we thank you for the opportunity to provide WPS' views to you today.

Thank you very much, Mr. Chair, Commissioners.

MR. SOLLOWS: Yes, Mr. MacDougall, thank you very much. It helps -- it has certainly helped me crystallize what some of the issues are.

You were careful to say at this time very often through your presentation. And I'm wondering if you would like to give some thought as to the implications of setting a date for a auction of the capacity sufficiently in the future to give private sector or other suppliers an opportunity to plan and develop their business cases. Doing something on six month's notice or three month's notice is very difficult. Doing something on a three year notice or with prior planning might increase the field of bidders. So I'm just wondering how you would react to that.

MR. MACDOUGALL: Certainly. I think I will react in two ways. Maybe a little background, to begin with.

I think there has been an issue here in some of the discussions that all people build is big power plants and people need 188 megawatts of capacity or more. WPS builds small power plants, efficient small power plants that can serve the legitimate needs of one or another of a large industrial users. For example, WPS currently serves the load of Perth-Andover at a rate that is more than competitive, i.e., it is lower than the rate that other customers in this province pay. So we have to keep in mind people don't always come knocking at the door for 188 megawatts. Plus the amount of capacity they may use is

just in an off-season or for a portion of the time. What this capacity does is assist in the economics of a project by helping to make it more viable and competitive with NB Power.

That being said, our thoughts aren't that it would be useful to hold an open season later, i.e., NB Power can hold this for some certain period of time now wondering when an open season could or should be held. The issue the way we see it is the reservation should continue to be held by NB Power, but the tariff, the out, and I believe it's Section 23, provides for assignment or transfer of that capacity. NB Power has shown a willingness to do that. They have done that with the Bayside project. I happened to be pretty personally involved at that time with the Bayside project. And that occurred and it helped the economics of that project where generation capacity is used in the province when it's needed and sold into the New England market when it isn't needed.

So I think what is important is to allow that to continue to go ahead, but because we are now under a regulated tariff, our thought is that your order should say that NB Power is required to negotiate on a good faith basis with third parties who come to them with proposals for generation capacity to help serve the needs in New

Brunswick and who require some assistance by way of the MEPCO tie.

So they can't then say, oh no, we are just holding this. They have to listen to that business case. But they have to listen to everybody's business case. So everyone then has a legitimate right to do that. And if NB Power doesn't listen, those parties can come to this Board, because you have made an order and say, now here is the issue. Now the problem has arisen at this time.

So we don't think, you know, setting a date for an open season in the future is appropriate. What we do believe though is if NB Power, as they agreed to, Mr. Bishop said this on the stand, we feel the force of an order is a little more useful. Mr. Bishop may not always be at NB Power Generation, although he was speaking for the company. And that's the approach we would suggest would be most appropriate, because it allows flexibility and it certainly allows a middle ground between a polarized situation in which we believe now, that transmission capacity was open the parties who obtain it may obtain it just to use it as a physical hedge for their future plans, because we just don't know. We don't know of any generation project considered right now to serve New Brunswick.

Sorry for the long answer.

CHAIRMAN: Thank you, Mr. MacDougall.

MR. MACDOUGALL: Thank you, Mr. Chair.

CHAIRMAN: We will take a break until 20 after 3:00. I see that it's five to. We will be back then. You are going to lead off in the next round, so you might as well leave your belongings there, sir.

MR. MACDOUGALL: That's great. And I'm jut going to distribute my notes -- a few things I left out, Mr. Chair, so the transcript will speak to it, but all the references are in here and it's really for the purposes of the citations.

CHAIRMAN: Good. Thank you very much.

MR. MACDOUGALL: Thank you very much.

(Recess)

CHAIRMAN: Commissioner Sollows has something he would like to mention.

MR. SOLLOWS: Yes. I would direct this to all participants. One thing that had been a recurring thought for me as I -- since I have listened to the testimony and reviewed the evidence is the understanding that I now have -- first and foremost we have been given to understand that NB Power, of course, thinks that the investments to date have been prudent and reasonably incurred.

And certainly when we look at the Electricity Act, it spells out the fact that irrespective of what anybody thinks, they are prudent and have been reasonably incurred.

But then in testimony last week we heard that one of the advantages of accepting NB Power's position was that if we did so then the generation company would acquire the downside risk for perhaps fuel price increases or an inability to make their export sales.

Now I have a bit of a problem with the contradiction there in that if these -- if indeed these investments were reasonable and prudent, and I will accept that they are or were, I don't understand why the owners of the company, and i.e., the taxpayers of the Province of New Brunswick should be asked to bear this risk rather than the ratepayers, which would be the normal case for a prudent investment by an electric utility.

