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(9:05 A.M.) CHAIRMAN:	1 with me is Maureen Greene, external counsel
Q. Well, good morning everybody. I don't think there's any preliminary matters, so I have been instructed to ask the parties to introduce themselves for the official record. So, Mr. Young, I believe we start with you, sir.	2 for the Board, and Cheryl Blundon, our Board secretary.
MR. YOUNG:	3
Q. Thank you, Mr. Chair. Mr. Fred Cass, external counsel, is going to be leading the argument today, and my name is, as you mentioned, Geoff Young, Newfoundland and Labrador Hydro, and also with us is Tracy Pennell, counsel.	4 CHAIRMAN:
CHAIRMAN:	5 Q. And I believe Mr. Little is recording these sessions. You had Newfoundland dogs?
Q. And Light and Power?	6
MR. O'BRIEN:	7 REPORTER:
Q. Good morning, Mr. Chairman, Commissioners. Liam O'Brien, outside counsel for Newfoundland Power, and with me is Mr. Gerard Hayes, inside counsel for Newfoundland Power.	8 Q. That's right.
MR. COXWORTHY:	9 CHAIRMAN:
Q. Good morning, Mr. Chair, Commissioner. Paul	10 Q. Right. I thought I recognized you. Mr. Young, sir, or Mr. Cass, I guess.
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	12 MR. CASS:
	13 Q. Thank you, sir. Mr. Chairman, we have a set of Authorities that has been provided. I know that it looks somewhat large, so I'll reassure you that I don't expect to dwell on any of these. They're just provided for very limited purposes.
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	19 In my submissions, I will start, of course, with the Board's letter setting out the questions of concern to the Board. That's the letter of January 18th of this year. The first set of issues appear under the heading "test year" and there's some explanatory comments there that indicate
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1 Coxworthy, Dean Porter for the Island Industrial Customer group.	1 that the Board raises these questions because rates will become effective in 2016 while Hydro has made proposals for relief in respect of 2014 and 2015 and rates will not actually be effective in either 2014 or 2015.
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3 MR. JOHNSON:	3
4 Q. Good morning, Mr. Chair and Commissioners. Tom Johnson, consumer advocate, and my colleague, Greg Kirby.	4
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7 MR. FLEMING:	7
8 Q. Good morning, Mr. Chair and Commissioner. Denis Fleming for Vale Newfoundland and Labrador Limited. I expect Tom O'Reilly to be joining me later in the morning.	8
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12 MR. LUK:	12
13 Q. Good morning, Mr. Chair and Commissioners. This is Senwung Luk for Innu Nation.	13
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15 CHAIRMAN:	15
16 Q. And Board staff.	16
17 MS. GLYNN:	17
18 Q. Well, just to note also that Ms. Dawson for Nunatsiavut Government has indicated that she would not be making any further submissions on the matter.	18
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22 CHAIRMAN:	22
23 Q. Okay.	23
24 MS. GLYNN:	24
25 Q. And it's Jacqui Glynn, Board Counsel, and	25
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<p style="text-align: right;">Page 5</p> <p>1 supply of power for one or more years.” So, 2 it is the case that this provision does not 3 use the words “test year”. It does though, 4 I think, tell us several things that are 5 relevant to the consideration of the test 6 year. One of those is obvious. 7 It refers to looking at costs for 8 supply of power for one or more years. So, 9 the obvious proposition, I think, arises 10 from this is that the Board would look at 11 costs for annual periods, and that would be 12 the test year, in my submission, is the 13 looking at costs for annual periods. 14 But another thing that this provision 15 makes clear is that it’s not necessarily 16 just one annual period. The Board can look 17 at one or more year, one or more annual 18 period when it sets rates. In my 19 submission, that’s what’s happening here. 20 The Board has to 2014 and 2015. 21 And the other thing, of course, is that 22 this indicates that where practicable, not 23 always, but where practicable the rates 24 would be based on forecast costs. So that, 25 of course, indicates that these annual – the</p>	<p style="text-align: right;">Page 7</p> <p>1 of the examples in the Authorities. 2 In my submission though, apart from the 3 issue of what is the test year, given the 4 situation where rates will become effective 5 in 2016, even though the Board has 6 information for 2014 and 2015, the key tools 7 for the Board are interim orders and 8 deferrals, and that’s the purpose of other 9 authorities that we have included in the 10 booklet that’s been provided to the Board. 11 When proceedings are lengthy, such that 12 rates will not become effective until a 13 period later than was anticipated in the 14 application, the tools that the regulator 15 can use are deferral accounts and interim 16 orders. These are both discussed in some 17 detail in the 2012 decision of this 18 Province’s Court of Appeal that is at Tab 3 19 of the booklet. I won’t go through that 20 discussion in detail. It relies on cases 21 from the Supreme Court of Canada and in 22 reliance on those cases and in the Court of 23 Appeal’s own words, it confirms that interim 24 orders and deferral accounts are two widely 25 used regulatory tools that allow relief with</p>
<p style="text-align: right;">Page 6</p> <p>1 annual period of one or more years, where 2 practicable, would be a prospective test 3 year. 4 Now, in the set of authorities that we 5 provided we have included some examples of 6 how other regulators have addressed the 7 situation where there are multiple years of 8 information that have been provided for the 9 setting of rates or where in a forecast 10 situation the Board’s consideration actually 11 occurs when the forecast year has become, at 12 least in part, an actual year. I will come 13 to discuss those in some more detail. 14 First I would submit though that the 15 type of practice contemplated by Section 3 16 of the Electrical Power Control Act is quite 17 consistent with other Canadian – practice of 18 other Canadian regulators, that first 19 regulators do consistently look at a 20 forecast test year, but not always, where 21 it’s not practicable. They do look at 22 annual periods and they do, from time to 23 time, look at more than one annual period 24 when they’re setting rates and I think we 25 will see some of that when we look at a few</p>	<p style="text-align: right;">Page 8</p> <p>1 a retrospective application. That can be 2 seen numerous times in the Court of Appeal 3 decisions. Paragraph 60, 62, 64 and 115 are 4 all examples of that proposition. 5 So, in this case, the Board did indeed 6 make interim orders or deferrals in respect 7 of both 2014 and 2015. When the Board did 8 that, as reflected in the case law and the 9 regulatory precedence, the Board was not 10 making a determination on the merits. The 11 Board was making an interim order or a 12 deferral with the decision on the merits to 13 come at the ultimate conclusion of the case, 14 that being where we’re at now. 15 So, when the Board makes the final 16 determination on the merits about the 2014 17 and 2015 revenue deficiencies now at the 18 conclusion of the case, the existence of the 19 deferrals that the Board created gives it 20 the full power, in my submission, to allow 21 or not allow recovery of the 2014-2015 22 deficiencies, up to the limits of the 23 deferrals that were established by the 24 Board. 25 So, in my submission, quite apart from</p>

<p style="text-align: right;">Page 9</p> <p>1 the issue of a test year, it's the Board's 2 interim orders and its deferrals that become 3 the key tools when the Board makes its final 4 determination on the merits with respect to 5 the 2014 and 2015 revenue deficiencies. The 6 Board has not made a determination on the 7 merits of either of those when it's decided 8 the deferrals. That's been left until the 9 conclusion of the proceeding and when that 10 determination is made at the conclusion of 11 the proceeding, the existence of the 12 deferrals gives the Board the full power to 13 do as it sees appropriate in relation to the 14 decision it reaches on the merits.</p> <p>15 Now, the sub-questions under issue one 16 generally relate to regulatory practice and 17 treatment of actual versus forecast costs in 18 circumstances where a proceeding has 19 extended into or beyond the forecast year or 20 years. And as I said, the regulatory cases 21 included in the Authorities are just some 22 examples of how – of regulatory practice of 23 other Boards addressing situations where 24 they need to contend with the existence of 25 actual information, even though they're</p>	<p style="text-align: right;">Page 11</p> <p>1 interim order, actually uses partially 2 actual and partially forecast information, 3 uses results on a nine-month actual and a 4 three-month forecast basis that it says are 5 the most appropriate to use in those 6 circumstances. So, just an example of the 7 discretion available to a Board under 8 typical regulatory practice where it has 9 both forecast information and it has actual 10 information because of the timing of the way 11 in which the case has proceeded.</p> <p>12 Tab 6 is another Ontario case, a 13 decision from 2001. In this case, as one 14 can see from paragraph 2.164, the applicant 15 submitted a plan based on a 1999 test year, 16 but it actually didn't submit this until 17 late in 1999 with a test year that was 1999 18 on a forecast basis. And then also 19 appearing in paragraph 2.164, because of the 20 work that was needed to complete discussions 21 with interveners on submissions, this didn't 22 happen until August of 2000, even though the 23 test year was 1999.</p> <p>24 So, without getting into the discussion 25 that follows, essentially the Board</p>
<p style="text-align: right;">Page 10</p> <p>1 dealing with a case presented on a forecast 2 basis.</p> <p>3 The first instance, at Tab 4, is 4 perhaps not the best example in relation to 5 a parallel to this case. It's of interest 6 for a couple of reasons. First, it's a case 7 from the Ontario Board where the Ontario 8 Board was actually addressing an interim 9 order, not a final order, and even in the 10 context of an interim order, before coming 11 to its final conclusion, the Board was 12 called upon to address what to do with 13 actual information and forecast information.</p> <p>14 It's also of interest because it's a 15 situation where the interim order was made 16 actually to give the utility an opportunity 17 to earn a reasonable return because there 18 was evidence of an increasing deficiency and 19 there was a – without interim relief, there 20 was a concern that the utility would not 21 actually have its opportunity to earn the 22 reasonable return.</p> <p>23 So, in this context, at paragraph 42 of 24 the decision at Tab 4, you'll see that the 25 Board for – just for the purposes of an</p>	<p style="text-align: right;">Page 12</p> <p>1 concludes or goes through the evidence and 2 forms its best conclusion on the evidence 3 before it, including evidence that updated 4 the forecast 1999 information. The Board 5 comes to its best conclusion about what the 6 reasonable costs are.</p> <p>7 So, for example, at paragraph 2.168, 8 the Board took into account cost reductions 9 that had been realized in 1999. They 10 weren't included in the forecast, but 11 because of the timing of this case, the 12 Board was able to take those into account in 13 coming to its conclusion about the most 14 reasonable costs to use in the 15 circumstances.</p> <p>16 And then at Tab 6 is an example from 17 Alberta, the Alberta Utilities Commission. 18 In a similar situation where because of 19 timing, although the Board would typically 20 set rates on a prospective basis, it had 21 actual results for particular years and the 22 issue was what to do, given that we usually 23 set rates on a prospective basis, but we 24 have actual results.</p> <p>25 So, you see at paragraph 65 of the</p>

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1 case, at Tab 6, it's indicated that "in
 2 accordance with the principles of
 3 prospective rate making, the Commission sets
 4 rates on the basis of forecast years." And
 5 this was a case in which Direct Energy had
 6 requested to set rates for 2012 to 2016, but
 7 it wasn't actually decided until mid 2015.
 8 So again, you have a decision well into the
 9 time period covered by the request for rate
 10 approval.

11 And back to paragraph 65, the
 12 Commission says "for the years for which the
 13 actual results are available, in this case
 14 those years being 2012, 2013 and 2014, the
 15 Commission may approve the forecast
 16 requirements that were submitted or approve
 17 the actual results for each of these years
 18 as the forecast revenue requirement". And
 19 then there's much further discussion about
 20 how this permission technically deals with
 21 that situation where because of the timing
 22 of a case, forecast numbers have been
 23 overtaken, if I can use that word, by actual
 24 numbers.

25 But another example of the comments by

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1 this Commission is found at paragraph 68
 2 where it quotes from a previous decision,
 3 and this quote is "because the Commission
 4 sets rates on the basis of forecast test
 5 years, it is required to assess the
 6 forecasts provided in support of rate
 7 applications. The Commission, however, has
 8 consistently stated that it will rely on the
 9 most up-to-date information in making such
 10 determinations."

11 So, the Commission is assessing the
 12 forecasts, but in that assessment, it's not
 13 going to ignore the most available – sorry,
 14 the most recent information that's become
 15 available in the case. The Commission would
 16 use the most up-to-date information in
 17 assessing the reasonableness of those
 18 forecasts it had been provided.

19 So, in my submission, that's typical of
 20 regulatory practice. In my submission,
 21 that's an appropriate approach for this
 22 Board to take in respect of 2014 and 2015.
 23 The Board can draw on all of the evidence
 24 available in this proceeding to form its
 25 conclusion about the most reasonable set of

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1 costs for 2014 and 2015. The fact that
 2 those were filed as forecast years and now
 3 in effect have been overtaken by actual
 4 results does not in any way limit the
 5 Board's jurisdiction to come to its view
 6 about the most reasonable set of costs for
 7 each of those years.

8 Mr. Chair, I'll move on then to the
 9 next issue in the Board's letter, which
 10 relates to the interpretation of the Order
 11 in Council with respect to return on equity.

12 The Board's first question in relation
 13 to this Order in Council was the
 14 significance of treatment of the 2014 and
 15 2015 forecast costs for the interpretation
 16 of the Order in Council. So this takes me
 17 back to the submission that I already made
 18 about interim orders and deferrals. The
 19 interim orders and deferrals empower the
 20 Board to make a decision on the merits of
 21 the 2014 and 2015 revenue deficiencies at
 22 the conclusion of this case. That decision
 23 on the merits would include the Board's
 24 decision about ROE.

25 So, the Board can make that decision on

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1 the merits about the overall revenue
 2 deficiencies for each of those two years at
 3 the conclusion of this case and because of
 4 the deferrals established by the Board, it
 5 can implement, in respect of each of those
 6 two years, what the Board concludes is the
 7 appropriate costs for the treatment of the
 8 revenue deficiencies in each of those years.

9 Now more specifically with relation to
 10 the interpretation of the Order in Council,
 11 I'd submit to the Board that it's very
 12 important to be sure that what gets applied
 13 in this case is the actual Order in Council
 14 issued by the Government, rather than some
 15 other version of an Order in Council that
 16 someone suggest the Government might have
 17 issued or might have had in mind.

18 And the reason I'm saying this is the
 19 Order in Council, it specifically speaks to
 20 when the policies set out in it are to
 21 commence. It specifically says commencing
 22 with the first General Rate Application by
 23 Newfoundland and Labrador Hydro after
 24 January 1 of 2009. It doesn't say
 25 commencing with the first setting of rates

<p style="text-align: right;">Page 17</p> <p>1 after January 1, 2009. It doesn't say with 2 the first setting of final rates after that 3 date. It doesn't say commencing with the 4 first change to rates. It doesn't even say 5 commencing with the first Board decision. 6 It says commencing with the first General 7 Rate Application after January 1, 2009. The 8 first General Rate Application after January 9 1, 2009 was made in 2013. That's when this 10 policy takes effect by its plain words. 11 These arguments that perhaps the policy 12 should take effect in respect of when the 13 Board actually sets rates, that might have 14 been a different directive that the 15 Government could have issued, a different 16 Order in Council, but it's not this one, in 17 my respectful submission. 18 And the other issue about the Order in 19 Council, my submission is very similar. The 20 other issue is the extent to which the Board 21 should have an adjustment mechanism that 22 automatically adjusts the ROE for Hydro when 23 Newfoundland Power's ROE is adjusted. I 24 accept that that's a reasonable thing to 25 think about, given how the Order in Council</p>	<p style="text-align: right;">Page 19</p> <p>1 effectiveness of the organizational 2 structure. Certainly the Board has broad 3 powers to gain information about a utility 4 under its jurisdiction and including the 5 operations and accounts of the utility. 6 There are numerous provisions that give the 7 Board these powers and that's why the Public 8 Utilities Act has been included at Tab 1 of 9 the Authorities. I don't think that I need 10 to go through the sections one by one. I 11 think it's well understood that the Board 12 has broad powers to require information. 13 But, I can just note that within the statute 14 at Tab 1, some examples are Section 16, 15 Section 58, Section 60, 61, 62 and 67. 16 These are all provisions that give the Board 17 powers to gain the information that it needs 18 to regulate utilities under its 19 jurisdiction. 20 If there is an issue of transparency or 21 clarity, in Hydro's submission, the Board 22 can rely on these powers to ensure that it 23 gets the information that it needs to 24 properly exercise its jurisdiction, and in 25 my submission, the Board has ample powers</p>
<p style="text-align: right;">Page 18</p> <p>1 has linked the ROE of the two different 2 entities. It's certainly a reasonable thing 3 to think about, but the Order in Council 4 also addresses this issue about when this 5 policy should be implemented, when and how, 6 because it says that these – it refers to 7 the Board to adopt policies for all future 8 general rate applications for Newfoundland 9 and Labrador Hydro. 10 So, the Order in Council itself, in my 11 submission, is telling us that the provision 12 with regard to Hydro's ROE is to be adopted 13 in all future general rate applications. 14 It's not telling us that there should be 15 some adjustment mechanism in between GRAs 16 for Hydro. It's certainly not saying that 17 at all. 18 So, in my submission, the questions 19 about interpretation really are answered in 20 the words of the Order in Council as it 21 exists. 22 Then the next set of issues in the 23 Board's letter relates to the organizational 24 structure of Hydro and issues raised by 25 interveners about transparency, clarity and</p>	<p style="text-align: right;">Page 20</p> <p>1 under these provisions to do what it needs 2 to do. 3 Having said that though, these 4 provisions do not, and the statute does not 5 provide a power to mandate an organizational 6 structure. That's clear on their face, on 7 the face of the statute and it's also 8 confirmed, I believe, in the Stated Case 9 decision at Tab 2 of the set of Authorities 10 which adopted what I would submit is a well- 11 known regulatory principle that recognizes a 12 distinction between regulation and 13 management, and this is touched on at two 14 places in the Court of Appeal decision in 15 the Stated Case. One is paragraph 32 and 16 the other is paragraph 118. 17 At paragraph 32, the Court of Appeal 18 makes some comments which include the 19 statement that "the utility must be accorded 20 a degree of managerial flexibility and 21 decision making in order to be able to 22 minimize the risks to which it must respond. 23 Thus, it is often said that the Boards must 24 be regulative and corrective, but not 25 managerial and they do not therefore</p>

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1 contemplate a retroactive adjustment for the
 2 actions of management.”
 3 And then a similar statement is made at
 4 paragraph 118, if I could just put my
 5 fingers on that. At paragraph 118, the
 6 Court says “in defining the parameters of
 7 the supervisory power, the Board must
 8 account for a competing principle, namely
 9 that the Board is not the manager of the
 10 utility and should not, as a general rule,
 11 substitute its judgment on managerial and
 12 business issues for that of the officers of
 13 the enterprise.”
 14 So, there is a distinction between
 15 regulation and management and it is
 16 recognized in the authorities. While the
 17 Board does indeed have broad powers in
 18 investigation and supervision of a utility’s
 19 operating expenses, the Board does not have
 20 the authority to substitute its judgment as
 21 to the manner in which a utility organizes
 22 itself or carries out its business, in my
 23 submission.
 24 Now, quite apart from the
 25 jurisdictional issue, it’s my submission

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1 that the evidence in this case demonstrates
 2 that Hydro’s organizational model has
 3 provided Hydro with savings and
 4 efficiencies. The Board’s consultant has
 5 stated that Hydro’s procedures are
 6 reasonable.
 7 So, quite apart from my submission that
 8 the powers of the Board do not include
 9 changing or requiring a change to Hydro’s
 10 management structure or methods, in my
 11 submission, we could go further and conclude
 12 that there’s no reason for the Board to do
 13 so in this case because there has been no
 14 proof that the organizational structure, on
 15 balance, and I emphasize on balance, has
 16 provided Hydro and Hydro’s customers with an
 17 inferior outcome. On the contrary, there is
 18 ample evidence that it has assisted Hydro in
 19 achieving cost savings and operational
 20 efficiencies.
 21 That then brings me, Mr. Chair, to the
 22 final area in the Board’s letter, which is
 23 relating to fuel prices. The Board has
 24 asked questions about fuel prices in
 25 relation to 2014 and 2015. For the purposes

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1 of the 2014 test year, costs were based on
 2 Holyrood fuel costs reflected in the 2007
 3 test year, but the operation of the RSP for
 4 2014 reflected fuel cost variances to the
 5 extent they existed for 2014. So, in my
 6 submission, once rates in effect for 2014
 7 and the RSP balances are made final, as the
 8 Board can do in this case, there’s no need
 9 for further consideration of this issue in
 10 relation to the 2014 deficiency.
 11 For 2015, the original forecast price
 12 of fuel was, I believe, \$93.32 per barrel
 13 for No. 6 bunker. This was updated on
 14 October 28th of 2015 to a forecast price of
 15 \$64.41 per barrel, obviously a sizable
 16 decrease reflecting market conditions.
 17 Hydro believes that it’s open to the Board
 18 to use the most up-to-date forecast of the
 19 fuel price in the determination of revenue
 20 requirement and setting the rates for 2016
 21 and that this is appropriate because the
 22 most recent forecast is the most likely
 23 number to come true, everything else being
 24 equal.
 25 Indeed, to the extent that the Board

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1 considers it appropriate, Hydro can update
 2 the fuel price for the GRA order. At this
 3 point, the most up-to-date forecast is the
 4 \$64.41 per barrel from October, but it can
 5 be updated for the GRA order.
 6 Those are my submissions, Mr. Chair.
 7 Thank you.
 8 CHAIRMAN:
 9 Q. Okay. Mr. O’Brien.
 10 MR. O’BRIEN:
 11 Q. Thank you, Mr. Chair, Commissioners. Thank
 12 you for the opportunity of addressing you
 13 here this morning. I’d also like to thank
 14 the Board staff and other counsel for their
 15 cooperation throughout this lengthy process
 16 and I guess we’re drawing to a close soon,
 17 with a compliance order after today
 18 hopefully.
 19 In my oral submissions today, I’ll try
 20 to address, as my learned friend has done,
 21 all of the issues the Board has raised and
 22 asked us to address, but I do want to
 23 comment on some of the key regulatory
 24 principles that you will be guided by, as
 25 well as make a few comments on the

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1 submissions of Hydro in its rebuttal, and
 2 there's one other minor item I wanted to
 3 touch on as well from one of the other
 4 intervener's submissions.
 5 But to begin with, some of the
 6 principles and the regulatory framework
 7 that'll guide the Board in exercising its
 8 supervisory powers in this matter. Mr. Cass
 9 has already taken you through a few of them,
 10 but to take you through what I see you'll be
 11 looking at here is some of the principles
 12 would include when you're setting rates,
 13 obviously the rate setting in this
 14 jurisdiction is a perspective exercise.
 15 Rates are set for the future and that's
 16 always been the case.
 17 CHAIRMAN:
 18 Q. Prospective.
 19 MR. O'BRIEN:
 20 Q. Prospective, sorry, yeah. The general
 21 principle of non-retroactivity prevents a
 22 utility from recovering expenses incurred in
 23 the past from future rates, save and except
 24 for the extraordinary circumstances of a
 25 deferral account for cost deferral, and

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1 we'll talk about that a bit later.
 2 So, as a result, a utility is not
 3 guaranteed to earn a particular rate of
 4 return. So that's one of the things that I
 5 wanted you to keep in mind. What they're
 6 guaranteed is really the opportunity to earn
 7 a reasonable return, within a particular
 8 range. So this is the allowable return.
 9 And Mr. Cass has pointed you to, I guess it
 10 was a quote really from the Stated Case
 11 involving the decisions of management in the
 12 operation of a utility.
 13 So, since a utility is only entitled to
 14 the opportunity to earn a reasonable return,
 15 it's subject to the financial risks
 16 associated with the decisions of management
 17 in the operation of the utility, and because
 18 a utility has to live with the outcome of
 19 those financial decisions, it does have to
 20 be given some flexibility in making those
 21 decisions. In other words, your powers
 22 can't be exercised in a manner which would
 23 result in a retroactive adjustment of the
 24 actions of management.
 25 So, that's of significance to you, I

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1 think, as you go through your deliberations
 2 in this matter because there's a number of
 3 issues that are on contention that arise out
 4 of management decisions made by Hydro,
 5 management decisions that they've had the
 6 flexibility to make, and also management
 7 decisions that have resulted or may result
 8 in adverse outcomes or consequences for
 9 which the customers of Hydro should not bear
 10 those consequences. So, that's sort of – I
 11 think those are key points you should keep
 12 in mind as you consider your order in this
 13 case.
 14 At the outset of this hearing in my
 15 opening statement, I indicated that
 16 Newfoundland Power's participation in this
 17 hearing was as an intervener on behalf of
 18 its own customers, and as you're aware,
 19 Newfoundland Power is Newfoundland and
 20 Labrador Hydro's largest customer and our
 21 interest was really to ensure that rates
 22 being charged by Hydro were going to be just
 23 and reasonable and our participation focused
 24 on three key areas: management decision
 25 making, costs and reliability.

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1 Now, with respect to the management
 2 decision making, a fair bit of the focus
 3 during the hearing revolved around the
 4 matrix organization of Nalcor, and this was
 5 important, I believe, and it was also
 6 necessary, given that the organizational
 7 structure was not in existence at the time
 8 of Hydro's last general rate application.
 9 So, it was important for Newfoundland Power
 10 and for a number of the interveners to
 11 understand the reporting arrangements, from
 12 both an account – from an accountability
 13 perspective and transparency, as the Board
 14 pointed out in your letter of January 16th
 15 was key.
 16 Now, against that background, you'll
 17 have to consider whether or not the
 18 management structure at Hydro has had an
 19 effect on the efficiencies of its operations
 20 from a cost perspective. With that said,
 21 and I'd like to turn at this point really to
 22 the third point of your letter where you've
 23 asked about remedial actions with respect to
 24 the corporate structure.
 25 The Board is constrained in terms of

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1 what the Board can do with an order relating
 2 to Hydro’s management structure. The Board
 3 can certainly look at reporting requirements
 4 for Hydro in the future. The Board can
 5 consider the productivity of the Hydro and
 6 if an allowance or an adjustment is
 7 necessary, it can make that kind of
 8 adjustment. But in terms of the corporate
 9 structure, I don’t – I’d have to agree with
 10 Mr. Cass. I can’t see in the powers of the
 11 Public Utility Act that the Board has a
 12 power to order Newfoundland and Labrador
 13 Hydro on how it should be structured. I did
 14 want to get that point made upfront and
 15 that’s Newfoundland Power’s position on that
 16 issue.

17 But before I get into the remainder of
 18 the letter, I wanted to talk about costs in
 19 general. Throughout the hearing, the
 20 lengthy hearing here, Newfoundland Power’s
 21 questioning of witnesses focused on costs in
 22 order to gain a better understanding of the
 23 nature and the reasons for the significant
 24 increases in revenue requirement and
 25 operating costs which Hydro seeks to recover

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1 in its rates. And I know it’s been said,
 2 but it should be said again, that cost
 3 increases which Hydro has experienced since
 4 2007 are indicative of escalations well
 5 above what we would see for a normal
 6 inflationary levels.

7 Newfoundland Power has highlighted its
 8 concerns regarding the reasonableness of the
 9 cost proposals in its written submission and
 10 I’m not going to take you through chapter
 11 and verse of those concerns. But suffice it
 12 to say, Newfoundland Power submits that
 13 Hydro has not established that its proposal
 14 on costs and overall revenue requirement to
 15 be collected in either of 2014 and 2015 is
 16 reasonable.

17 Now in addition to the reasons behind
 18 the significant cost increases, Newfoundland
 19 Power feels it was equally important to get
 20 an understanding into the processes which
 21 Hydro has put in place in order to run a
 22 more efficient operation, in other words to
 23 do more with less. In fact, you may recall
 24 that Mr. Martin, the President and CEO of
 25 Hydro, at the time testified that efficiency

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1 is a key factor in terms of cost control.
 2 And while a number of Hydro’s witnesses
 3 stated that they felt Hydro had exercised
 4 reasonable control of its controllable
 5 costs, none were able to point to any
 6 specific programs directed towards
 7 efficiency improvement. This was quite
 8 disconcerting in light of the fact that
 9 costs had escalated beyond inflationary
 10 levels.

11 And the other area which Newfoundland
 12 Power was keen on getting a better handle on
 13 was reliability. The questioning of
 14 management witnesses in this area focused on
 15 certain reliability deficiencies which were
 16 readily acknowledged. There were concerns
 17 raised about what Liberty Consulting Group
 18 had determined to be an ongoing culture of
 19 acceptance of rotating outages and the Vice-
 20 President of Hydro acknowledged there was
 21 still work to be done on Hydro’s end to
 22 address its track record in future. And the
 23 Prudence Review put a spotlight on supply
 24 issues arising out of the actions and
 25 decisions of management.

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1 I did want – on the basis of that, I
 2 wanted to turn to Newfoundland Hydro’s
 3 rebuttal. If we could, I wanted to refer
 4 you to a couple of passages starting at page
 5 one. There’s some commentary there about
 6 balancing costs with reliability. So, page
 7 one under the heading two, balancing costs
 8 and reliability, I just wanted to read to
 9 you some of the comments here.

10 “The interveners, both individually and
 11 as a whole, have made submissions on Hydro’s
 12 expenditures that cannot sensibly be
 13 reconciled with other aspects of their
 14 submissions where they seek better
 15 reliability and enhanced information and
 16 recording.” And if we move down further
 17 into the next paragraph, there’s a comment
 18 “it’s difficult, if not impossible, to
 19 reconcile these positions. Increased
 20 maintenance has an unavoidable cost and
 21 reducing revenues with a view to cutting
 22 these costs will require decisions and
 23 choices to be made that are inconsistent
 24 with improving reliability.”
 25 I’d like you to consider those

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1 comments. Hydro is suggesting that the
 2 interveners would like it both ways and I
 3 think that’s a mischaracterization of the
 4 submissions of the parties.
 5 First and foremost, Hydro has an
 6 obligation to provide reliable service.
 7 There’s no question with that. So, if
 8 increased asset maintenance is required to
 9 allow Hydro to provide that reliable
 10 service, the interveners would expect that
 11 that maintenance be done. There’s no
 12 question there. Hydro talks about an
 13 expectation of better reliability. Well,
 14 that has to be put into context. No one
 15 here is asking that Hydro exceed its
 16 statutory obligations. The fact of the
 17 matter is reliability has been shown to have
 18 declined between 2013 and 2015 and the
 19 interveners expect Hydro to bring that up to
 20 par.
 21 And with respect to the expenses that
 22 the Board determines are reasonable and
 23 prudent, Newfoundland Power agrees that
 24 Hydro should be entitled to anything that
 25 they have shown to be reasonable and

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1 prudent. That’s not a contentious point.
 2 Section 82 of the Public Utilities Act
 3 clearly sets that out. But make no mistake,
 4 it’s Hydro who has the burden to prove
 5 what’s reasonable and prudent.
 6 To the extent certain expenditures,
 7 such as increased maintenance, have been
 8 shown to be necessary due to imprudent
 9 management decisions in the past, Hydro’s
 10 customers should not bear the responsibility
 11 of those. Hydro’s witnesses have readily
 12 agreed with the proposition that they have
 13 the burden of proving that their costs are
 14 reasonable. Mr. Henderson’s evidence on
 15 that point was clear.
 16 Now the costs that Hydro seeks to
 17 recover in rates are substantially higher
 18 than what the Board determined was
 19 reasonable the last time Hydro was before
 20 you. For whatever reason, Hydro and its
 21 shareholder, Provincial Government, have
 22 made the financial decision not to have its
 23 costs audited through an earlier GRA, and
 24 while Hydro submits these costs are
 25 reasonable and prudent, there’s nothing

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1 untoward about the interveners asking that –
 2 or putting them to the test of proving those
 3 costs to be reasonable and prudent. That’s
 4 the purpose of a general rate application in
 5 the first place, to test and audit those
 6 costs.
 7 Now, as we’ve outlined in our written
 8 submissions, there’s a number of
 9 inconsistencies with the record and the
 10 evidence disclosing significant
 11 discrepancies with respect to test year
 12 forecast and actuals. To the extent there
 13 are inconsistencies or inaccuracies or
 14 missing information, any questions should be
 15 resolved in favour of Hydro’s customers.
 16 Ultimately, Newfoundland Power and the
 17 other interveners are not suggesting that
 18 the Board disallow costs which are proven to
 19 be reasonable or prudent. We’re just
 20 suggesting that Hydro be – we’re suggesting
 21 that Hydro be allowed those costs, nothing
 22 more. So you’ll have to determine whether
 23 or not Hydro has proven those costs to be
 24 reasonable and you’re going to have to
 25 grapple with the concept that some of these

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1 costs have already been incurred or will be
 2 incurred. But that doesn’t necessarily mean
 3 that they’re reasonable, and Hydro’s
 4 witnesses seem to agree with that in
 5 testimony. I’m not so sure Hydro agrees
 6 with that in its written – in its rebuttal.
 7 At page 23 of the rebuttal, line 23,
 8 “many interveners, particularly Newfoundland
 9 Power, propose material cost disallowances
 10 that cannot be sensibly reconciled with
 11 other aspects of their submissions in which
 12 they seek improved reliability and enhanced
 13 regulatory scrutiny and reporting. The
 14 Board must balance the provision of reliable
 15 service with cost to provide that service.
 16 The record of the current proceeding does
 17 not indicate that the forecast costs in the
 18 2015 test year, for the purposes of rate
 19 setting, are in excess of the costs that
 20 Hydro will incur in providing reliable
 21 service to customers.” Well, that may be
 22 the case. Hydro may incur those costs, but
 23 that doesn’t necessarily mean that they will
 24 be reasonably incurred. The Board has to
 25 determine that that’s the case.