So I would just like all the participants to think about that and maybe offer me some advice for the record. Thank you.

CHAIRMAN: I have two matters. One, the rumour in the hall during the break was that I had misinterpreted A-13, I believe it is, and NB Power will probably be addressing that. So I think if any of the rest of you think I am off

base in what I have said or like to add something to it, why by all means do so.

The second thing stems from Mr. MacDougall's presentation to us. And that is my difficulty, and I will try and be succinct with that. If for instance in a Board Order that says that we direct NB Generation or Genco to bargain in good faith, by the Electricity Act, we have absolutely no jurisdiction whatsoever over Genco. All right. So even if Genco were to treat that as being a legitimate thing to do now pre April 1 -- and I am not promising we will get the decision out that soon, I am just using that date. Anyway, even if that were legitimate after the 1st of April, then we have no jurisdiction. So that if they "didn't bargain in good faith" I don't see how we would have any jurisdiction to adjudicate on that. Anyway, would you address that as well?

So, Mr. MacDougall, do you want to take a minute, because you have been thrust in the vanguard here.

MR. MACNUTT: Mr. Chairman, and I am giving Mr. MacDougall a few more minutes --

CHAIRMAN: Sorry, Mr. MacNutt, pull in the mike.

MR. MACNUTT: -- giving Mr. MacDougall a few more minutes to compose himself to respond to these last few questions.

It's my understanding the Municipals have the response to the questions put to them before the break.

CHAIRMAN: Thank you, Mr. MacNutt. Go ahead, sir.

MR. YOUNG: Yes, Mr. Chairman. For residential customer using 1,350 kilowatt hours per month, I had recalculated 1 percent, 2 percent and 8 percent. 1 percent is $11.64 per year. 2 percent is $23.28, where we rounded it up to 25. And at 8 percent, it's $93.12 per year, where we rounded it up to 100. And that's just a quick calculation on our part while we sit here.

CHAIRMAN: Thank you. Take your time, Mr. MacDougall.

MR. MACDOUGALL: Mr. Chair, I think I am fine. There may be some citations in the Act. I won't have the number. But I think the Board will be able to find them. I think I know the principles. So I can speak to it in that way.

I think I will start with your question, Mr. Chair, since it's the one most germane to the issues put forward by WPS.

I think there is a couple of issues we have to keep in mind here. First off NB Power Generation currently is still one company. And the evidence before us included the evidence of Mr. Bishop speaking for NB Power Generation, sort of as a subset of NB Power. So right now you are adjudicating on NB Power even under this tariff as

a single entity. So I do think you have jurisdiction over them now. And you have jurisdiction to make a Board -- over them now -- an order over them now, which should by rights then flow through to the subsets of NB Power. Mr. Marshall was put up as -- sorry, Mr. Bishop is up there as a witness for NB Power. And we would expect for the reason we asked him the questions that, you know, he would be held to the comments he made for NB Generation.

So one issue we have is we only have NB Power now. If you make an order on NB Power, we would presume that it's binding on NB Power, whatever hat it then wears later on after the Electricity Act comes into place. And it would follow through just like any of your orders that you may have made in the past with respect to rate setting or otherwise are binding on the subsidiaries once they are created. That's how I would understand the situation. And currently we are dealing with the one entity.

A second approach, however, if you wanted to take this approach is to put some wording in the tariff. You do have jurisdiction over the tariff. I will use as an example the previous tariff, the out and through tariff, talked about eligible customer and then what it did was say NB Power Generation was allowed to be an eligible customer on NB Power Transmission. So it was very odd in

that they had to show that because in fact as some of the witnesses have said and under cross examination, there was only one legal entity.

For the same way, you could possibly put in the tariff that if you are deciding that NB Power Generation should maintain this, but you have a concern with that and accept the approach that WPS put forward, you could just put some wording in the tariff that says NB Power Generation with respect to the capacity on the MEPCO line not covered by third party contract will be required to do X, Y, Z. They are before you now. They are a party to this proceeding as a division of NB Power. And I think you could put it right in the tariff. Otherwise you could make the order and assume that the order continues to be binding and allow for the complaints process. And again those are the sections that I was looking for.

The only problem I have Mr. Chair is you have to look at the section of the Public Utilities Act and the Electricity Act. So they will change. So I won't cite to the sections. But you do have broad authority certainly.

I will just use an example. Section 8.3 (2) that any order of the Board made under this Act is subject to such terms and conditions that the Board considers necessary in the public interest.

I think a term and condition that you feel is in the public interest can be made to be bound -- binding on NB Power Generation after the restructuring.

There is a similar section I know in the Electricity Act. I am not sure which one it is. I believe it is section 130. But then there is also other broad powers.

So I certainly think that you could do that. And maybe the best way to do it would be by putting some wording in the tariff in the same way that NB Power in their own out and through tariff created the definition of eligible customer to actually accommodate Generation, which was a subsidiary and not a separate legal party. They have done it. I think this Board certainly can do it.

And I could probably come up with other ways given more time, but I believe the Board has able legal counsel, including its Chair. And I think if that was the will of the Board, I think the public interest and the Act and legislation would provide you avenues to achieve that goal.

It is complicated I have to admit. But those are -- I think I have thrown out some avenues to achieve it.

CHAIRMAN: Well it's certainly food for thought. Thanks, Mr. MacDougall. Did you have any other matters that

you --

MR. MACDOUGALL: I think I would like to respond to the other two questions. One that you posed and Commissioner Sollows. And then I had just one question in reply.

With the greatest of respect I believe the interpretation of A-13 isn't simple subtraction. I don't believe those taxes are the taxes on that margin. I am pretty sure of that. But I believe my friends at NB Power will be able to explain it more concisely. But I do think there may be a small issue with that, Mr. Chair.

With respect to Commissioner Sollows' questions, my understanding of the issue, if I have interpreted your question correctly, what Generation has said is in the vesting contract, they are going to state a price that's based on the amount of exports or the value of the exports that they anticipate receiving in the years going forward. And then what the risk they will bear is whether their estimate was right or wrong. So they will make an estimate, but their estimate presently is based on the assumption that they have the 188 megawatts.

What I believe NB Power was saying is that if they lose the 188 megawatts, their assumption will be different. It will actually be that they will be recover less. Therefore they will have to pass more of those

costs from Genco onto the consumers of New Brunswick. Whereas Genco could have passed some of those costs on by selling into the export market and therefore reducing their overall fixed costs and therefore allowing a smaller amount of costs to be passed on to the distribution company and eventually to the customers.

The issues that do arise there are we haven't seen the vesting contract. And that's -- there is nothing that we can do about that. It isn't available right now in that regard. And also it appears that this is a one shot thing. That Genco isn't going to come in annually and change the prices. Again this appears to be a policy decision where they are going to say for the first number of years we, Genco will give you, Disco, a price. And I believe they are probably doing that to give some certainty to Disco. That is my understanding. So that Disco can then go out and to its customers, who are all the customers of New Brunswick who aren't in the wholesale market and those who want to stay on standard service, those customers would have some idea of Disco's price going forward.

Now I really do believe NB Power have to make it more clear. But that's my understanding of it. So the only risk Genco is saying its bearing is the risk of their

estimate. The concern here is that estimate will be different if they have the 188 megawatts than if they don't have the 188 megawatts. That's my understanding of the issue. I don't think it's inappropriate. Genco is supposed to be moving to be more of a commercial generator. Other parties are supposed to be able to compete against it. I think you have to put it on a level footing with other parties who would bear those same sort of risks. So I think the division of risk is appropriate as NB Power has set it up. If I understand it as I explained it.

And, Mr. Chair, I just then had really one comment in reply. And this was in reply to Mr. Zed. And again it goes -- maybe a little legal, technical question, but since we are lawyers, I will give my views on it.

He indicated that he felt the test that this Board had to meet in this instance was that NB Power must prove that you were wrong in your first decision or that they brought some new evidence to bear that wasn't available at the time of the first decision.

Well one or the other of those tests may be appropriate in a normal court situation. I have to beg to differ and give my interpretation of what the test is. I did state it in my argument. But I would like to restate

it in the context of the Order-in-Council. And I think we need to talk just briefly about the history of that. Emera Energy did make a motion to this Board to have both the letter application by NB Power and the Order-in-Council disposed of. This Board disposed of the letter application, but then accepted the review application. And it didn't accept the review application with modifications. It accepted it.

So WPS has continued under the understanding that that is the review that we are undertaking here pursuant to Section 60(1)(1) of the Public Utilities Act. And the review that this Board accepted -- and I am sorry, I don't have the exhibit reference to the Order-in-Council -- but the wording is in conducting such review to determine if it is in the public interest to preserve the transmission reservations, which are not subject to a firm contract involving the third party who is not affiliated with NB Power.

So it's not a question of whether you were right or wrong at your first decision. I don't know that anyone could state that you were right or wrong. The question is there was a concern raised by the government. They used a section of the Public Utilities Act that you as a Board accepted was appropriate, even after it was challenged by

a third party. The test that is set out in there is for you to determine what is in the public interest for this question.

I think at this stage we have to stop really looking back at history. The question is what is in the public interest in your review on Section 2.1 of the Open Access Transmission Tariff? I think that's the -- truly the only question before you. And I believe that is the legal test that you have to follow. The one that you accepted under the terms of the review, because that's how the legislation is set up.