<p style="text-align: right;">Page 37</p> <p>1 And another point in its submission, 2 Hydro appears to suggest the Board’s 3 deliberations should be guided on whether 4 cost disallowances would result in Hydro’s 5 actual return on rate base falling outside 6 of the allowed range of return. Again, 7 Newfoundland Power takes no issue with the 8 fact that Hydro is entitled to a fair return 9 on its investment. While we may take issue 10 with how that would be calculated, we accept 11 that – for example, with respect to 2014, we 12 take issue with whether the OC applies for 13 rate of return. We do accept it would apply 14 for 2015. But what does it – what does that 15 mean? It means that Hydro is entitled to 16 the opportunity to earn a return on equity. 17 So, the right to the opportunity to 18 earn a fair return is discreet from the 19 utility’s right to recover the expenses 20 which the Board determines are reasonable 21 and prudent. They’re two separate analyses. 22 So, the return, the actual return is 23 essentially a by-product after you’ve 24 determined what the reasonable costs are. 25 If that takes determining the reasonable</p>	<p style="text-align: right;">Page 39</p> <p>1 to Hydro’s proposed revenue requirements. 2 Hydro submits that this decision is 3 distinguishable from the present matter in 4 two very important aspects. At issue in the 5 OPG case were salaries and wages paid above 6 the industry standard. The cost 7 disallowance made by the OEB was targeted to 8 those salary and wage costs which were 9 specifically found to have been 10 unreasonable. Clearly if a specific cost of 11 Hydro was not a reasonable and prudent cost 12 to providing service, the Board may exercise 13 its discretion with respect to that cost and 14 determine that it will not be permitted to 15 be recovered.” 16 Now, Newfoundland Power in this case is 17 not suggesting that generalized, as Hydro 18 has indicated, generalized cost 19 disallowances be awarded against Hydro. In 20 our submission, we’ve provided two summary 21 tables dealing with specific cost 22 disallowances, just as the OPG case here 23 deals with specific cost allowances for 24 salaries and wages. So, it appears that 25 perhaps Newfoundland Power and Newfoundland</p>
<p style="text-align: right;">Page 38</p> <p>1 costs takes Hydro outside of or 2 disallowances on reasonable – on costs takes 3 Hydro outside of the allowable return, well 4 that’s the by-product of the analysis. 5 Now, Newfoundland Power had in its 6 submissions referred to the OPG case. This 7 is the OEB’s decision on Ontario Power 8 Generation, which found its way to the 9 Supreme Court, and a concept of actual 10 versus allowable return was relevant there 11 in the decision. And Hydro has taken some 12 issue with whether or not that particular 13 decision has any applicability to this case, 14 and I’d like to point to Hydro’s rebuttal on 15 that point and just make some comments on 16 that. 17 Page five of Hydro’s rebuttal. So, 18 Hydro takes issue, and I’m reading from the 19 rebuttal here, “Hydro also takes issue with 20 the assertion of Newfoundland Power which 21 relies upon a recent Supreme Court of Canada 22 case, Ontario Energy Board versus Ontario 23 Power Generation, 2015 SCC 44, that the 24 Board should order generalized cost 25 disallowances against Hydro or adjustments</p>	<p style="text-align: right;">Page 40</p> <p>1 Hydro here are on the same page. 2 But Newfoundland and Labrador Hydro 3 says the costs – goes on to say “that cost 4 can properly be deducted from allowed 5 revenue requirement. However, it’s quite 6 another thing to suggest, as Newfoundland 7 Power has done at line 6 to 10 of page B13 8 of its argument, that generalized reduction 9 in revenue, short term or otherwise, is 10 permissible in this matter.” Now, I wanted 11 to take you to Newfoundland Power’s 12 submission on that, just to put it into 13 context as to what we’ve said. 14 It’s at B11 actually, yes. So, at B11, 15 line 13, “Newfoundland Power’s submission on 16 costs, if accepted by the Board, would 17 result in significant adjustments to Hydro’s 18 2014 and 2015 test year revenue 19 requirements. It’s Hydro’s evidence that 20 any such adjustments would be recorded by 21 Hydro in its 2016 financial results. On 22 that basis, the adjustments recommended in 23 these written submissions would have 24 implications for Hydro’s opportunity to earn 25 a just and reasonable return in 2016.”</p>

<p style="text-align: right;">Page 41</p> <p>1 We go on to say that “the entitlement 2 of a utility to earn just and reasonable 3 return has been described by Newfoundland 4 and Labrador Court of Appeal as follows:” 5 and cite from the Stated Case. 6 But the purpose of relying on the OPG 7 case was to highlight the balance inherent 8 in utility regulation. In other words, in 9 the process of considering whether or not 10 you should disallow specific costs, you have 11 to consider a balance between customers and 12 the utility. If as a result of disallowing 13 specific costs, it puts the utility in a 14 position where its financial integrity is at 15 risk in the long term, well, you have to 16 consider whether or not those disallowances 17 should be made. But if it doesn’t put the 18 utility at risk in the long term, the OPG 19 case suggests that there is nothing untoward 20 about the Board making a determination which 21 would put the utility’s return in – to give 22 the utility a lower return in the short 23 term. That’s the point to raise in that 24 case. 25 And Hydro goes on in its rebuttal to</p>	<p style="text-align: right;">Page 43</p> <p>1 Hydro was entitled to that actual return. 2 I’m not sure that’s what Hydro is trying to 3 say, but that’s the way it sounds when I 4 read the rebuttal. 5 So, again, the reason why the OPG case 6 is applicable is because unless there’s 7 evidence here, which I submit that there 8 isn’t, that a short term reduction in 9 Hydro’s actual return would have – would put 10 its financial integrity at risk, then 11 there’s no reason why the Board can’t make 12 those disallowances. In other words, it’s 13 acceptable from a regulatory perspective. 14 And one of the other items I wanted to 15 clarify was an issue raised by the Island 16 Industrial Group. It’s a minor point, but 17 it deals with the evidence given on the 18 specifically assigned charged for O&M and 19 specifically deals with the evidence of Mr. 20 Brockman, the expert witness called by 21 Newfoundland Power. I just wanted to 22 briefly refer you to page 38 of the Island 23 Industrial Customers’ submission, and it’s 24 line 14, starting at line 14. 25 “Other experts called during the cost</p>
<p style="text-align: right;">Page 42</p> <p>1 almost suggest that the Order in Council 2 somehow sets it apart from the OPG case. If 3 we look at page six of the rebuttal, Hydro, 4 at line 23, Hydro submits that “the OPG case 5 is distinguishable from the present matter 6 as there is no indication in the OPG case of 7 the presence of a directive to the Board to 8 establish a particular return on equity.” 9 I’m not sure how that’s relevant. If we 10 consider that what the outcome that the 11 Order in Council is likely addressing the 12 allowable return, not the actual return, 13 then it puts – the OPG case is not 14 distinguishable because in the OPG case, the 15 Ontario Energy Board would have been 16 addressing the allowable return as well. 17 The knock-on effect would be a reduce in 18 actual return, yes, by making a 19 disallowance, but it can’t be considered 20 that the Order in Council here in 2009 063 21 was suggesting that Hydro was entitled to an 22 actual return of what Newfoundland Power’s 23 most recent return is and that no matter 24 what disallowances were possible by the 25 Board for imprudent action or otherwise,</p>	<p style="text-align: right;">Page 44</p> <p>1 of service component of the GRA also 2 supported Mr. Dean’s proposed approach.” So 3 they’re discussing the approach of the 4 expert called by Vale. “As the Board is 5 aware, Mr. Larry Brockman, the expert called 6 by Newfoundland Power, stated the following 7 of Mr. Dean’s proposition:” and the 8 submission goes on to quote from the record 9 a question from O’Reilly, Q.C. “But do you 10 understand the point that Mr. Dean was 11 making with respect to the specifically 12 assigned charges with respect to O&M?” Mr. 13 Brockman answers “Yes”. O’Reilly, Q.C. “And 14 the idea that to make the assignment of 15 costs equitable across that some recognition 16 had to be had for the cost of” – the 17 question isn’t finished. Mr. Brockman “I 18 think theoretically that’s correct.” 19 O’Reilly, Q.C. “yeah, you’d agree with 20 that?” Mr. Brockman “yes”. So that’s the 21 extent of the reference that suggests Mr. 22 Brockman is supportive of Mr. Dean’s 23 approach. 24 And I think it’s important to put Mr. 25 Brockman’s evidence in context and the</p>

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1 reason why is that essentially Newfoundland
 2 Power has taken the position here that the
 3 method – any changes in methodology for
 4 allocation of specifically assigned charges
 5 for O&M should be deferred until completion
 6 of Hydro’s embedded costs in rate design
 7 reviews. And I know you don’t have the
 8 transcripts here, but I can briefly refer
 9 you to Mr. Brockman’s other evidence
 10 surrounding this point and it’s not very
 11 long. In fact, the entire amount of
 12 evidence given by Mr. Brockman runs from
 13 pages 166 to 170 and that’s discussions with
 14 Mr. Johnson, Mr. Coxworthy and Mr. O’Reilly.
 15 So it’s a fairly short – and it’s on
 16 September 29th, 2015.

At 166, Mr. Johnson puts the question
 17 to him, and starts with “and put that to Mr.
 18 Greneman. Just finally then on the
 19 specifically assigned O&M, and I won’t call
 20 this the speed round, I suppose, in your
 21 experience, Mr. Brockman, as an expert here
 22 at the proceeding, is Hydro’s current
 23 methodology for determining specifically
 24 assigned O&M costs generally consistent with
 25

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1 practice elsewhere?” and the answer from Mr.
 2 Brockman is “are you talking about the ones
 3 where they don’t adjust it for the inflation
 4 and so on?” And Mr. Johnson says “right,
 5 yeah”. Mr. Brockman says “yeah, I think
 6 it’s fairly consistent with what I’ve seen
 7 elsewhere. I haven’t done studies perhaps
 8 some other witnesses have done and say that
 9 90 percent of the people do it this way and
 10 ten do it that way, but generally, you know,
 11 I think it’s a fair statement that that’s
 12 mostly the way that people do it elsewhere,
 13 yes.” Mr. Johnson says “okay. And Mr.
 14 Brockman, are you aware of any jurisdiction
 15 that uses the methodology that is proposed
 16 by Vale offhand?” Mr. Brockman says “no,
 17 but I haven’t done an exhaustive review on
 18 that issue, so I don’t know. I haven’t seen
 19 it, no, but I haven’t really looked at it,
 20 as to whether they do it – whether they do
 21 or they don’t all across any North America –
 22 or say North America or anything.”

And further on, Mr. Coxworthy asks him,
 23 at page – actually at page 167 at line 18,
 24 “just one question, I think. Thank you, Mr.
 25

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1 Chair. And just following up on the last
 2 question from the Consumer Advocate. Paul
 3 Coxworthy and Dean Porter for the Island
 4 Industrial Customers. Mr. Greneman
 5 yesterday was asked with respect to the
 6 proposed change to the O&M treatment
 7 specifically assign that Vale’s expert, Mel
 8 Dean, has proposed, whether a comprehensive
 9 analysis could be done in this general rate
 10 application, and I believe you indicated you
 11 heard his evidence.” Mr. Brockman “yes”.
 12 Mr. Coxworthy “I think he indicated that he
 13 thought it could be done in this”. And Mr.
 14 Brockman says “yes”. Mr. Coxworthy “as
 15 opposed to a more comprehensive review, and
 16 I think the inference was that that might be
 17 done later?” Mr. Brockman “right”. Mr.
 18 Coxworthy “do you have an opinion on that?
 19 I realize you haven’t studied the issue, but
 20 do you have an opinion?” And Mr. Brockman
 21 says “well, I guess I first should say
 22 theoretically I agree with the idea, I mean
 23 the idea that sort of bathtub curve and
 24 maybe that – I haven’t tested that to see
 25 whether it’s applicable to the facilities

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1 that we’re talking about, but assuming it
 2 is, you know, yeah, you’ve got high
 3 maintenance in the early years and maybe it
 4 flattens out and then goes up later. So, if
 5 you have a customer with a brand new
 6 facility dedicated to – maybe there’s very
 7 little costs in O&M to keep him on the
 8 system for a while.”

So Mr. Brockman is suggesting, “yeah,
 9 there’s a theoretical analysis that I could
 10 agree with here. I haven’t done any
 11 studies. I’m not aware what the facilities
 12 are. I’m not aware whether they’re
 13 applicable in this particular case. But the
 14 type of theory of inflation adjusted, yeah,
 15 maybe that can be done.” But that’s what
 16 Newfoundland Power is suggesting as well,
 17 and to suggest that what Mr. Brockman is
 18 saying support – is supportive of Mr. Dean,
 19 I think is putting a little bit more into
 20 words in Mr. Brockman’s mouth than what’s
 21 there on the page and what was there in the
 22 testimony. So, I just wanted to clear that
 23 up and suggest that there was a – that Mr.
 24 Brockman is not taking a different position
 25

<p style="text-align: right;">Page 49</p> <p>1 than Newfoundland Power. 2 And the last item I just wanted to 3 touch on before I get to the issue of the 4 test year was the vacancy adjustment. And 5 the reason I wanted to touch on it was 6 merely a comment made by – in the rebuttal 7 of Newfoundland and Labrador Hydro, and 8 that’s at page 17 of the rebuttal. It deals 9 with the vacancy allowance at line 19. 10 “At page C22 of its submission, 11 Newfoundland Power states that Hydro’s 12 suggestion that lower human resources costs 13 due to higher vacancies would be offset by 14 increase over time in consultant costs was 15 not proven by evidence.” So that’s what was 16 suggested in the Newfoundland Power’s 17 submission. Hydro goes on to say “this 18 statement by Newfoundland Power is false. 19 As noted in Hydro’s Response to Undertaking 20 146, Newfoundland Power’s own undertaking 21 request, vacancy savings are more than 22 offset by increased overtime and consultant 23 costs.” 24 Now Undertaking 146 shows data points 25 that show an increase in overtime costs and</p>	<p style="text-align: right;">Page 51</p> <p>1 consistent that a test year is an annual 2 measurement or 12-month measurement of a 3 utility’s cost of providing service or its 4 revenue requirement. It can be represented 5 by historical period where actual costs are 6 measured or a future period where forecast 7 costs are measured. Whether or not a 8 utility has its rates set on the basis of a 9 historical period or a future period varies 10 from jurisdiction to jurisdiction and in 11 many cases dependent on the statutory 12 mandate. And as Mr. Cass has indicated, in 13 this jurisdiction and in most jurisdictions, 14 I believe, across Canada, the statutory 15 mandate would be to provide a forecast or 16 future test year. But in any event, in this 17 jurisdiction, that’s the mandate. 18 While a test year is essentially a 19 measurement of a 12-month period, you can’t 20 define it without considering what its 21 purpose is. So, in Newfoundland Power’s 22 submission, the purpose of a test year is to 23 allow the regulator to match a utility’s 24 cost of providing service to the revenue to 25 be collected from rates. That’s the purpose</p>
<p style="text-align: right;">Page 50</p> <p>1 an increase in consulting costs. That’s it. 2 You look at that undertaking, there is no 3 reconciliation as to how those data points 4 have anything to do with a decrease or an 5 increase in vacancies. Hydro has provided 6 no evidence on that. And it’s on that basis 7 that Newfoundland Power is saying that it’s 8 been unsupported. The suggestion that the 9 overtime and consultant costs have offset 10 those vacancy costs in some way, shape or 11 form has been unsupported. There was no 12 testimony to show that either. So, I just 13 wanted to point that out, and then when you 14 look at that Undertaking 146, ask yourself 15 does that – is that sufficient evidence that 16 the vacancy adjustment should – or vacancy 17 allowance should not be adjusted. 18 Turning to the specific questions that 19 you’ve asked us to look at here, the first 20 one, the test year or the concept of a test 21 year, I guess. We’ve completed some 22 research and filed a number of Authorities 23 with the Board. They’re not lengthy, but 24 basically, in its simplest terms, it appears 25 from a review of those Authorities to be</p>	<p style="text-align: right;">Page 52</p> <p>1 of it. In other words, it’s used to audit 2 the utility’s revenue requirements and set 3 rates for a future period. 4 Newfoundland Power is not aware of any 5 accepted practice for using test year for 6 any other purpose other than setting rates 7 nor have we found an accepted definition of 8 a test year that suggests otherwise. 9 Now to just briefly illustrate the 10 connection between the test year and the 11 process of setting rates, I’d just refer you 12 to a couple of the Authorities which we have 13 filed. The first will be in our letter of 14 January 26th, 2016. The first one is the 15 NARUC Rate Case and Audit Manual at page 16 eight and nine of our letter. It’s actually 17 page ten out of the manual. 18 There’s a passage here that deals with 19 determining the appropriateness of a test 20 year. So if I read from that passage, “the 21 test year is a period of measurement for a 22 recent consecutive 12-month period, 23 consisting of a full year of operations 24 where data is readily available.” And later 25 on in the first paragraph, “whether using a</p>