And my only comments in closing on that is to -- being at the end of the batting order you get to see what everybody did. And I guess I play a bit of ball hockey and everything. And I think the score here is 6 to 1 right now. And the 6 are the home team. I would leave that with you as some food for thought.

CHAIRMAN: Thank you, Mr. MacDougall, for being the clean up batter.

MR. MACDOUGALL: Thank you, Mr. Chair.

CHAIRMAN: Mr. Young, if you want to stay where you are. Sir, unless you have a lot that you wish to talk to, why you can stay where you are.

MR. YOUNG: Mr. Chair, we have nothing further to add to the

two issues you have raised.

CHAIRMAN: I'm going to have to pull the MacNutt admission and ask you to pull the mike in a bit, please.

MR. YOUNG: Mr. Chairman, we have nothing further to add on those two points that the Board has raised.

CHAIRMAN: And nothing that you want to comment on that any of the other parties brought up?

MR. YOUNG: Not at this time, sir.

CHAIRMAN: Good. Thank you. Mr. Zed. No. It would be Mr. McCarthy. Do you have anything?

MR. MCCARTHY: We have nothing to add, sir. Thank you.

CHAIRMAN: Okay. It is Mr. Zed. Go ahead, sir.

MR. MACNUTT: Mr. Anderson, I believe.

CHAIRMAN: No, you are first. The first shall be last. I have always called on you first otherwise. Please, Mr. Anderson. Go ahead, Mr. Zed.

MR. ZED: Thank you, sir. Just to continue the baseball analogy and looking up at the Board, there appear to be five unaccounted for runs right now and we certainly take our chances with our argument.

It has never been the practice of this Board to listen to numbers but to logic. It has always been the practice of this Board to listen to fairness. And your original decision was a great example of FERC aside, because we had

nothing before us then about what FERC said or what FERC didn't say. This Board sat down, examined the facts, and regardless of whose obligation it is, regardless of what the test is, regardless of who has the burden, came to the conclusion that it was unfair and discriminatory.

Public interest is a very, very broad, broad topic. Surely it is in the public interest for this Board to do the right thing. Surely it is not in the public interest for this Board to uphold and the admittedly unfair and discriminatory practice that occurred in 1998.

Now we are at the start of opening competitive markets in this province. Surely this Board has an interest in establishing a foundation for that competitive market on something other than that unfair and discriminatory process.

Mr. MacDougall, as logical as his argument might sound, it is absolutely fundamental for you to ignore that season. What he is saying is, give them their contracts. In order to do so you have to ignore the discrimination and the unfairness that went on in 1998. That's what you have to do. You have to suspend -- like it never happened. And you have to sanction in fact what happened, notwithstanding that it was discriminatory and unfair.

So we would urge this Board not to do that. But, you

know, from a practical point of view -- and we have faith that you will not -- but from a practical point of view if we examine what he is asking this Board to do, what he is saying is, have faith that NB Power will negotiate in good faith. And if they don't negotiate in good faith then the parties can go to the Board and have their differences resolved.

Now just from a practical point of view, even if this Board had that authority do you really want to put yourself in a situation where you are adjudicating the negotiations between NB Power and a third party? And how would you conduct those hearings? What evidence would you have before you? I mean there would be so much confidential evidence floating around that, you know, it would be virtually impossible to hold a meaningful hearing, even if you were so inclined.

But let's step back. What is wrong with putting this capacity on the market? What is likely going to happen? What is likely going to happen is those entities that have a commercial interest in the capacity will put bids in. Some will be successful, some won't. What you have now is a monopoly. If there are two players who end up with capacity or three players who end up with capacity, surely another party who wants to build generation in this

province is better served being able to negotiate with three players as opposed to the incumbent. I mean, it just defies common sense to think anything else.

If I come to this province and I want to build a generation facility and I need capacity, surely I am in a better negotiating position if I have NB Power and Emera and WPS and Hydro Quebec to negotiate with as opposed to just having NB Power. So I don't see the logic in saying we won't better off. Of course we will be better off if there is more than one player in the market.

Secondly and I guess really we go back to the fundamental issue of public policy and that is the 1998 tariff was unfair, and I will say nothing more than that. Thank you.

And really, sir, with respect to the issues Mr. Sollows raised, I can really only refer you to our evidence and I will just repeat what our understanding of the vesting contract is. And our understanding of the vesting contract is that without any discussion with the regulator there appears to be a mechanism which has the effect of Disco assuming all of the energy forecast accurate risk and all of the fuel supply risk with Genco being essentially assured to make a rate of return on their capital structure. Now that was our understanding

of the evidence.

MR. SOLLOWS: Sorry for this, this is not really directed at you, Mr. Zed, but it's something that occurred to me as you were arguing.

It occurs to me that in certain circumstances in other fields we would look at whether or not a reservation was actually used and perhaps for two or three years running, and then if it was not used, if the 700 megawatts was never used and it was only used to the tune of 500, then we would after a certain period of time then release it and have an option on it.

Is there any precedent for anything like that in the electricity market that would sort of an ongoing rolling average basis look at the unused capacity and just try to put it back on the market to put it to some economic use rather than just have it sit there and in case the prices stabilized three years hence in New England or whatever else might go on? So that isn't really just directed to you. It's directed generally -- quite frankly my other life. I'm an academic. We at least try to in our university calendar if we don't give a course three years running we delete it from the calender, or we are supposed to. And I'm just wondering if there isn't some mechanism like that that would give -- make -- some way to make this

capacity available on an ongoing basis?

MR. ZED: I think really the primary safeguard is simply that it's an economic decision to enter into a long term firm contract. And so unless somebody has some use for that capacity, then it doesn't necessarily make sense to purchase it. As well of course if there is a provision that it's released the day before if it's not going to be used, and I guess finally if there were some evidence of "hoarding" of which we had some discussion at the last hearing, which I understand to be if somebody were holding it simply for the purpose of denying access to another party, then that aggrieved party could come before the Board.

But I think the theory really is essentially that the market looks after itself. You are not going to buy all this capacity unless you have a use for it either short, long or medium term.

CHAIRMAN: Thank you, Mr. Zed. Now, Mr. Anderson?

MR. ANDERSON: Thank you, Mr. Chairman. On one of the latter points first that Mr. Zed came back to and made a comment with respect to what he considered to be the obvious benefits of more -- two or more entities holding the reservations upon the MEPCO line. The proposition being as was stated earlier in the past hearing, the

proposition being that if two or more entities hold reservations then the prospective power generators have more than one person with whom to negotiate.

The position of the Attorney General is as follows, that's irrelevant. If you accept the proposition that NB Power is the least cost producer, and Emera has. Secondly, if you accept that NB Power has sufficient generating capacity to fill 188 megawatts, which they have. And thirdly, if Emera as it admitted, will buy its electric power for export at the cheapest cost. Then no one will commence production of additional electric power because they cannot build new capacity to compete with the elephant, with NB Power or Genco. And it doesn't matter how many persons or entities hold reservations, as long as NB Power, the least cost producer, has 188 megawatts to flow south, whoever holds the reservations will buy from NB Power it seems to me. So I still do not accept and I don't understand the position of Mr. Zed.

Mr. Zed in his argument, and Mr. MacPherson addressed that. I simply want to echo my view. The task undertaken by the Board in response to the request of the Lieutenant-Governor in Council in its Order-in-Council is clear conducting a review to determine if it's in the public interest to preserve the transmission reservations not

subject to a firm contract involving a third party who is not affiliated with NB Power.

This is not an appeal. It's not a reconsideration of the earlier decision of the Board. There is a clear request and an acceptance of the request by the Board. It shall determine whether its preservation of the transmission reservations by NB Power is in the public interest. And on that question evidence has been adduced showing a detriment to NB Power with no correlative benefit were Emera to succeed.

The focus of Mr. Zed in much of his remarks was addressed to two circumstances in the past. His argument in -- although I am not sure he went so far, but he invites the Board to make a determination on the public interest as to whether Genco should retain their reservations. And that it should determine that by considering the fairness of the open season in 1998.

The position of the Attorney General is that that is not a relevant factor for consideration. This is not a test. This is not a hearing to determine the fairness or openness of that open season. The question for the Board is Genco now holding that, should it be preserved?

And it's the submission of the Attorney General that this Board, had there been no open season back in 1998,

this Board would still be in the position of determining whether a contract or agreement or reservation held by Genco should be maintained. Not depending upon the prior form or protocol of an open season. No matter how Genco obtained that reservation, the question is not how they got it, but whether it should be maintained? And I am not here to defend the open season in 1998. I am here to say it is to the public interest for Genco to retain the transmission.

The second argument that Mr. Zed made with respect to the reasons why the Board should in his view support its earlier decision, in his terminology, is that past practice by Genco resulting from what can be considered either incomplete unbundling or lack of a code of practice should determine the future should he -- he suggests implicitly that that if there are deficiencies will be carried on into the future. And of course the position of the Attorney General is we are starting from the Board's order with an approved tariff with a requirement that there be conditions with respect to the reservation and provision against hoarding. What happens in the future is not going to be reflective of the past. And regardless whether Emera holds it or Genco holds the transmission, the conduct of that person or entity should be the same.