<p style="text-align: right;">Page 53</p> <p>1 future or historic test year, the auditor 2 should judge the appropriateness of the test 3 year that has been proposed. Is it 4 representative after adjustments of the 5 period in which rates take effect?" So 6 that's what the test year is, is to look at 7 whether it's representative of the period in 8 which the rates are to take effect. 9 Well, what's that period? If you look 10 to the second paragraph here under 11 determination – determining the 12 appropriateness of the test year, "when 13 looking at a historic test year, one of the 14 first questions asked is whether the test 15 year is too stale to make it a reasonable 16 basis upon which to establish rates for a 17 future period." So you're establishing 18 rates for a future period with the test 19 year. So, even if you use historic test 20 year, you're not establishing rates to be 21 applied in that particular historical year. 22 That would be retroactive rate making. 23 Now, in our jurisdiction, a regulatory 24 framework generally contemplates that a 25 utility would file a general rate</p>	<p style="text-align: right;">Page 55</p> <p>1 dollars or profit is obtained by multiplying 2 the allowed rate of return set by the 3 regulator by the rate base." 4 And later on, it goes on to say "an 5 estimate of revenue requirement is derived 6 from a thorough scrutiny of a total 7 company's costs during a test year, adjusted 8 for known changes between the test year or 9 period for which rates will come into 10 effect." So the test year is there to set 11 the rates and the rates are set for a future 12 period. I don't – we have been unable to 13 find anything other than text to say that. 14 So, we have no – Newfoundland Power is 15 unable to provide you with any authority to 16 suggest that you can use a test year for 17 revenue requirement – sorry, revenue 18 deficiency or otherwise. The test year is 19 to set rates in the future. 20 So, where does that leave Newfoundland 21 and Labrador Hydro with respect to the 2014 22 and the 2015 revenue deficiencies, which is 23 what we understand the Board is focused on 24 here. Well, in this proceeding, Hydro has 25 filed what it refers to as two test years,</p>
<p style="text-align: right;">Page 54</p> <p>1 application with a future forecasted test 2 year well in advance of implementing test 3 for proposed rates, and that gives the Board 4 interveners ample time to audit the 5 utility's proposed test year costs for 6 reasonableness before the rates come into 7 effect. 8 There's another passage I'd refer you 9 to from Roger Moran's text, "New Regulatory 10 Finance" and it's page three of that text 11 under the heading "overview of the 12 regulatory process". 13 So there's a brief overview here 14 talking about test year and revenue 15 requirement and in this passage, Mr. Moran 16 states "in a nutshell, the determination of 17 rates is implemented by defining a total 18 revenue requirement, also referred to as the 19 total cost of service, then by adjusting the 20 rates so as to achieve those totals. More 21 specifically, the rates set by regulators 22 should be sufficient to cover the utility's 23 costs, including taxes and depreciation, 24 plus an adequate dollar return on the 25 capital invested. Expected return in</p>	<p style="text-align: right;">Page 56</p> <p>1 2014 and 2015. Now, it's certainly not 2 unheard of in this jurisdiction or other 3 jurisdictions for a utility to file two test 4 years at one time. Newfoundland Power has 5 done it in the past, but in both cases, they 6 were – in those cases, it was for the 7 purpose of setting rates. And in this 8 proceeding, Hydro readily admits that the 9 2014 test year included in its proposal, in 10 its Amended GRA, is not included for the 11 purpose of establishing rates. It's offered 12 for the sole purpose of the recovery of a 13 45.9 million revenue deficiency in the year 14 that was almost complete. 15 Hydro's proposal to put 2014 forward as 16 a test year doesn't conform with any 17 definition of a test year or any generally 18 accepted usage of a test year familiar to 19 Newfoundland Power. The fact that it's 20 called a test year doesn't necessarily make 21 it a test year. So whether it's based on 22 historical data or forecast data or a 23 combination of both, it doesn't conform with 24 the notion of prospective rate making. 25 Now, the Board, in carrying out its</p>

<p style="text-align: right;">Page 57</p> <p>1 duties, has to apply tests that are 2 consistent with generally accepted sound 3 public utility practice, and Hydro alone 4 bears the onus of establishing that its 5 proposal accords with generally accepted 6 regulatory principles. Newfoundland Power 7 submits that really what Hydro has proposed 8 here is to recover a prior year’s revenue 9 deficiency as if it were a cost deferral. 10 That’s what was proposed, and those things 11 are two different beasts. 12 Cost deferrals have been allowed in 13 this jurisdiction in the past in 14 extraordinary circumstances. For example, 15 to recover variations in unpredictable costs 16 or to address specific costs which are 17 reasonably quantifiable and clearly 18 distinguishable from the costs reflected in 19 a utility’s rates. But there’s no precedent 20 for this type of relief in this 21 jurisdiction. 22 A revenue deficiency is not a cost and 23 the Board has determined that in its – in 24 Order No. PU 36 (2015). It’s a net 25 financial result of a year of utility</p>	<p style="text-align: right;">Page 59</p> <p>1 this application for a 2014 revenue 2 deficiency in a year that was almost 3 complete, at a time when the Board did not 4 have appropriate time to consider the 5 proposal and indicated so in its order, 6 didn’t have enough time to consider the 7 proposal. 8 That certainly was Hydro’s prerogative 9 to make its management decisions and decide 10 to file on that basis, but the decision to 11 proceed in a way which doesn’t accord with 12 generally accepted regulatory principles 13 constituted a financial risk which Hydro 14 took. 15 All that said, a deferral account has 16 been set aside by the Board and 45.9 million 17 has been segregated in that amount for 18 potential recovery. If the Board decides 19 that in principle Hydro should be able to 20 recover some or all of that amount, there 21 remains a question as to how that should be 22 determined, how it should be evaluated. And 23 when Hydro filed its application for the 24 2014 revenue deficiency in November of 2014, 25 Newfoundland Power took the position that it</p>
<p style="text-align: right;">Page 58</p> <p>1 operations, not a cost. It’s difficult to 2 see how treating it as a cost would amount 3 to anything but retroactive adjustment of 4 the actions of management. 5 It’s Newfoundland Power’s submission 6 that Hydro should not be entitled to recover 7 any of the alleged 2014 revenue deficiency 8 on that basis, on that principle basis. I 9 know that may sound harsh and I can assure 10 you that Newfoundland Power’s intention is 11 not to ask that Hydro be penalized, but 12 Hydro does have the burden of showing and 13 the Board has the – is bound to apply 14 generally accepted regulatory principles. 15 So that has to be considered. 16 And I think it’s important to consider 17 that it was Hydro that made the decision to 18 abandon its 2013 rate case on the eve of the 19 hearing. That was a decision made, a 20 financial decision, a management decision 21 made by Hydro. It wasn’t made by the Board. 22 It wasn’t ordered by the Board. Wasn’t made 23 by or suggested by the interveners. And it 24 was Hydro that made the decision to, in 25 November of 2014, on November 28th, to file</p>	<p style="text-align: right;">Page 60</p> <p>1 was unclear as to how the Board was going to 2 evaluate this proposal or how a final amount 3 could be determined, whether there could be 4 a reduction at all from the final amount, 5 but the Board has indicated that this final 6 amount is subject to reduction. 7 So how do you evaluate it? Well, 8 really all you can evaluate it on is on the 9 basis of the information that was put before 10 you, and Newfoundland Power has indicated 11 that the 45.9 million is subject to 12 reduction on the basis of Hydro having 13 failed to establish a number of entitlements 14 to costs. And I’d refer you to page D21 of 15 Newfoundland Power’s submission. There’s a 16 table there, Table D10. It’s a summary of 17 adjustments. 18 So, Newfoundland and Labrador Hydro 19 filed what they called a combination of 20 actuals and forecast, but they forecast an 21 amount of 45.9 for a deficiency. All their 22 witnesses indicated that they were not 23 intending to update that amount or update 24 the costs in it. The only reason the 2014 25 costs got filed really was because the</p>

<p style="text-align: right;">Page 61</p> <p>1 interveners wanted to have a look at them 2 and they were filed. They were asked to be 3 filed. And this table, if it's accepted 4 that these amounts are deducted, would 5 completely offset the 45.9 million. The 6 total summary of adjustments is in the range 7 of 64 to 66 million dollars. And we'd 8 suggest that those summary adjustments be 9 considered and that no amount be recovered 10 from the 45.9 million in any event, whether 11 it's on a principle basis or whether it's on 12 the basis that after adjustments there is no 13 proven revenue deficiency.</p> <p>14 So, what do you do with 2015? Well, 15 2015 is a little bit different scenario in 16 that it is a proper test year. It's filed 17 as a test year. It's filed for the purposes 18 of setting rates, for setting rates in a 19 future period. And the fact that rates have 20 not ultimately been set in 2015 is a result 21 of regulatory lag, albeit the lag may 22 partially be due to the lateness in filing 23 the Amended Application, but in any event, 24 there's lag there. We had a lengthy 25 hearing. And the Board has, in the past,</p>	<p style="text-align: right;">Page 63</p> <p>1 given 7.6 with respect to – 7.6 million with 2 respect to the RSP interest. They've been 3 given .8 million with respect to the GRA 4 costs and there was 2.2 million in there as 5 well on another item. And we take no issue 6 with those items.</p> <p>7 But to the extent the Board is going to 8 look at whether Hydro should recover 9 anything above and beyond the 19.7 million, 10 the Board has to consider all the evidence 11 here and whether or not any – all the – 12 whether or not any adjustments should be 13 made. And in Newfoundland Power's 14 submission, we've set out in a table at C20 15 – a summary table at C34, that's Table C15, 16 a summary of adjustments in 26 million to 31 17 million dollar range. So, if the Board is 18 going to look at anything more for Hydro for 19 2015, the Board has to consider that total. 20 And to the extent those adjustments would 21 reduce the 19.7 million, then that should be 22 done. But in any event, whatever the Board 23 does with the 2015 year, Newfoundland 24 Power's submission is that it should be done 25 on a principle basis as outlined in – the</p>
<p style="text-align: right;">Page 62</p> <p>1 allowed cost deferral recoveries when 2 there's been a delay in rate implementation. 3 Usually rates are implemented in the year or 4 the recovery in the year, but in this 5 particular case, rates won't come into 6 effect until 2016. So, in this particular 7 case, it was certainly open to the Board to 8 create a deferral account, which it did, 9 subject to the final determination of 10 revenue requirement.</p> <p>11 Well, Newfoundland Power had submitted, 12 during – with respect to that application, 13 that the Board should evaluate the revenue 14 deficiency for 2015 on the basis of the 15 forecast costs for 2015, which is what the 16 Board – and the Board agreed with that, and 17 ultimately, in the Order, the Board set 18 aside 30.2 million dollars under a number of 19 categories. One of the categories was a 20 19.7 million dollar revenue deficiency.</p> <p>21 Now, if I understand my learned friend, 22 Mr. Cass, correctly, Hydro is indicating or 23 accepting that that's the cap on what they 24 would recover for the 2015 revenue 25 deficiency. They're already – they've been</p>	<p style="text-align: right;">Page 64</p> <p>1 reasons for it outlined in the order is the 2 basic position that we would take.</p> <p>3 I just had a couple of comments on some 4 of the Authorities that were filed by Hydro, 5 one of which was the Directed Energy case. 6 I believe it's at Tab 6 of Hydro's 7 Authorities. Now, this was a lengthy case. 8 We got it yesterday. I had a brief run 9 through it. So, it's difficult really to 10 make too many comments on the case. In 11 addition, we heard really no expert 12 regulatory evidence as to whether or not the 13 Alberta – where or not the AUC has different 14 policies or practices in place in terms of 15 dealing with revenue deficiencies and 16 dealing with forecast test years and that 17 sort of thing. But, I can make a few 18 comments.</p> <p>19 First of all, it was clear from Mr. 20 Cass' comments that the AUC indicates its 21 normal practice is to set rates on a 22 perspective basis. In this particular case, 23 there was a number of years in which revenue 24 deficiencies were granted, based on actuals, 25 and the AUC appears to have a practice of</p>

<p style="text-align: right;">Page 65</p> <p>1 relying on forecast projections for setting 2 rates, but also looking for the more up-to- 3 date information, if possible, where there's 4 a regulatory lag. That seems to be their 5 practice. I'm not aware of any evidence as 6 to whether or not that's the practice in 7 every other jurisdiction, but that's 8 something the Board has to consider as to 9 whether or not it's their practice. 10 The initial application in this 11 Directed Energy case was filed in 2011 and 12 it was filed for forecast rates in 2012, '13 13 and '14. So the application was filed in 14 2011 and ultimately, from my reading of the 15 case, the reason for the lag had to do with 16 a Board Order in 2012 where a settlement 17 agreement was not accepted. A filed 18 settlement agreement was not accepted and 19 the Board directed that a re-filing occur. 20 So, the re-filing occurred in 2013 and 21 ultimately there were some – due to the 22 regulatory lag, there were revenue 23 deficiencies granted for the 2012, 2013, 24 2014 periods. Nothing was granted prior to 25 2011. So the case sort of doesn't help</p>	<p style="text-align: right;">Page 67</p> <p>1 October of 1977 and the revenue deficiency 2 dealt with 1978 and they used a 1977 3 combination of forecast and actuals to set 4 the revenue deficiency for 1978. I'm not 5 sure how that helps in terms of your 6 deliberations. 7 The Union Gas case from 1998 I believe 8 is distinguishable, and that's the one at 9 Tab 5. That's a different scenario there, I 10 believe, in that there was an application 11 for an order to approve movement to a 12 performance based rate scheme, which was to 13 commence in 2000. So while there was a 1999 14 rate application filed, it was for rates to 15 start in 2000. The fact that that's the 16 case, yeah, that's okay. That's applicable 17 to the 2015 test year. I'm not sure how it 18 helps with respect to 2014. But it's 19 applicable for the 2015 test year as late in 20 2014 Hydro filed an application for 2015 21 rates. Yes, it was in November. Yes, this 22 one was late in 1999 and was filed for the 23 purposes of moving to a new scheme in 2000. 24 I don't think that there's an issue for the 25 parties here with respect to that. So, I'm</p>
<p style="text-align: right;">Page 66</p> <p>1 Hydro with respect to the 2014 revenue 2 deficiency, but certainly is helpful in 3 terms of conforming or confirming that a 4 2015 revenue deficiency would have been 5 appropriate. 6 What's also distinguishing about this 7 case is that the reason for the regulatory 8 lag was related to a Board order and 9 instructions to re-file. That wasn't the 10 case here. Hydro made the decision in June 11 of 2014 to abandon its 2013 rate case 12 essentially and to file the 2014 revenue 13 deficiency application and the 2015 test 14 year. 15 The Consumer Gas Company case, at Tab 16 5, and that's the – sorry, at Tab 4, that's 17 the 1977 case out of the OEB. I'm not sure 18 it provides any assistance to the Board. It 19 does show that there's some forecast – 20 accommodation of some forecast data and some 21 actual data used for the purposes of 22 calculating a revenue deficiency, but the 23 revenue deficiency in that case was 24 calculated prospectively. It was calculated 25 for – the application was to set rates in</p>	<p style="text-align: right;">Page 68</p> <p>1 not sure on the basis for filing the case. 2 Now, the other point I wanted to make 3 under the test year heading, you've asked 4 for some comments regarding the adjustment 5 of 2014 forecast costs in setting 20 – 6 sorry, 2015 forecast costs in setting 2016 7 rates. Now, we've assumed that this inquiry 8 relates to the dispute regarding the 9 adjustment to rate base related to the 100 10 megawatt CT and some of the other projects 11 which were included in the opening rate base 12 in 2015 in Hydro's initial application for 13 which Hydro agreed to – or has in its 14 revenue deficiency application made an 15 adjustment for 2015 but not for 2016 because 16 they weren't in service in 2015. I'm 17 assuming that the genesis of the question. 18 So, what has occurred is that in its 19 application in November of 2014, Hydro filed 20 a forecast average rate base which included 21 the 100 megawatt CT and a number of other 22 projects which they suggest would be in 23 service as of January 1, 2015. And I'd 24 suggest that Hydro knew or ought to have 25 known at that point in time that they</p>

<p style="text-align: right;">Page 69</p> <p>1 wouldn't have been in service and that 2 forecast average rate base ought to have 3 been adjusted from the start. And it's 4 Hydro that is asking to have the 2016 rate 5 base adjusted to include those items. 6 So, Hydro has acknowledged with its own 7 witnesses that this would depart from normal 8 regulatory practice. Normal regulatory 9 practice would be that you'd set your rate 10 base in your test year and you kept your 11 rate – you keep your rate base in your test 12 year unless further ordered to adjust it or 13 unless another rate application follows. 14 That's the normal practice. 15 Hydro says the reason it asks to 16 include these in 2016 for rates is because 17 otherwise it would be deprived of the 18 opportunity to earn a just and reasonable 19 return in 2016. Now, even if that were a 20 reason to depart from regulatory practice, 21 how are we to determine that Hydro will not 22 earn a reasonable return in 2016? Hydro 23 hasn't produced or hasn't presented its 2016 24 costs in a manner that they can be tested. 25 It was asked to provide 2016 forecast costs</p>	<p style="text-align: right;">Page 71</p> <p>1 Newfoundland Power was ordered by the Board 2 in that order to file an application for its 3 – for approval of its 2015 cost of capital 4 as well as its 2015 forecast average rate 5 base. So that was an order of the Board at 6 the time. And Newfoundland Power filed that 7 application for adjustment to the rate base 8 and it was approved after it was thoroughly 9 reviewed by the Board's financial 10 consultants. 11 Hydro hasn't filed a complete 2016 12 forecast average rate base to determine 13 whether there's any puts and takes in there 14 to suggest that the rate base should be 15 changed. So, ultimately this appears to be 16 nothing more than spot rate making. 17 The next item that I wanted to touch on 18 was the interpretation of the OC with 19 respect to the rate of return. Now, you've 20 asked us to consider the significance of the 21 treatment of forecast costs on the 22 interpretation of the Order in Council 23 relating to Hydro's return. 24 Now, that order is stated to the effect 25 of from Hydro's next GRA following 2009, as</p>
<p style="text-align: right;">Page 70</p> <p>1 and they were provided -- and certain costs 2 were provided after budget was completed at 3 the end of the hearing, but none of them 4 were tested. 5 So, the assertion here is therefore 6 based on estimates of Hydro's 2016 return 7 that haven't been tested – costs that 8 haven't been tested. Accordingly, Hydro's 9 2016 cost estimate hasn't been shown to be a 10 reasonable basis for a regulatory decision 11 to be made by this Board to include those 12 particular items in rate base. 13 Now, Hydro's rebuttal submission has 14 cited Newfoundland Power's last GRA order 15 from 2013, PU 13 (2013) as a precedent for 16 allowing the addition of new investment in 17 utility assets in rate base outside of the 18 test year. Now that case is somewhat 19 distinguishable in that in its GRA at the 20 time, Newfoundland Power had its automatic 21 adjustment formula suspended, its cost of 22 capital in rates were set for 2013 and 2014 23 and Newfoundland Power was ordered to file a 24 GRA in 2015 for 2016 rates. As the cost of 25 capital had not been set for 2015,</p>	<p style="text-align: right;">Page 72</p> <p>1 Mr. Cass has indicated. So it should be 2 interpreted as speaking with reference to 3 the generally accepted purpose of a GRA, a 4 general rate application. The generally 5 accepted purpose of a general rate 6 application is to establish new rates. In 7 this jurisdiction, the practice has been to 8 set rates on a prospective basis based on 9 forecast costs. In Hydro's case, new rates 10 are proposed for 2015 and a 2015 rate change 11 has really been implemented already, albeit 12 on an interim basis, but no rates were 13 proposed for 2014. 14 I don't want to steal Mr. O'Reilly's 15 thunder, but I think he put it succinctly in 16 Vale's submission filed in the case when he 17 said that Hydro's application to recover its 18 stated 2014 revenue deficiency is brought 19 coincident with the 2013 Amended General 20 Rate Application but is not itself a general 21 rate application. It's a separate 22 application. And the Board asked that Hydro 23 file a separate application. 24 The mere fact that Hydro has included 25 the request for recovery of a 2014 revenue</p>