So I don't accept that his analysis or his critique of how what was -- what happened in the past has any relevance to the determination of this Board as to whether Genco should continue to have that reservation.

And those are the only comments that I have with respect to the issues raised, particularly by Commissioner Sollows. I can add nothing to what Mr. MacPherson and Mr. Zed have stated on that question, sir.

CHAIRMAN: Thanks, Mr. Anderson. Mr. Morrison?

MR. MORRISON: Thank you, Mr. Chairman. I will deal first with the issues that were raised by Commissioner Sollows. I will get my hastily scribbled notes here.

Dealing first, Commissioner Sollows raised the issue of a mechanism to deal with capacity. And I think what he was getting at is -- the suggestion is that transmission capacity isn't used for some time, let's say a two or three year period, that it be put up for bid again. We have a couple of comments to make on that.

First, competitive forces will free up that transmission capacity. If Genco doesn't use it, it will be competitively market to reduce its stranded cost of transmission. In other words, why would it continue to incur the ongoing transmission costs if they weren't going to use it?

In addition to that, there is already a mechanism in place to deal with that issue. There is a mechanism in the Act for the Board and the system operator to review market power. So if a party refuses to use capacity and effectively hoards it, until that issue can be brought -- taken before the system operator and the Board, and I believe you people have the power to release it to other parties. So I think that's the answer to that question.

CHAIRMAN: I am just going to jump in there, Mr. Morrison. Do you think that applies to a reservation that's held by Genco?

MR. MORRISON: I guess the answer being whispered to is why would Genco be treated any different than any other generator in the market? It would be subject to the tariff and also to the provisions -- whatever the SO provisions are. So under the tariff, all generators are to be treated equally. So I believe that the Board would have jurisdiction over that aspect of it, even though the Board doesn't -- I understand the Board will not have direct regulatory control over Genco.

CHAIRMAN: I just had a flash. Maybe one of the ways around it, if the Board were to go in that direction at all, would be in the licence that we grant to Genco that it be subject to such things as bargaining in good faith, et

cetera. Anyway --

MR. MORRISON: We will get to the bargaining in good faith issue shortly, Mr. Chairman.

The other issue that was raised by Dr. Sollows dealt with the apparent contradiction in the export risk, who in Genco and Disco bears the risk?

Today, New Brunswick Power is an integrated utility. And to create a competitive market, Genco obviously must be separated from Disco. And we agree wholeheartedly with Mr. MacDougall's comments on this aspect.

The vesting contract gives all capacity to Disco and they are to pay the fixed costs. Price certainty for Disco requires a basic assumption for the benefits of the export market. Other than this assumption, the risk in the export market rests with Genco. So it can operate as a commercial entity and on the same basis as any other competing generator. Without separation of the risks, it would not be possible to create a competitive market.

The Market Design Committee recognize this and recommended the vesting contract approach. And it's being implemented as such by the government. And if you want to delve deeper than that, I will consult with Mr. Marshall.

There was one other issue I think that we were asked to deal with that arises from Mr. MacDougall's argument.

And I think we have been asked to consider it. And that is the notion that the Order of this board direct Genco to negotiate in good faith for the release of transmission to a generator who wants to compete in the New Brunswick marketplace.

Conceptually NB Power has no problem with that notion. Practically there is an issue that we see from a practical point of view. We would suggest that if that is the route that the Board is going to follow, that the Board would have to first be in a position to review the business cases of these generators to see if in fact they are credible for supply of load New Brunswick. Otherwise, NB Power or Genco will be inundated with any wild-eyed proposal that might come forward.

So there has to be some type of filtering mechanism to see whether, you know, this is a credible proposal to begin with. Thereafter, NB Power would then be in a position on this limited basis, with a filtered group, if you will, to conduct negotiations in good faith.

Now I have heard the other comments about, you know, whether the Board can actually insinuate itself into negotiations and so on. I think that's more of a nuts and bolts issue. But from a principle, NB Power has no real problem with what was proposed by WPS with this caveat

about the filtering.

Now to get on to exhibit A-13, Mr. Chairman --

CHAIRMAN: Just before you do, Mr. Morrison, I am very much concerned about nuts and bolts.

MR. MORRISON: Oh, I am sure you are. Mr. Chairman, this morning you raised an issue -- or you asked some questions with respect to A-13 and how the tax issue works.

We are concerned that you may have misinterpreted the data on exhibit A-13. If you look at the gross margin foregone of 10.3 under the 2004-2005 column, and then if you look down at the taxes in millions, which is 3.7, that 3.7 is based on what NB Power would have made. Basically it's 35 -- 35. -- 36 percent is the marginal tax rate. So that's 36 percent of that 10.3. And that gives you the 3.7 percent.

However, if you are going to interpret this correctly, if you look at the foregone margin, which is 5.3, then that tax number would be 36 percent of the 5.3, not 36 percent of the 10.3.

CHAIRMAN: Have you done the math?

MR. MORRISON: I haven't done the math with respect to this. No, I haven't. But we can do that fairly quickly. And that would be taxes foregone. And there is another issue with that. This is taxes or a payment in lieu of taxes,

which would accrue to the Province. So you would lose both the margin and the differential in taxes that would have gone to the Province. So either way you cut it, there is a loss inprovince, if you will, of the 5.3 million of the margin foregone. Partly to the tax-payer, partly to the --

CHAIRMAN: What I would like to do is put the Province in the position of being the owner and deal with it in that fashion.

MR. MORRISON: Tax as a dividend.

CHAIRMAN: All right. I appreciate what you have brought forward in that regard.

MR. MORRISON: Now, Mr. Chairman, the balance of my comments are going to deal with arguments raised by -- the points raised by Mr. Zed. And my rebuttal is going to be brief. And it is going to hit a few points.

The first has been dealt with very eloquently by Mr. MacDougall and Mr. Anderson. And that is the burden of proof in this case. I'm not going to reiterate what they have said other than to say that I wholeheartedly endorse their position. We don't have a burden of proof to establish that somehow the Board was wrong in its decision. The issue before you is is this in the public interest?

Now the second point, and it really is the backbone of Mr. Zed's argument, is that this Board's decision back in March last year was based on what I'm going to call the unfair bidding environment in 1998. And his argument -- certainly that is the major thrust of his argument.

If you follow the logic of that argument to its conclusion, if that in fact is true, then the Board should have abrogated all the transmission reservations that arise from the 1998 open season. You didn't do that. So there is a logical inconsistency in that.

It is our view, and it is the view that was espoused by Mr. Hoecker, that what happened in 1998 is completely irrelevant.

Now Mr. Zed did go on at some length. And in fairness, your decision does refer to the unfair environment. But Mr. Zed went a little bit further in his argument. He didn't say that just this environment wasn't conducive to an open and nondiscriminatory bidding. He also said that there was actual unfair dealing by NB Power.

And his support for that, he suggested that Mr. Scott or -- well, he was referring to Mr. Scott's evidence -- but that Transmission had permitted insider information to be passed to Generation regarding the capacity that was

available in September 1998. That was the 16931 megawatt argument.

That simply just is not the case. All that information is contained in Appendix 1 to Mr. Scott's evidence. It was also attached to the 1998 open and through tariff. And it was posted on the OASIS. So all of that information was available to everyone.

Now I would like to deal with the numbers a little bit. Mr. Zed referred to when looking at what I will call the numbers argument, said that there were a number of assumptions that were made by NB Power that were just not correct.

First he says that the financial mitigation techniques that Emera was the proponent of were ignored. You will recall that we put in undertaking number 1 this morning, which was marked as exhibit A-12 I believe. Those mitigation -- the financial mitigation is included in those numbers.

Secondly, Emera's position in its argument was that NB Power was presenting a worst case scenario. Again we take issue with that. The NB Power numbers were based on the most reasonable forecasts and do contain mitigation, which brings me to my next point.

Emera questions the Hydro Quebec mitigation strategy

which was employed by NB Power. Now this strategy, as was indicated in the evidence of Mr. Bishop, is based on history. It is mitigation that works in the real world, not some theoretical strategies that have been offered by Emera.

Finally with respect to the numbers, I believe Mr. Zed said that it was based on the assumption -- and while you should question our numbers -- it is based on the assumption that NB Power will lose all of the 188 megawatts that is in issue here.

That is correct. But that is the real risk that is posed here. We have no idea what will happen if that capacity goes up for bid. It could very well fall into the hands of competitors.

Now there was one other issue that Mr. Zed raised in his argument. And he says -- or he said in his argument, and I think I'm quoting him correctly, that Mr. Bishop agreed with Emera's numbers on mitigation strategy. And I would like to say that that is simply not correct.

And I'm going to read and refer you to page 143 of the transcript where Mr. Bishop was questioned on this point. And the question was: And can I assume that if the mitigation strategies, if the mitigation strategies suggested by Emera were able to be fully utilized, that

perhaps those losses would be significantly smaller?

Mr. Bishop's response was: If the mitigation techniques would play out as Emera has suggested, the losses could be the numbers that are in fact shown in your evidence.

So I think it is a bit of a reach to say that we have agreed with Emera's mitigation strategy numbers. Simply we have agreed with the math.

Finally on the numbers, Mr. Zed did say this morning that forecasts are inaccurate. Well, I do agree with him on that point. Forecasts are inaccurate. That is the nature of a forecast. They are always inaccurate.