Page 73	<p>1 deficiency in its GRA shouldn't have a</p> <p>2 bearing on whether the directed return</p> <p>3 becomes effective. If such an effect were</p> <p>4 intended, it should have been clearly stated</p> <p>5 in the OC and the OC says general rate</p> <p>6 application when it comes into effect. That</p> <p>7 means setting rates.</p> <p>8 The OC makes no mention of a revenue</p> <p>9 deficiency for test years past or present,</p> <p>10 just rate applications, it's necessary –</p> <p>11 it's next general rate application. The</p> <p>12 purpose of and contextual reading of this</p> <p>13 order can only lead to the conclusion that</p> <p>14 the intent was that Hydro would only be able</p> <p>15 to recover when it – the change in return</p> <p>16 when it applied for a change in rates; could</p> <p>17 not have been intended that it would recover</p> <p>18 otherwise. Otherwise, it would have been</p> <p>19 open to Hydro really to file its general</p> <p>20 rate application and look for the change in</p> <p>21 return back to 2010. Revenue deficiency and</p> <p>22 a change of return back to 2010, that</p> <p>23 couldn't have been the case. That would</p> <p>24 constitute retroactive rate making and be –</p> <p>25 and require clear indication of legislative</p>	Page 75	<p>1 recover anything in the 2014 revenue</p> <p>2 deficiency amount, it's limited itself to a</p> <p>3 return on equity equal to its marginal cost</p> <p>4 of debt as approved in the 2007 rate order.</p> <p>5 With respect to the adjustment</p> <p>6 mechanism, I'd have to acknowledge there's</p> <p>7 nothing in the Order in Council which talks</p> <p>8 about an adjustment mechanism on the rate of</p> <p>9 return on equity in between general rate</p> <p>10 applications. So, we can provide very</p> <p>11 little guidance on the actual intent of</p> <p>12 Government in that regard, other than to say</p> <p>13 if you read the OC as assuming that the</p> <p>14 intention is to make their same – is to</p> <p>15 provide for the same rate making ROE for</p> <p>16 both utilities, it would appear that an</p> <p>17 adjustment of Hydro's rate making ROE should</p> <p>18 occur when there's a change to Newfoundland</p> <p>19 Power's ROE. An adjustment mechanism would</p> <p>20 provide for that.</p> <p>21 I touched on the management structure</p> <p>22 and item number three already. Again, if</p> <p>23 the Board is satisfied Hydro is not</p> <p>24 operating efficiently, it can impose a</p> <p>25 productivity allowance, but it's</p>
Page 74	<p>1 intent.</p> <p>2 The fact is, it was open to Hydro since</p> <p>3 2009 to file a GRA seeking the directed rate</p> <p>4 of return on equity and the change. It was</p> <p>5 Hydro's choice not to do this. This was a</p> <p>6 financial decision made by Hydro, not the</p> <p>7 interveners, not the Board, and Hydro</p> <p>8 continued on with the originally scheduled –</p> <p>9 had Hydro continued on with the originally</p> <p>10 scheduled hearing in July of 2013, Hydro</p> <p>11 would have been entitled to recover an ROE</p> <p>12 commensurate with Newfoundland Power's ROE</p> <p>13 at the time in 2014 rates once they were</p> <p>14 implemented. Hydro chose to abandon its</p> <p>15 2013 test year in favour of a 2015 test</p> <p>16 year. Hydro's witnesses have indicated that</p> <p>17 this was done due to the fact that it was</p> <p>18 forecasting increases in costs above and</p> <p>19 beyond what was included in the 2013 test</p> <p>20 year costs. But this was a choice made by</p> <p>21 Hydro and having made the decision, Hydro</p> <p>22 has effectively made the 2015 test year its</p> <p>23 first general rate application following the</p> <p>24 2009 Order in Council.</p> <p>25 To the extent Hydro is entitled to</p>	Page 76	<p>1 Newfoundland Power's position that the Board</p> <p>2 does not have the power to order Hydro how</p> <p>3 to structure itself corporately.</p> <p>4 And the only other comments I have with</p> <p>5 respect to the fuel price are limited. We'd</p> <p>6 have to state that with respect to the fuel</p> <p>7 prices for 2014 and 2015, it's Newfoundland</p> <p>8 Power's position that the basic principle</p> <p>9 should be that Hydro should be no better off</p> <p>10 and no worse off than the status quo which</p> <p>11 exists under the RSP. Essentially that</p> <p>12 Hydro should be entitled to recover the</p> <p>13 reasonable actual cost of fuel at a</p> <p>14 reasonable burn rate. Right now, Hydro is</p> <p>15 essentially entitled to recover the</p> <p>16 difference between volume of fuel, market</p> <p>17 price of fuel and energy sales as expressed</p> <p>18 in rates in the actuals and Hydro will have</p> <p>19 to file that information with you in a</p> <p>20 compliance filing. With respect to the 2016</p> <p>21 year, the most updated full cost, I guess,</p> <p>22 would be the appropriate fuel cost to use,</p> <p>23 and that's something Hydro have to deal with</p> <p>24 in a compliance filing. Those are my</p> <p>25 submissions, Mr. Chair. Thank you.</p>

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<p>1 CHAIRMAN: 2 Q. Okay. It seems like it's a good time for a 3 break. Is that okay with you, Mr. Johnson? 4 JOHNSON, Q.C.: 5 Q. Certainly, thank you. 6 (RECESS) 7 CHAIRMAN: 8 Q. Mr. Johnson, I believe we commence with you, 9 sir. 10 JOHNSON, Q.C.: 11 Q. Thank you very much, Mr. Chairman, 12 Commissioners. My intent is mainly to 13 address the matters as best I can that the 14 Board wanted the parties to address in its 15 correspondence of January 18th, but before 16 going to that main task, and again my intent 17 would not be to provide a summary argument 18 on matters that we've laid out in our 19 submissions, but before going to that, I 20 would just like to touch briefly on Hydro's 21 Reply Brief under the Section, "Balancing 22 costs and reliability" that Mr. O'Brien 23 spoke about this morning. As I read that 24 submission, Hydro has basically argued that 25 it's impossible for Hydro to provide better</p>	<p>1 distributed last night - or yesterday 2 afternoon which I only saw last evening, and 3 I think it would be appropriate so that the 4 Board is not at the risk of putting an 5 emphasis on these authorities from Hydro 6 that they don't deserve, for the parties to 7 be given a brief amount of time to provide a 8 written comment as to where these decisions 9 fit and what weight they should be given and 10 what distinguishing features they should 11 have; otherwise, we're sort of drinking from 12 a fire hose and trying to do our best with 13 what's been filed. As I say, the time 14 constraint hasn't allowed us to do our best, 15 frankly, on that. 16 So if we turn then to the Board's 17 issues regarding the definition of a test 18 year and accepted regulatory practice about 19 the use of test years, whether they be 20 historical and forecast, I think the key 21 here is to differentiate between a test year 22 and a rate year. The test year, whether 23 historical or future, is in all cases being 24 used as the basis for determining allowable 25 costs and revenue requirement for a</p>
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<p>1 reliability and enhanced reporting without a 2 corresponding increase in expenditures. In 3 a sense, it's saying if you want more from 4 us, you've got to give us more money, and 5 they made the statement that if we reduce 6 costs like the interveners want us, we'll 7 have to make decisions that are inconsistent 8 with improving reliability. This position 9 is, to say the least, untenable, for the 10 reasons that my friend, Mr. O'Brien, Counsel 11 for Newfoundland Power, has already stated 12 and with which I fully agree. The fact is 13 that the evidence discloses that Hydro has 14 seen its expenses rise dramatically, vastly 15 exceeding the pace of inflation, and while 16 Hydro's witnesses testified that cost 17 control was reasonable at that organization, 18 the evidence simply does not square with and 19 is not consistent with that assertion, as 20 set out in our brief, and in the briefs of 21 all the other parties who've intervened in 22 this matter. The second area now that I 23 just wish to address briefly before going 24 into the terms of the Board's letter is 25 there were a vast number of pages</p>	<p>1 prospective rate year. Just to illustrate 2 the point, if we could just turn to the 3 materials that Newfoundland Power has filed, 4 in particular the Phillips materials at page 5 196, and look at those comments in the 6 context of a historic test year situation. 7 So Phillips starts off at the top of page 8 196 saying, "The company, with the 9 concurrence of the Commission or its staff, 10 will generally select a test year, 11 frequently the latest twelve-month period 12 for which complete data are available. The 13 purposes of such a test year are as follows. 14 In the first place, Commission staff must 15 audit the utility's books. For rate making 16 purposes, only just and reasonable expenses 17 are allowed. Only used and useful property, 18 with certain exceptions, is permitted in the 19 rate base. In the second place, the 20 Commission must have a basis for estimating 21 future revenue requirements. This estimate 22 is one of the most difficult problems in a 23 rate case. A Commission is setting rates for 24 the future, but it has only past experienced 25 revenues, demand conditions, to use as a</p>

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1 guide”. Of course, that pertains to a
 2 historical test year. “Philosophically, the
 3 strict test year assumes the past
 4 relationship among revenues, cost, and net
 5 investment during the test year will
 6 continue into the future. To the extent
 7 that these relationships are not constant,
 8 the actual rate of return earned by utility
 9 may be quite different from the rate allowed
 10 by the Commission. For many years,
 11 Commissions have adjusted test year data for
 12 known changes that is a change that actually
 13 took place during or after the test period,
 14 such as a new age agreement that occurred
 15 toward the end of the year. More recently
 16 due to inflation, a few commissions have
 17 modified the traditional historic test year
 18 approach by using a forward test year,
 19 either partial forecast or by permitting pro
 20 forma expense and revenue adjustments”. Now
 21 the terminology then of historic test year
 22 or future test year speaks to the year for
 23 which costs are being used relative to the
 24 date of the utility’s application, but in
 25 all cases the rate year is in the future.

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1 In all cases the rate making is prospective.
 2 So a utility that is seeking to set rates
 3 prospectively for 2014 –
 4 CHAIRMAN:
 5 Q. Prospective, isn’t it?
 6 JOHNSON, Q.C.:
 7 Q. Prospectively.
 8 CHAIRMAN:
 9 Q. Is it.
 10 JOHNSON, Q.C.:
 11 Q. Or prospectively.
 12 CHAIRMAN:
 13 Q. Prospect, I think.
 14 JOHNSON, Q.C.:
 15 Q. It’s probably right, prospectively, in
 16 retrospect.
 17 CHAIRMAN;
 18 Q. I have a grammar obsession. I don’t know
 19 why, but I’m sure it’s prospect because
 20 you’re looking to the future.
 21 JOHNSON, Q.C.:
 22 Q. I think our discussion is going to look
 23 weird on the transcript.
 24 CHAIRMAN:
 25 Q. It would fit in.

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1 JOHNSON, Q.C.:
 2 Q. So a utility that is seeking to set rates
 3 prospectively for 2014 in a future test year
 4 regime such as we have, would file an
 5 application in 2013 for 2014 rates using a
 6 forecast of 2014 test year costs. So, of
 7 course, we see there “relative to the date
 8 of the application”, 2014 is a future test
 9 year. So in a historic test year regime, a
 10 utility seeking to set rates prospectively
 11 for 2014 would apply in 2013 using 2012
 12 actuals as the basis for determining the
 13 allowed 2014 revenue requirement, and hence
 14 rates. This time under that scenario,
 15 relative to the date of the utility’s
 16 application, the filing in 2013, 2012 is a
 17 historic test year.
 18 Now to round this out a little bit
 19 more, in the materials filed from Mr. Moran
 20 filed by Newfoundland Power, he also speaks
 21 of besides historical or forward test year,
 22 you can also have a current test year. So
 23 in a current test year regime or situation,
 24 the utility seeking to set rates
 25 prospectively for 2014 would apply in 2013

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1 using current year 2013 estimated costs,
 2 part actual, part forecast, as the cost to
 3 establish the 2014 revenue requirement and
 4 rates. So in all cases regardless of the
 5 test year regime, the rate year is in the
 6 future, the rate making remains prospective.
 7 Now this discussion so far should make it
 8 fairly obvious that Hydro has a first order
 9 principles problem with its purported use of
 10 what it calls a 2014 test year.
 11 Let us leave to the side for the moment
 12 whether a utility can use a test year for
 13 the purpose of determining a revenue
 14 deficiency as Hydro refers to it. We’ll
 15 come back to that, but the first order
 16 principles problem is that a test year
 17 regime, whether historic, future, or
 18 current, has as a basic principle the
 19 concept that the utility be incented to
 20 manage its costs because the actual rate of
 21 return earned by the utility in the rate
 22 year may be quite different than the rate
 23 allowed by the Commission. So we don’t
 24 allow utilities to use 2014 as a test year
 25 to set rates in 2014. No rate regime,

<p style="text-align: right;">Page 85</p> <p>1 whether future, historic, or current, 2 permits this because the rates are to be set 3 prospectively. So although Hydro's 4 application which was filed in November of 5 2014 is not seeking to have rates set for 6 2014, and it seeks a recovery of a 2014 7 deficiency, conceptually a rate application 8 serves the same purpose, and that is to 9 recover a revenue deficiency through 10 increased rates. Now Hydro says we should 11 be allowed to recovery these 2014 costs 12 because they were prudently incurred and 13 they were tested during the GRA process, but 14 that approach, in our submission, undermines 15 the whole principle of the utility's 16 accountability to manage within a 17 preapproved revenue requirement budget, and 18 to be incented to do so. Our argument very 19 much is one of principle, and I would point 20 out here that Hydro is not claiming that its 21 financial integrity is placed at risk if the 22 Board doesn't deviate from normal regulatory 23 practice in this regard. So what we have to 24 ask ourselves is if what Hydro is seeking in 25 respect of 2014, if that were to be endorsed</p>	<p style="text-align: right;">Page 87</p> <p>1 setting customer rates, and the Board asked 2 for any applicable authorities. Now Hydro, 3 as Mr. O'Brien has stated this morning, 4 clearly bears the onus of showing that its 5 2014 revenue deficiency proposal accords 6 with regulatory practice. We don't believe 7 that Hydro has met this onus. Ms. Russell 8 testified during the hearing that Hydro had 9 not, to her knowledge, consulted with a 10 regulatory expert with respect to this 11 approach. She said that on November 19th, 12 page 38. So as we sit here today, clearly 13 Hydro wishes the Board, in our submission, 14 to be the first to go down this road, and to 15 do so without any expert evidence supporting 16 the notion that this would be in accordance 17 with regulatory and rate making principles. 18 With respect, we believe the Board should 19 decline Hydro's invitation in this regard. 20 It is of significance in my view that 21 Newfoundland Power, a utility intervener, 22 has stated in its written argument that 23 Hydro's application for recovery of the 24 proposed 2014 revenue deficiency is 25 inconsistent with generally accepted</p>
<p style="text-align: right;">Page 86</p> <p>1 as an ongoing practice, would it be 2 acceptable. Would it be acceptable for 3 Newfoundland Power, for example, to file in 4 September in each year using actuals for 5 part of the year and forecasts for the rest 6 of the year and say we want our revenue 7 requirement for this year approved for 8 either rate of deficiency recovery purposes, 9 or would it be appropriate for Hydro to come 10 back and do the same thing as they've done 11 this time on the basis that it couldn't file 12 its application on a more timely basis. 13 We submit to the Board that this 14 obviously would not be an acceptable 15 practice because it undermines fundamental 16 principles. Utilities must make proper use 17 of test years; otherwise, the principles of 18 utility accountability and incentives will 19 be undermined, and these principles matter 20 because if we don't adhere to them, they 21 disappear. 22 So then we next return to the issue of 23 whether a utility can make use of a test 24 year forecast for purposes other than 25 determining a revenue requirement for</p>	<p style="text-align: right;">Page 88</p> <p>1 regulatory practice. As Newfoundland Power 2 has pointed out, it's difficult to 3 understand how the deferred recovery of a 4 revenue deficiency from a prior year to 5 recover the incurred costs of operating the 6 utility would not be a retroactive 7 adjustment of the actions of management. 8 Now Hydro has submitted in its rebuttal that 9 denying the recovery of the 2014 revenue 10 deficiency is tantamount, as it says, to 11 denying Hydro its statutory entitlement to 12 the opportunity to earn annually a just and 13 reasonable return on its rate base. 14 Hydro continues on to say in its 15 written reply that "It is incumbent upon the 16 Board to use its discretion to act as 17 necessary and appropriate to effect recovery 18 of Hydro's 2014 revenue deficiency 19 consistent with ensuring Hydro's customers 20 obtain adequate service at reasonable 21 rates". With all due respect to Hydro in 22 this regard, this overlooks the 23 responsibility of the utility of Hydro to 24 file in a timely basis. The concept of 25 filing revenue requirement and rate</p>