But having said that, that means that, yes, the loss margins that we have -- that NB Power has placed in its evidence could be lower. But they could also be higher. And Mr. Jessome, you will recall, in cross examination by me, agreed to that.

Now turning to Mr. Hoecker for a moment. Mr. Zed this morning says that Mr. Hoecker agreed that -- and you will recall the cross examination on Order 2000 -- that

Mr. Hoecker agreed that FERC was abrogating transmission reservations.

Now you will recall when Mr. Zed put Order 2000 to

Mr. Hoecker, and referred him to a footnote that had I think four or five cases including the WPL case that we

were talking about this morning, remember that Mr. Hoecker did not -- those cases weren't put before him. He wasn't cross examined on the cases themselves.

All I can say to you -- and we have the cases available, I urge you or your counsel to review those cases. They do not stand for what Mr. Zed put to Mr. Hoecker. They do not stand for the proposition that transmission reservations are to be abrogated. And Mr. Hashey this morning set out some of the reasons why. But if that is an issue, please take a look at the cases.

There was some suggestion this morning that because we did not cross examine Mr. Trabandt that that should be taken as an acceptance of his evidence. There was an interrogatory process, as you well know. And we put a number of questions to Mr. Trabandt.

And as pointed out by Mr. Hashey this morning, the responses that we got indicated to us that Mr. Trabandt's evidence was not substantiated. From a purely tactical point of view, why would we cross examine Mr. Trabandt? That doesn't suggest that we accept his evidence in any way whatsoever.

Now Mr. Zed also made reference to something that Mr. MacPherson said. And he indicated that -- and I wasn't sure where his argument was going entirely. But he

said that Mr. MacPherson said in his evidence that the public interest issue, if you will, is a side issue.

Now let's be clear what Mr. MacPherson was talking about in his evidence. And it appears at page 107 of the transcript. He is talking about last year's tariff hearing. He said the tariff hearing focused on the terms, conditions and rates in the tariff. Grandfathered transmission reservations were a side issue. And I think we can all agree that in the large scheme of things last year, that these transmission reservations were really not on the radar screen. Which reminds me, when Mr. Zed was speaking of this issue this morning about what Mr. MacPherson said, and I hope I'm quoting him correctly, but I think he said something to the effect that regardless $10 million is a lot of money. And I just throw that out for what it is worth.

I said earlier at the outset that Mr. Zed's -- or Emera's argument delivered by Mr. Zed -- the backbone of his argument was this unfair environment. And I mean -- and it focused on that. It is interesting to note that in Emera's argument there was almost no reference to the competitive market issue, in other words the offsetting benefit.

And I would suggest that there is good reason for

that. It is our submission that Emera cannot demonstrate that there is any benefit to New Brunswick in essentially throwing out these transmission capacity reservations.

Finally, and I guess it relates somewhat to one of the questions from Dr. Sollows, Mr. Zed said that we didn't demonstrate that there was a detriment to ratepayers. And I know there is a lot of numbers floating around. And I know there is a lot of what I would call noise in this case.

I would urge you don't get lost in the house of mirrors here. Whether the buck stops with the ratepayer or the taxpayer, the fact is there is a loss to New Brunswickers. And we are talking about losses in the millions of dollars. And we can fool around with percentages of gross revenue and percentages of net revenue. But the fact of the matter is millions of dollars is not insignificant.

One final point, and actually I meant to deal with it up front. We were talking about the 1998 open season and the fairness of it and the fact that if it was relevant then all of the -- really if that was the issue, that there was an unfair environment, then all of the transmission reservations ought to have been abrogated.

But in your decision you didn't abrogate all

transmission reservations. You did preserve those that were supported by a third party contract if you will. And we can only presume that that was based on the evidence of Mr. Connors, that what FERC was talking about, was preserving transmission reservations, that FERC was talking about third party contracts.

We know that now, as a result of Mr. Hashey's cross examination of Mr. Connors in response to IR, that that was simply not the case.

So, Mr. Chairman, those are all the comments I have to make with respect to Emera's submission. And thank you for your attention.

CHAIRMAN: Thank you, Mr. Morrison. I think the Board would appreciate it if you were to share those cases with Board counsel.

MR. MORRISON: We will.

CHAIRMAN: If any of the other parties want them then they can have them.

Well, I don't know what we would call our ultimate disposition of this matter. Because I guess it is our written conclusions of our review is probably what it would be. And we will of course issue that sometime in the future.

And again I want to thank all of the witnesses and the

parties that have been before us for their cooperation and their clarity on the whole.

So we will now break. And we will conclude this matter, is what I mean to say. Thank you again.

(Adjourned)

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

Reporter