<p style="text-align: right;">Page 89</p> <p>1 applications on a timely basis is so deeply 2 embedded in generally accepted regulatory 3 practice that most regulators do not 4 consider an explicit policy statement to be 5 necessary. It is well understood by all 6 participants in regulatory processes, except 7 it seems, Hydro, that rates and revenue 8 requirements must be set on a prospective 9 basis and that this requires costs to be 10 filed in advance of the rate year. To do 11 otherwise would undermine the accountability 12 of management to manage within a budget that 13 it commits to in advance. 14 The company in our respectful 15 submission demonstrates a profound 16 misunderstanding of the prospective nature 17 of the rate setting regime when it suggests 18 that the Board has a statutory duty to allow 19 Hydro to recover a revenue deficiency that 20 was not identified on a timely basis. The 21 regulatory reality is quite the opposite. 22 To allow the company to recover a revenue 23 deficiency for 2014 that was not disclosed 24 to the Board until November of that year, 25 would not only deviate from the principle of</p>	<p style="text-align: right;">Page 91</p> <p>1 treated the same as 2014, and this is IV of 2 the Board’s letter. Again I would echo here 3 the comments of Mr. O’Brien this morning 4 that the 2015 does not have the same problem 5 that the 2014 clearly has, because the GRA 6 filed by Hydro in November of 2014 properly 7 used a forward test year of 2015 and applied 8 to set rates in 2015 on a prospective basis. 9 So other than saying that I would 10 respectfully concur with the comments made 11 by Newfoundland Power in his addressing that 12 submission to the Board this morning. 13 Again IV of the letter, should forecast 14 or actual cost be used to determine a 15 revenue deficiency, we would there submit 16 that it would have to be a fully forecast 17 cost to ground any revenue deficiency 18 because otherwise you’d be undermining the 19 utility incentive. 20 The next topic had to do with the 21 regulatory practice regarding the adjustment 22 of 2015 forecast cost in setting 2016 rates. 23 We interpreted, likewise as Newfoundland 24 Power did, to be dealing with the CT issue, 25 and in our submission, a test year is a test</p>
<p style="text-align: right;">Page 90</p> <p>1 determining revenue requirements on a 2 prospective basis, but in doing so set a 3 precedent that would open the door to 4 allowing cost recovery not on the basis of a 5 before the fact determination of a 6 reasonable revenue requirement, but instead 7 to give utilities a licence to spend freely 8 first, then justify past spending, rather 9 than to submit to a review of the prudence 10 of their budget plans in advance. 11 So I then turn to III of the Board’s 12 letter, turning to the Board’s query that if 13 the 2014 forecast is used to determine a 14 revenue deficiency, can it also be used for 15 determining a credit to customers if the 16 utility has collected more than the revenue 17 requirement for the years determined by the 18 regulator. Just to be clear on this, of 19 course, as you will have gathered, we don’t 20 accept that the 2014 forecast can be used to 21 determine a revenue deficiency. However, if 22 the Board is persuaded otherwise, then 23 surely it would follow that it would not be 24 just for deficiencies, but also for credits. 25 The Board then asked whether 2015 should be</p>	<p style="text-align: right;">Page 92</p> <p>1 year. If Hydro knew there was a problem in 2 2016, it would need to file for 2016 rates 3 in 2015 using a 2016 test year, not make 4 adjustments to the 2015 test year. Hydro, 5 as has been pointed out in the written 6 materials and here this morning, proposes 7 that the Holyrood CT remain rate base for 8 rate making purposes even though it was not 9 in service at the beginning of 2015. It’s 10 been acknowledged that this is a clear 11 departure from generally accepted regulatory 12 practice, for which Hydro has not provided 13 any expert support. Any number of changes 14 can be experienced in Hydro’s 2016 cost and 15 revenues and it would not be, in our 16 respectful submission, appropriate to make 17 this judgment. We referred to it in our 18 brief as “single issue rate making”, and I 19 think that that comment fairly applies to 20 that request. 21 Turning then to this interpretation of 22 Order in Council, 2009-063, back several 23 years ago in 2009, that Order in Council was 24 issued to direct the Board that in all 25 future general rate applications by</p>

<p style="text-align: right;">Page 93</p> <p>1 Newfoundland and Labrador Hydro, commencing 2 with the first general rate application by 3 Hydro after January 1st, 2009, that in 4 calculating the return on rate base for 5 Hydro, to set the same target return on 6 equity as was most recently set for 7 Newfoundland Power through a general rate 8 application, or calculated through 9 Newfoundland Power’s automatic adjustment 10 mechanism. The Supreme Court of Canada in 11 the Rizzo Shoes decision, which I’ve 12 provided to the parties and to the panel 13 sets out succinctly that – and in that 14 regard, I think I’d be referring to 15 paragraph 21 of the case, as has been 16 presented, where the court states and 17 approved of the following statement, “Today 18 there is only one principle or approach; 19 namely, the words of an Act are to be read 20 in their entire context, and in their 21 grammatical and ordinary sense, harmoniously 22 with the scheme of the Act, the object of 23 the Act, and in the intention of 24 Parliament”, and the Consumer Advocate, 25 Newfoundland Power, and Vale, have submitted</p>	<p style="text-align: right;">Page 95</p> <p>1 for new rates on a prospective basis, would 2 not be reading the term “general rate 3 application”, as used in the Order in 4 Council in its ordinary sense, nor would it 5 be reading the Order in Council harmoniously 6 with the scheme of our legislation. Our 7 legislation sets rates on a prospective 8 basis and as the Court of Appeal said in the 9 stated case, Hydro must manage its business 10 so as to minimize the risks and maximize its 11 opportunities for a just and reasonable 12 return. Hydro is not guaranteed to earn the 13 established return. To read the Order in 14 Council as mandating that Hydro be entitled 15 to return in a year where it has not sought 16 rates on a prospective basis, and in a year 17 where it is putting forward a current year 18 forecast to ground relief in that very year 19 is to change our framework. It is certainly 20 not to act harmonious with it. 21 Finally, on the issue of whether the 22 Order in Council affects the adjustment of 23 Hydro’s return on equity between its rate 24 cases based on changes in Newfoundland 25 Power’s return, the Order in Council does</p>
<p style="text-align: right;">Page 94</p> <p>1 that the Order in Council is not applicable 2 to 2014, since 2014 is not a year in which 3 new rates are being set by the Board. 4 In regulatory practice, a general rate 5 application typically involves consideration 6 of a utility’s proposal for new rates, 7 tolls, and charges. In this jurisdiction, 8 rates are designed to recover the utility’s 9 revenue requirement based on a forecast test 10 year. That’s the only type of general rate 11 application that this jurisdiction, at least 12 to my knowledge, has ever had. In this 13 case, Hydro, as we’ve discussed, Hydro’s 14 application not only proposed that the Board 15 approve new rates based on a 2015 test year. 16 They went further and in its November, 2014, 17 filing, also filed a test year forecast of 18 2014 cost as a basis for recovery of a 2014 19 revenue deficiency. That is a novel use of 20 a test year that is unknown in these parts 21 and represents a department from normal 22 regulatory practice. So to read the 23 directive as mandating that Newfoundland 24 Power’s return be applied in respect of 25 2014, a year for which Hydro did not apply</p>	<p style="text-align: right;">Page 96</p> <p>1 not mandate that Hydro’s return can only be 2 adjusted after a Hydro GRA, in my view, did 3 not cut down on the Board’s ability to 4 fashion an adjustment mechanism, and at the 5 hearing, I thought that Hydro had conceded 6 that the Board would have the jurisdiction 7 to change Hydro’s return on equity by way of 8 an automatic adjustment formula in the event 9 that Newfoundland Power’s target rate was 10 changed. Certainly that approach would much 11 better ensure that Hydro’s return on equity 12 tracked the ROE most recently set for 13 Newfoundland Power, which seems to be at the 14 heart of the issue in the Order in Council. 15 I think it would be far better. We have a 16 case now on the immediate horizon with 17 Newfoundland Power, and certainly from a 18 policy standpoint, it certainly makes sense 19 to have an adjustment so we don’t get the 20 two returns being out of step, seeing that 21 the province has entered the field on this 22 matter. 23 As regards the corporate structure, the 24 Board has asked the parties to address what 25 remedial actions can and should the Board</p>

<p style="text-align: right;">Page 97</p> <p>1 consider in respect of any deficiency that 2 may be determined by the Board to exist as 3 regards the transparency, clarity, and 4 effectiveness of the current organizational 5 structure, as well as certain practices as 6 regards inter-company charges. 7 Let me take the last part first, what 8 the Board can and should do regarding 9 deficiencies as regards inter-company 10 charges. The Consumer Advocate has called 11 for revenue requirement reductions to 12 address the fully burdening issue, and the 13 issue pertaining to the fact that all of the 14 personnel providing core shared services for 15 Nalcor’s line of business are Hydro 16 employees. Because these costs are 17 allocated based on total FTEs of the Nalcor 18 group, more of the cost of common services 19 are allocated to Hydro. It would not be 20 proper for the Board, in my judgment, to 21 dictate that these employees should be taken 22 off Hydro’s employment rolls, but it is 23 certainly legitimate to order a revenue 24 requirement reduction as if these employees 25 were based in the parent. The Consumer</p>	<p style="text-align: right;">Page 99</p> <p>1 As the Board put it in its Order PU-14-2004 2 at page 27, “The role of the Board is not to 3 exercise managerial influence, but to ensure 4 appropriate reporting/compliance mechanisms 5 are in place such that regulatory objectives 6 are met”. 7 In our brief, we pointed to a number of 8 concerns. We said while Hydro remains part 9 of its matrix organization, there must be 10 clearly known and applicable rules governing 11 the identification and resolution of 12 conflicts. The Board can and should order 13 Hydro to develop and file strict rules 14 regarding these matters. As a parallel, the 15 Board in Newfoundland Power’s 2007 GRA Order 16 accepted the Consumer Advocate’s proposal 17 for the utility to develop a formal code of 18 conduct for affiliates. So this is clearly 19 within the power of the Board. 20 Another concern that we highlighted 21 with the matrix model is that in our 22 judgement it diluted executive focus on 23 Hydro. The Board cannot dictate, in our 24 view, how Hydro organizes itself, but it can 25 get alignment on the performance indicators</p>
<p style="text-align: right;">Page 98</p> <p>1 Advocate has also called for Hydro to be 2 ordered to charge a markup in respect of 3 certain services it provides to Nalcor and 4 related businesses. I won’t revisit the 5 reasons for this request, as they are set 6 out in the brief, but the point here is that 7 the Board certainly has the power to ensure 8 a markup is at least reflected in customer 9 rates. In that regard, I note that in 10 Newfoundland Power’s 2007 GRA and the order 11 following same, the Board ordered 12 Newfoundland Power to file a fair market 13 value determination for insurance services 14 provided by Newfoundland Power to Fortis 15 affiliates with an appropriate charge out 16 rate to be recommended. 17 Now going back to what the Board can 18 and should do as regards any deficiencies 19 found in regards to transparency, clarity, 20 and effectiveness of the matrix 21 organizational structure, as the Board has 22 noted in past GRA orders, the Court of 23 Appeal has stated that the Board can be 24 regulative and corrective, but not 25 managerial in its management of a utility.</p>	<p style="text-align: right;">Page 100</p> <p>1 that are reported to it, so that the Board 2 can monitor what the utility is measuring 3 itself against. I note that the Board in 4 its 2004 GRA Order ordered Hydro, amongst 5 other things, to report on initiatives 6 targeting productivity or efficiency 7 improvements and the like. So these are 8 certainly matters that can, and in our 9 judgement should be the subject of such 10 orders. 11 As regards the fuel price to be used, I 12 would just end by saying that as regards 13 2016, these certainly should be as up to 14 date as we can get them. Hydro has 15 indicated a willingness to have these 16 updated. That would be a welcome and 17 advisable thing to do, and as regards 2014 18 and 2015, again we would, for the sake of 19 brevity on the point, align ourselves with 20 what Newfoundland Power has said on the 21 matter this morning. I guess, I would just 22 finally like to echo my friend, Mr. 23 O’Brien’s comments, I’d like to thank the 24 Board and the Board staff, and the other 25 parties for everybody’s constructive role in</p>

Page 101	<p>1 the hearing. Thank you very much.</p> <p>2 CHAIRMAN:</p> <p>3 Q. Thank you. Sir, you are on.</p> <p>4 MR. COXWORTHY:</p> <p>5 Q. Thank you, Mr. Chair. Mr. Chair, I'll start</p> <p>6 with the first set of issues that the Board</p> <p>7 has asked the parties to address with</p> <p>8 respect to the test year, and it's been</p> <p>9 referred to and perhaps it does not need to</p> <p>10 be referred to at length, but I do feel the</p> <p>11 need to turn to the stated case which has</p> <p>12 been filed, I think, as Tab 2 to Hydro's</p> <p>13 authorities today. It is, I think, and</p> <p>14 still remains the foundational document for</p> <p>15 this Board in considering the scope of its</p> <p>16 authority and discretion to grant the type</p> <p>17 of relief that Hydro is requesting in</p> <p>18 relation to the 2014 test year that its</p> <p>19 proposed and the 2015.</p> <p>20 So if I could refer to paragraph 18 of</p> <p>21 the stated case, and, of course, the Court</p> <p>22 of Appeal there warns against supplying a</p> <p>23 two literal or technocratic interpretation</p> <p>24 of the Act, the Public Utilities Act, and</p> <p>25 favour an interpretation that will advance</p>	Page 103	<p>1 think the important ones to the issues that</p> <p>2 the Board has asked us to speak to in</p> <p>3 respect of the test year are number two and</p> <p>4 number five, but the Board has a broad</p> <p>5 discretion and hence a large jurisdiction in</p> <p>6 its choice of methodologies and approaches</p> <p>7 to be adopted to achieve the purposes of the</p> <p>8 legislation and to implement the provincial</p> <p>9 power policy. In fact, although I said two</p> <p>10 and five, I think three follows, principle</p> <p>11 number three, that the failure to identify a</p> <p>12 specific statutory power in the Board to</p> <p>13 undertake a particularly impugned action</p> <p>14 does not mean that the jurisdiction of the</p> <p>15 Board is thereby prescribed. In other</p> <p>16 words, we need to be careful not to put the</p> <p>17 blinders on too much in terms of what the</p> <p>18 Act says and what it doesn't say, and look</p> <p>19 at it in the broader context of what is the</p> <p>20 legislation trying to achieve, and in</p> <p>21 principle five, I think, in the context –</p> <p>22 because this is the issue that Hydro has</p> <p>23 brought to the Board and has asked the Board</p> <p>24 to grant relief on, and that is will it be</p> <p>25 earning a just and reasonable rate of return</p>
Page 102	<p>1 the underlying purpose of the legislation,</p> <p>2 the Public Utilities Act, as well as the</p> <p>3 power policy of the province, which is</p> <p>4 expressed in the Electrical Power Control</p> <p>5 Act, but also in Orders in Council that have</p> <p>6 been issued by government, and be consistent</p> <p>7 with generally accepted and sound public</p> <p>8 utility practice. So we have a three-legged</p> <p>9 stool, as I would propose to use on a homely</p> <p>10 analogy. One doesn't dominate over the</p> <p>11 other or certainly can't be ignored;</p> <p>12 otherwise, the stool doesn't stand. So all</p> <p>13 three need to be considered, need to be</p> <p>14 balanced against each other.</p> <p>15 So the consistent with generally</p> <p>16 accepted sound public utility practice is</p> <p>17 important. It's also important to consider</p> <p>18 it in light of the direction to the Board</p> <p>19 provided by legislation and by the Orders in</p> <p>20 Council.</p> <p>21 I'd like to then turn to paragraph 36</p> <p>22 in the stated case, and the Court of Appeal,</p> <p>23 after its review of the case law, stated</p> <p>24 some general principles to be used in the</p> <p>25 interpretation of the legislation, and I</p>	Page 104	<p>1 in 2014 and 2015. So principle five speak</p> <p>2 to this, "The setting of a just and</p> <p>3 reasonable rate of return is of fundamental</p> <p>4 importance to the utility, just always be an</p> <p>5 important focus of the Board's</p> <p>6 deliberations", however, and I think this</p> <p>7 goes to the point that's been made by my</p> <p>8 other learned friends here today, "The</p> <p>9 entitlement of the utility to adjust a</p> <p>10 reasonable rate of return does not guarantee</p> <p>11 that level of return". The entitlement is</p> <p>12 to have the Board address that issue and</p> <p>13 make its best prospective estimate based on</p> <p>14 its full consideration of all available</p> <p>15 evidence for the purpose of setting rates,</p> <p>16 tolls, and charges. So that's the</p> <p>17 entitlement. I think it's certainly</p> <p>18 consistent, I would submit, with the</p> <p>19 submission that have been made by my</p> <p>20 friends, Newfoundland Power, and the</p> <p>21 Consumer Advocate, that least generally</p> <p>22 speaking, when we think about a just and</p> <p>23 reasonable rate of return for Hydro, it's a</p> <p>24 prospective looking forward exercise. It's</p> <p>25 also to be one that's based on full</p>

Page 105	<p>1 consideration of all available evidence.</p> <p>2 So on that point with respect to the</p> <p>3 2014 revenue deficiency, it's certainly not</p> <p>4 a prospective exercise. The Board does have</p> <p>5 the ability to consider available evidence</p> <p>6 in relation to that revenue deficiency. The</p> <p>7 Board needs to consider, and in this respect</p> <p>8 I'll refer to the legislation and Section 80</p> <p>9 of the Public Utilities Act, Section 80, Sub</p> <p>10 1, "A public utility is entitled to earn</p> <p>11 annually a just and reasonable return". I</p> <p>12 think the starting point for the Board is</p> <p>13 has Hydro demonstrated by the evidence that</p> <p>14 it will not be earning a just and reasonable</p> <p>15 return in 2014, and I think the test for</p> <p>16 that has been referred to, is the return</p> <p>17 that's going to be earned by Hydro in 2014,</p> <p>18 if there's no change by way of addressing it</p> <p>19 by providing the relief, is it going to be a</p> <p>20 return which undermines its financial</p> <p>21 integrity. That's the first question, and I</p> <p>22 would concur with the submissions of my</p> <p>23 learned friends that there's been no</p> <p>24 evidence presented by Hydro that if its</p> <p>25 return in 2014, if it's not allowed, this</p>	Page 107	<p>1 considered in the context of that original</p> <p>2 filing of the application, and that is that</p> <p>3 the Board is to adopt policies for all</p> <p>4 future general rate applications commencing</p> <p>5 with the first one filed, and although the</p> <p>6 word "filed" is not used there, I think it's</p> <p>7 reasonable to read it into, filed by</p> <p>8 Newfoundland Hydro after January 1, 2009,</p> <p>9 in calculating the return on rate base for</p> <p>10 Newfoundland and Labrador Hydro to set the</p> <p>11 same target return on equity. I think that</p> <p>12 goes back to the words of the Court of</p> <p>13 Appeal that there's no guarantee, it's a</p> <p>14 target, it's a target return on equity. So</p> <p>15 even if this Order in Council is applicable</p> <p>16 to a 2014 revenue deficiency, it is nothing</p> <p>17 more than a target rather than a guarantee,</p> <p>18 and if the only argument that Hydro is</p> <p>19 putting forward is that, look, no, we're</p> <p>20 entitled to 8.8 percent, and whatever has to</p> <p>21 be done to get the numbers to provide us</p> <p>22 with that has to be done, that's not what</p> <p>23 this Order in Council says, even if you</p> <p>24 accept that Hydro could seek a 2014 revenue</p> <p>25 deficiency in the manner that they're</p>
Page 106	<p>1 revenue deficiency that it's seeking for</p> <p>2 2014, that its financial integrity will be</p> <p>3 undermined.</p> <p>4 The second question is, is there</p> <p>5 something in the Order in Council or in</p> <p>6 other direction to this Board which</p> <p>7 indicates that notwithstanding there not</p> <p>8 being a concern with respect to financial</p> <p>9 integrity, that Hydro is entitled to a just</p> <p>10 and reasonable return different from would</p> <p>11 be otherwise the case if the 2014 revenue</p> <p>12 deficiency is not permitted, and that does</p> <p>13 take us, I think, to a consider of the Order</p> <p>14 in Council, 2009-063. I say that because</p> <p>15 the original filing of the general rate</p> <p>16 application that is before you was made in</p> <p>17 2013, was not made in relation to a 2014</p> <p>18 test year, it was made in relation to a</p> <p>19 previous year, but certainly there was an</p> <p>20 intent evidenced by Hydro to proceed with a</p> <p>21 general rate application at that time. The</p> <p>22 application was subsequently amended, and I</p> <p>23 don't think we need to get into in detail</p> <p>24 all the procedural history, but the Order in</p> <p>25 Council does have words that have to be</p>	Page 108	<p>1 seeking it.</p> <p>2 So the Order in Council doesn't require</p> <p>3 this Board to grant the relief of a 2014</p> <p>4 revenue deficiency to Hydro, nor has the</p> <p>5 case been made with respect to financial</p> <p>6 integrity. The Island Industrial Group</p> <p>7 would not go so far as to say, however, that</p> <p>8 in no case could the type of relief that</p> <p>9 Hydro is seeking ever be granted. Hydro has</p> <p>10 not made the case for it in this particular</p> <p>11 circumstance, but can a test year never be</p> <p>12 used for the purpose for which it's seeking</p> <p>13 it; the Island Industrial Customers would</p> <p>14 not go that far, and when we say that, we</p> <p>15 say that referring to the reference in the</p> <p>16 stated case to the Board having large</p> <p>17 discretion, broad discretion, and</p> <p>18 methodologies. So if this Board were to</p> <p>19 come to the conclusion that, in fact, Hydro</p> <p>20 had not earned a just and reasonable return</p> <p>21 in 2014, and the only means of rectifying</p> <p>22 that was by means of the mechanism that</p> <p>23 Hydro has put forward, I think it would be</p> <p>24 wrong at law, based on the stated case, for</p> <p>25 the Board to say we can't do it, we just</p>

<p style="text-align: right;">Page 109</p> <p>1 can't do it because it's not prospective 2 rate making. Again Hydro has not made the 3 case for that in this particular, that it's 4 necessary for them to achieve a just and 5 reasonable return in 2014. A financial 6 integrity case has not been made, the 7 direction to the Board case has not been 8 made in the submission of the Industrial 9 Customers. 10 If you could turn to the specific 11 questions that have been asked by the Board, 12 there is no statutory definition of test 13 year, and we would agree that usually it's 14 in accordance with accepted regulatory 15 practice to use test years to establish 16 prospective rates. Again with reference to 17 the stated case, we wouldn't go so far as to 18 say that means that a test year could not be 19 used for other purposes if the circumstances 20 obtained - Hydro has not made the case in 21 this particular matter that it can be used 22 for those other purposes. 23 With respect to question two, I think 24 it follows from the submissions we made in 25 relation to number one. Number three, yes,</p>	<p style="text-align: right;">Page 111</p> <p>1 that was appropriate, then it could not also 2 be used in the appropriate circumstances to 3 determine credits to customers. 4 With respect to the fourth question, 5 should 2015 be treated the same as 2014 as a 6 deferral account has been established for 7 2015 and rate changes will not be effective 8 until 2016, the Island Industrial Customers 9 are of the view that generally speaking, if 10 a 2014 test year were to be used by the 11 Board or applied by the Board, generally 12 speaking, yes, they would be treated the 13 same. The only exception, which I think has 14 been referred to, is with respect to fuel 15 cost. Fuel cost was addressed in the 2014 16 by operation of the RSP. It's been 17 addressed in 2015 by Hydro's fuel forecast 18 as updated in October, 2015. 19 With respect to the question, should 20 forecast or actual costs be used to 21 determine a revenue deficiency, the Island 22 Industrial Customers feel that, generally 23 speaking, forecast costs should be used, 24 although we would note that the EPCE, 25 Paragraph 3(a)(3) does refer to forecast</p>
<p style="text-align: right;">Page 110</p> <p>1 we would agree with the Consumer Advocate 2 that certainly if there can be recovery 3 based on 2014, forecast for 2015, if that 4 were to be the finding of the Board to 5 determine revenue deficiency, equally how 6 could that not apply if the circumstances 7 were otherwise to justify a credit going 8 back to the customers. I would refer in 9 this regard to Section 3(a) of the EPCA, of 10 the Electrical Power Control Act, and it 11 seems to me that there has to be a 12 balancing. Hydro has an interest under 13 Section 3(a)(iii) to have just and 14 reasonable rates of return. That's also a 15 direction to the Board, and found in Section 16 8 of the Act, but that has to be balanced 17 against the customer's interest under 18 Section 3(a)(i) in rates that are reasonable 19 and the stated case talks about this. The 20 stated case talks about that balancing. I 21 think, bearing in mind that balancing, it 22 certainly cannot be a one-way exercise that 23 if this Board were to use 2014 and 2015 24 forecasts for determining a revenue 25 deficiency, if the Board were to find that</p>	<p style="text-align: right;">Page 112</p> <p>1 costs being used whenever practicable. So 2 the Island Industrial Customers certainly do 3 not feel that it's an absolute purity test 4 that you could never use actual costs. 5 Certainly they should be used to test the 6 reasonableness of forecast costs at minimum. 7 If they're available, they should be tested 8 so that the forecast costs can be tested 9 against the actual costs to see do they fall 10 within a reasonable range. There may be 11 circumstances where it's appropriate to 12 actually use the known actual costs. It's 13 not an absolute purity test that you can 14 only use forecast costs. Again I turn to 15 the reference that's made in the stated case 16 to the Board having reference to all of the 17 available information. So how could the 18 Board not take into account, if it's 19 available, the actual costs, but does that 20 mean it has to substitute, swap out the 21 forecast costs in every category for the 22 actual costs; no, it doesn't mean that. You 23 could, but you don't have to, but it 24 certainly at minimum provides a test to test 25 the reasonableness of the forecast.</p>

<p>Page 113</p> <p>1 With respect to VI, the regulatory 2 practice regarding adjustment of 2015 3 forecast costs and setting 2016 rates up, 4 it's the submission of the Island Industrial 5 Customers that that should be generally 6 avoided, making adjustments in the 2015 7 forecast cost; otherwise, we're going down 8 the slippery slope of using a de facto, an 9 inadequately tested 2016 test year or 10 putting some things in that would otherwise 11 only be used in the context of the full 12 testing of all the issues you would look at 13 in the test year. The RSP is the mechanism 14 to make the adjustments based on factors in 15 future years, such as in 2016. 16 With respect to the Order in Council, 17 I've already spoken to whether it requires 18 the Board to apply a different criteria with 19 respect to what is a reasonable rate of 20 return for Hydro that might otherwise be the 21 case. With respect to the automatic 22 adjustment point, my learned friend, Mr. 23 Cass, has made reference to the fact that 24 the wording of the Order in Council talks 25 about the Board being directed to adopt</p>	<p>Page 115</p> <p>1 Newfoundland Power's rate of return that 2 might occur between Hydro GRAs. The Order 3 in Council does not prohibit that. Whether 4 that's a good idea or not, we haven't seen a 5 model in terms of how that type of mechanism 6 would work. I understand that Newfoundland 7 Power's automatic adjustment mechanism 8 perhaps could be a model for how that would 9 work for Hydro. Today I'm not here to 10 advocate for any particular model or 11 mechanism. I would presume that if this 12 Board does order that such a mechanism 13 should be considered, that there'd be some 14 filing by Hydro and an opportunity for the 15 parties to address any concerns that might 16 arise from the mechanism, but in terms of 17 the law, again the Island Industrial 18 Customers are of the view that there's no 19 absolute impediment to the Board arising out 20 of the Order in Council implementing that 21 type of mechanism if the Board feels that 22 that is appropriate. The other thing to 23 bear in mind, of course, is the importance 24 particularly if such a mechanism is not put 25 in place, of ensuring that we do not have</p>
<p>Page 114</p> <p>1 policies as follows for all future general 2 rate applications, and Mr. Cass has made the 3 submission that that must mean that you can 4 only change the rate of return in a general 5 rate application. I would note that in past 6 general rate applications, this Board has 7 implemented mechanisms, such as the rate 8 stabilization plan, which operate between, 9 in the interim periods between general rate 10 applications, and it's not unknown for a 11 general rate application to use those types 12 of mechanisms. I think when I read the 13 policies as follows for all future general 14 rate applications, I don't see that as 15 language that is reasonably to be 16 interpreted as constraining the Board in 17 using those types of mechanisms; mechanisms 18 that have always been available to it to 19 address changes between general rate 20 applications. 21 So based on that interpretation, I 22 would say that there is no legal impediment 23 in the Order in Council to this Board 24 adopting a mechanism for automatic change of 25 the rate of return based on any change in</p>	<p>Page 116</p> <p>1 long gaps between GRAs. I understand 2 pursuant to settlement agreements that 3 there's an agreement that the GRA be brought 4 forward within a reasonable period of time, 5 within a set and fixed period of time on the 6 next GRA, but that would be a concern that 7 if for some reason that GRA did not proceed 8 at that time, what would be the consequences 9 of not having such an automatic adjustment 10 mechanism in place. 11 With respect to Hydro's corporate 12 structure, certainly the Island Industrial 13 Customers would agree with the position 14 expressed by Newfoundland Power and by the 15 Consumer Advocate that this Board doesn't 16 have the authority, the jurisdiction, to 17 mandate or require a particular corporate 18 structure to say that Hydro shouldn't or 19 can't participate in a matrix type 20 organization with its parent, Nalcor. We 21 would agree that those are not issues with 22 the purview of this Board. By way of the 23 submissions that were filed by the Island 24 Industrial Customer group, we made what we 25 thought was a fairly modest proposal for</p>

<p style="text-align: right;">Page 117</p> <p>1 more transparent policies and tracking of 2 charge ins to Hydro from Nalcor and its 3 subsidiaries in respect of the Muskrat Falls 4 Exemption Order, and the direction in that 5 order that certain costs were not to be 6 included in rates, and again today I'm not 7 here to interpret exactly what those costs 8 are. There's been no filings made in 9 respect of what they are, whether they've 10 been incurred yet, when they might start to 11 be incurred, but certainly there's clear 12 direction in that Exemption Order that 13 there's something that isn't to be included 14 in rates, and I think identifying, having 15 Hydro identify what they understand that 16 something to be, and reporting on that 17 something and tracking on those costs is 18 something that's appropriate to do and it's 19 appropriate to start doing from this GRA, so 20 that when we come back before this Board in 21 the next GRA, that information is available, 22 doesn't have to be reconstructed after the 23 fact, it's available in a way that everyone 24 will understand what the rules were that 25 applied to the tracking of that information,</p>	<p style="text-align: right;">Page 119</p> <p>1 is a reasonable proposal to make and for 2 Hydro to seek to implement before the next 3 GRA. 4 With respect to the 2014, 2015, 2016 5 fuel price, again we would agree with the 6 submissions of Newfoundland Power that Hydro 7 certainly shouldn't be entitled to anything 8 more in terms of fuel price than what would 9 be expected would be the normal case under 10 the RSP. With respect to 2014, that is how 11 that fuel price has already been adjusted. 12 With respect to 2015, the Industrial 13 Customers are satisfied with the forecast 14 cost as adjusted in October of 2015. If 15 there's a further adjustment that comes 16 forward, that may be appropriate as well, 17 but the Industrial Customers are not 18 opposing fuel price being determined on that 19 basis. For 2016, we would expect that there 20 would be a revision of the RSP rider as part 21 of the compliance applications that will be 22 filed by Hydro coming out of the GRA 23 decision, which will set the appropriate 24 fuel price rider for 2016 based on market 25 prices at that time.</p>
<p style="text-align: right;">Page 118</p> <p>1 and we go beyond that to say, look, not just 2 that Exemption Order cost, but all the 3 integration costs, and I use integration in 4 the sense that it was used by Hydro's 5 witnesses throughout the GRA. The cost 6 involved with integrating Hydro's 7 organization with the upcoming Muskrat Falls 8 in-feed, and the Maritime Link, the Labrador 9 Link, that is all that the Island Industrial 10 Customers have proposed in terms of 11 tracking. Obviously, there are other costs 12 that are charged in from Nalcor subsidiaries 13 to Hydro. There are other policies perhaps 14 that could be adopted, such as the Consumer 15 Advocate has indicated with respect to 16 conflict, and the Island Industrial 17 Customers certainly are not opposed to that, 18 but from the Island Industrial Customers 19 point of view, at least a modest start to 20 tracking costs that are being incurred. If 21 they're not being incurred now, they're 22 going to be incurred in the very near future 23 at least in respect of one category of them. 24 There's been direction from government that 25 it's not to be included in rates, but that</p>	<p style="text-align: right;">Page 120</p> <p>1 There is one other issue which I don't 2 want to belabour, but I do want to raise it 3 and that's the question of award of costs to 4 the parties in this GRA hearing. Hydro, in 5 their reply or rebuttal document, made 6 reference, and I believe it's the first 7 reference on the record to the Board, as I 8 understand it, perhaps re-examining the 9 manner in which it has awarded costs, and I 10 believe it was directed – Hydro's submission 11 were directed to the interveners, and 12 awarded costs to interveners and there was 13 provided to the Board as part of that reply 14 a rule that has been implemented in Alberta 15 by the Alberta Utilities Commission in 16 respect to award of costs. We have filed a 17 case, a 2014 case, the ATCO decision, and 18 the purpose of filing that, and again I 19 don't want to spend a lot of time on it 20 because my ultimate submission will be that 21 if the Board does feel that there needs to 22 be time spent on it, that there should be a 23 separate process to establish that, but the 24 point we wanted to make by filing the ATCO 25 decision, and I think it can be made in a</p>

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1 reasonably brief fashion, is that it's not a
 2 matter of simply looking at Rule 22 or it
 3 oughtn't to be a matter of simply looking at
 4 Rule 22 as filed by the Board, and sort of
 5 picking and choosing out of that, oh, that
 6 looks like a good idea, let's use that, and
 7 this other stuff over there, maybe we don't
 8 need to. It's part of a comprehensive
 9 scheme in Alberta with respect to costs; not
 10 only costs of interveners, but costs of the
 11 utility, and if you look through what's been
 12 filed by Hydro, you will see that that rule
 13 doesn't just apply to interveners, it
 14 applies to the applicant, and the applicant
 15 has certain obligations as well. We are not
 16 suggesting that in this GRA at the end of
 17 the GRA process that this Board should be
 18 adopting those types of rules either for
 19 Hydro or for the interveners. We think that
 20 that would be procedurally unfair to do that
 21 at the end of the GRA process. If you look
 22 at Rule 22, you will see that there is a
 23 line in there that says, "This is to apply
 24 to future general rate applications", and
 25 certainly if this Board feels that there is

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1 value in setting rules or guidelines around
 2 award of costs, and we would submit not just
 3 to interveners, but also in respect of
 4 Hydro's costs to the extent that those are
 5 recovered from customers, that a separate
 6 process, whether as part of this GRA or
 7 subsequent to this GRA, but prior to the
 8 next GRA where all parties would have an
 9 opportunity to put in input on that would be
 10 appropriate. Certainly, I will conclude by
 11 saying that the Island Industrial Customers
 12 would submit that it would be procedurally
 13 unfair to at the end of a hearing process
 14 apply the type of rules that they have in
 15 Alberta, which are part of a legislative
 16 scheme, which the legislature has
 17 specifically authorized the Board to make
 18 regulations about awarding of costs to
 19 interveners, and the legislative scheme here
 20 in Newfoundland is different. Newfoundland
 21 and Labrador is different. Again I don't
 22 want to get into interpretation, but I think
 23 that would have to be considered through a
 24 due process before the types of rules for
 25 awarding of costs like they have in Alberta

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1 could be adopted in this jurisdiction.
 2 Thank you, Mr. Chair, Commissioners, those
 3 are our submissions.
 4 CHAIRMAN:
 5 Q. Mr. Fleming, sir.
 6 MR. FLEMING:
 7 Q. Thank you. First of all, I'd like to start
 8 by thanking the Board, the Board staff, and
 9 all the parties for all their efforts in
 10 making this hearing run so efficiently. At
 11 times it might have seemed to us like it
 12 would never end, but I think we can all
 13 agree that it ran very, very well
 14 procedurally. Vale adopts and supports the
 15 submissions of those who came before them
 16 today –
 17 MS. GLYNN:
 18 Q. Mr. Fleming, can you speak further into the
 19 mic. I don't think we can hear you –
 20 MR. FLEMING:
 21 Q. Can't hear me. It's the second time I've
 22 heard that complaint, and both times it's
 23 been here.
 24 CHAIRMAN:
 25 Q. You're worthy of being heard, you know.

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1 MR. FLEMING:
 2 Q. I don't have a lot to say today, thankfully.
 3 We support the – on each of the issues, the
 4 parties seem to be pretty much in alignment.
 5 On issue one, the Industrial Customers
 6 raises a point about whether revenue
 7 deficiency could ever be collected in such a
 8 manner as is being proposed by Hydro.
 9 Putting that aside, we support the
 10 submissions of those who came before us on
 11 each of the four issues, and, of course, the
 12 other interveners.
 13 The only thing that I'd like to discuss
 14 very briefly is the interpretation of the
 15 Order in Council which was issued. In
 16 Hydro's submissions, it was focused on the
 17 portion of the Order in Council that states
 18 that this Order in Council commences with
 19 the first general rate application. While
 20 that part of the Order speaks of the timing
 21 of when the order is to come into effect,
 22 the preceding sentence says it's for all
 23 future general rate applications, and as
 24 pointed out by both Newfoundland Power and
 25 the Industrial Customer, the revenue

<p style="text-align: right;">Page 125</p> <p>1 deficiency applications here were not 2 general rate applications. So regardless of 3 when this Order in Council, or this policy 4 in the Order in Council was to commence, it 5 shouldn't be used for revenue deficiency 6 applications as Hydro is proposing in the 7 applications brought at the same time as the 8 2013 amended general rate application. So 9 subject to that, we have no further comments 10 on the four issues.</p> <p>11 CHAIRMAN: 12 Q. Okay, sir. Mr. Luk, you're next.</p> <p>13 MR. LUK: 14 Q. Good afternoon. Thank you, Mr. Chair, thank 15 you, Commissioners. Innu Nation doesn't 16 have any submissions to make with respect to 17 the four issues stated by the Board, but we 18 do have one brief submission with respect to 19 another issue, which is the Labrador 20 industrial transmission rate, approval for 21 which Hydro is applying for the first time 22 at this GRA. Now just generally speaking, 23 transmission rates are meant to capture cost 24 causation for transmission infrastructure, 25 and the rate that Hydro is applying for is</p>	<p style="text-align: right;">Page 127</p> <p>1 the rate does not account for the fact that 2 the new customer requires new capital cost 3 in order to be served. In effect, the rate, 4 as proposed by Hydro, would permit a new 5 customer to pass on their network upgrade 6 costs to existing customers. All this was 7 presented in Innu Nation's evidence. I draw 8 your particular attention, Commissioners, to 9 the testimony of Mr. Raphals on September 10 29th at page 19 of the transcripts, as well 11 as Section 4.2.2 of his evidence, and I'd 12 like to note that that evidence has not been 13 controverted or impeached by any party, and 14 it's square before the Board, and it's 15 squarely before the Board to the effect that 16 the rate as proposed does cause potential 17 risks to existing users in terms of new 18 customers imposing their transmission costs 19 upon existing users. What's new in this 20 puzzle is Hydro's reply at page 82 to the 21 extent that they're acknowledging that the 22 Labrador industrial transmission rate, as 23 applied for, does not address the demand 24 arising from interruptible loads. As I said 25 before, as we submitted before, the rate</p>
<p style="text-align: right;">Page 126</p> <p>1 quite simple. It only contains one 2 variable. The rate depends on that one 3 variable and that one variable is firm 4 demand, and you can see that at the Table 5 4.14 at page 4.48 of the application. I 6 think that page has been before the 7 Commissioners before, so I don't need to 8 bring you back to that. Basically, in 9 essence, the higher the firm demand, the 10 higher the transmission rate. Now Innu 11 Nation has let evidence to the effect that 12 transmission rates can be tricky things that 13 can potentially burden existing users with a 14 cost generated by new customers on that 15 rate. Now if there are no new customers, 16 then the rate as proposed is not 17 problematic, customers pay according to the 18 amount of firm demand that they require, but 19 the problem arises when a new customer 20 enters the scene. They require network 21 upgrades like new transmission assets and 22 the cost of these new transmission assets 23 would be recovered through the transmission 24 rate. However, if the transmission rate is 25 as proposed, only dependent on firm demand,</p>	<p style="text-align: right;">Page 128</p> <p>1 they're applying for contains only one 2 variable, that's firm demand. It doesn't 3 even take into account interruptible demand. 4 So we submit that Hydro's reply is an 5 implicit acknowledgement that the rate that 6 they have applied for is problematic in that 7 it's too simple. They have acknowledged 8 this as a problem and they're suggesting 9 that they will rectify it by filing a 10 further application some time in January 11 2016 to included interruptible load as a 12 factor in the transmission rate. So Innu 13 Nation supports this further refinement of 14 the transmission rate to include 15 interruptible load, but we submit that 16 further refinements are necessary to the 17 rate as proposed. So among other issues, 18 the design of the rate must protect existing 19 customers from the network upgrade costs 20 caused by new customers. Mr. Raphals gave 21 evidence both in his report and his life 22 examination about the "higher of policy" 23 under the FERC regulatory framework in the 24 US. In this framework, a new customer must 25 pay the higher rate, the higher of the</p>

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1 incremental cost or the imbedded cost of the
 2 upgrade. So if the imbedded cost is higher
 3 to the new customer, then that’s what the
 4 new customer pays. If the incremental cost
 5 is higher to the customer, then that’s what
 6 the new customer pays. There’s a succinct
 7 explanation of that in Appendix “A” of Mr.
 8 Raphals evidence, which is quoting from
 9 evidence given before the Regis in Quebec
 10 about what this FERC policy entails. So
 11 I’ll just read from it briefly, “At the time
 12 of restructuring, FERC’s primary policy
 13 objective was to ensure that transmission
 14 providers offered non-discriminatory, open
 15 access to the transmission network,
 16 particularly for customers that were not
 17 traditional native load. However, since
 18 native load customers prior to restructuring
 19 had funded and were going to continue to
 20 fund the infrastructure that made the
 21 delivery of power to them possible, FERC
 22 also wanted to ensure that existing
 23 transmission users would not be unduly
 24 harmed by cost imposed by customers
 25 requesting transmission service involving

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1 network upgrades that could increase the
 2 imbedded cost of the system. Thus, FERC’s
 3 initial higher up policy was designed to
 4 ensure that existing and growing need of
 5 load was protected while the wholesale
 6 market developed, allowing new customers to
 7 interconnect through the existing
 8 transmission network that was predominantly
 9 funded by existing native load. In a policy
 10 statement in the mid 1990s, FERC stated that
 11 one of the goals of its new pricing policy
 12 was to hold native load customers harmless”.
 13 So we submit that the FERC policy would be
 14 one option for the Board to consider in
 15 designing a transmission – approving of a
 16 transmission rate designed by Hydro in the
 17 Labrador system, but prior to that, prior to
 18 approving of a transmission rate generally,
 19 we submit that this rate that Hydro is
 20 applying for currently is too incomplete to
 21 be approved of, except for on only a
 22 provisional basis. So what we would submit
 23 is that the Board should order Hydro to
 24 submit a Labrador transmission rate that
 25 protects existing customers from cost

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1 incurred by new customers. Short of doing
 2 that, if the Board approves the existing
 3 rate, then any new entrants to the Labrador
 4 system does point cost to existing customers
 5 at risk. Now we understand that Hydro is
 6 due to enter a new GRA process in the not
 7 too distant future, and that’s why we
 8 submitted that it would be acceptable for
 9 the Board to approve the rate as applied for
 10 by Hydro only provisionally until the next
 11 GRA, so that in the short time between the
 12 approval of these rates and the next GRA,
 13 there is a risk of a new entrant coming into
 14 the market and imposing their cost on
 15 existing customers, but that risk would not
 16 be so great, given the short time frame
 17 until the next GRA. So we submit that until
 18 Hydro submits a rate that does take into
 19 account the potential risk to existing
 20 customers, the Board can ask Hydro to submit
 21 a rate that does protect existing customers
 22 or to conduct a hearing to fully assess what
 23 kind of rate would be required to achieve
 24 that objective, but until those steps are
 25 made, that the approval of the transmission

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1 rate be only provisional, and that Hydro’s
 2 amendment to its transmission rate that it
 3 is proposing to make some time in January,
 4 2016, also be only approved provisionally
 5 until there is fuller information on the
 6 impacts of a transmission rate on existing
 7 customers. So those are Innu Nation’s
 8 submission on this issue, and I’d like to
 9 conclude by thanking the Board and all
 10 counsel for a very collegial relationship
 11 that has made the progress of this hearing
 12 very efficient and pleasant. Thank you.
 13 CHAIRMAN:
 14 Q. Thank you. So have we got questions up here?
 15 Do I go here or go to you? I thought you
 16 had the last kick at the cat.
 17 MR. YOUNG:
 18 Q. We normally would. Mr. Chair, I wonder if
 19 we could have a brief, and I mean a brief
 20 moment to speak about the matters that have
 21 been raised before I give what I think is
 22 going to be a brief response.
 23 CHAIRMAN:
 24 Q. Okay.
 25 (RECESS)

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1 CHAIRMAN:
 2 Q. I guess, I'm going to go to our
 3 Commissioners. Oh, I'm sorry, you got
 4 something you want to say?
 5 MR. CASS:
 6 Q. We do, Mr. Chair, thank you. I propose to
 7 touch on a few areas in reply to the
 8 submissions that the Board has heard from
 9 others. I will try to make this quick. The
 10 first thing that I wanted to do was to go
 11 back to where I started with my initial
 12 submissions which was the statute. In fact,
 13 Mr. Coxworthy did that, so I don't need to
 14 spend much time on it. As I was listening
 15 to the submissions of others, I heard
 16 statements and I noted a number of
 17 statements that, in my view, are not in line
 18 with what the statute indicates. For
 19 example, I heard a statement of rates must
 20 be set on a prospective basis. In my
 21 submission, Mr. Chair, while rates are set
 22 going forward, the statute is very clear
 23 that for the purposes of setting those
 24 rates, forecast costs are to be used where
 25 practicable. The fact that they're to be

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1 used where practicable in itself implies
 2 that where it's not practicable, that
 3 forecast costs don't necessarily have to be
 4 used. So against that background of what
 5 the statute says, and again I reiterate that
 6 it makes clear that it can be one or more
 7 years of costs that the Board can look at,
 8 I'd like to take that then and put it into
 9 the context of the circumstances of this
 10 case. As the Board knows, Hydro made a
 11 filing in 2013 for a 2013 test year to give
 12 effect to rates as of January 1st, 2014.
 13 Hydro's witnesses explained during the
 14 testimony, the oral testimony, that costs
 15 emerged starting in 2014 put pressure on
 16 Hydro that it could not accommodate within
 17 the filing. The witnesses indicated that
 18 Hydro considered should it have back to back
 19 applications or perhaps even back, to back,
 20 to back applications, or should it amend.
 21 Hydro chose the latter course of action, it
 22 chose to amend. The important thing I would
 23 like to stress here, Mr. Chair, is we heard
 24 the word "abandonment" or "abandoned".
 25 Hydro did not abandon anything in respect of

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1 2014. Quite the contrary, it was the cost
 2 pressures emerging in 2014 that were
 3 underlying Hydro's amendment. The amendment
 4 was discussed with parties at the time. If
 5 there was ever any suggestion that the
 6 amendment would disentitle Hydro to relief
 7 in respect to 2014, Hydro would not have
 8 done it, it would have proceeded with the
 9 back to back applications. Hydro's very
 10 intent was to address these emerging cost
 11 pressures in 2014. So with that background
 12 and the circumstances of the case, I would
 13 just like to move to my next point, which is
 14 what are the tools to deal with such
 15 circumstances.
 16 First I'd like to make the observation
 17 that I believe it can be fairly said that
 18 the circumstances of major rate cases tend
 19 to be different. We wouldn't all be here if
 20 the circumstances were the same. The cases
 21 tend to have their own circumstances, and
 22 it's hard to find two cases that are exactly
 23 the same on their circumstances. In my
 24 submission, though, the tools – if I can use
 25 the word "tools", regulatory tools are more

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1 or less the same in regulatory practice. It
 2 might be more accurate to talk about what's
 3 in the Board's jurisdiction to do, but I'll
 4 just use the word "tools". So given the
 5 circumstances that I've described that Hydro
 6 had this application with a 2013 test year,
 7 based on government directive, and emerging
 8 cost pressures in 2014, does that mean that
 9 Hydro was just out of luck when 2014 came
 10 around, or is there jurisdiction in the
 11 Board, are there regulatory tools that would
 12 allow the Board to address that by way of
 13 Hydro coming forward with its costs for 2014
 14 and 2015. My submission is that there are
 15 tools available to the Board. It's up to
 16 the Board to decide whether the costs are
 17 justified and so on, but it's a matter of
 18 jurisdiction there are tools available to
 19 the Board. I apologize for saying it so
 20 many times, the statute does not require
 21 forecast costs where it's not practicable.
 22 The Board can look at costs other than
 23 forecast costs. Second, rates are interim
 24 in this case and have been interim, and the
 25 authorities are clear about the jurisdiction

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1 that that gives a regulator to make a final
 2 determination as to the merits of cost and
 3 then do something that might otherwise
 4 appear to be retrospective, but to use the
 5 interim rates as a basis to implement its
 6 final determination on the merits, and
 7 deferral accounts are a similar sort of
 8 tool. As I mentioned in my initial
 9 submissions, the decision of the Court of
 10 Appeal in the 2012 case refers to both of
 11 these as being tools that are widely used
 12 and that do not give rise to the usual
 13 concerns about retroactivity or
 14 retrospectivity. Mr. Coxworthy has also
 15 pointed out that in addition to those tools
 16 the state cases confirms the Board's broad
 17 discretion and large jurisdiction in the
 18 choice of methodologies and approaches to be
 19 adopted to achieve the purposes of the
 20 statute. In my submission, in the
 21 circumstances that Hydro found itself in
 22 2014, there are and continue to be tools for
 23 the Board to address those.
 24 Just a couple of other points before I
 25 finish, and Mr. Young would like to add

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1 something as well, I think, but it will be
 2 very brief. Mr. Johnson asked for a request
 3 to comment on the regulatory decisions that
 4 were brought forward. Of course, it's
 5 helpful to the Board and there's no
 6 objection to it, I just wanted to explain
 7 the regulatory cases were brought forward
 8 largely because the Board had asked in its
 9 questions – a number of its questions talked
 10 about regulatory practice and also seemed to
 11 touch on use of actual costs when costs are
 12 presented on a forecast basis, but then
 13 actual costs become available. The cases
 14 were put forward as an attempt to respond to
 15 the Board's request for regulatory practice
 16 to look at. Hydro's real emphasis, though,
 17 is not on that. It's on these tools that
 18 I've described to you, and I don't need to
 19 repeat those submissions. The real emphasis
 20 is does the Board have the tools, and in my
 21 submission, yes, it does, and they're the
 22 ones that I've described. Finally, with
 23 respect to the Order in Council, there's
 24 been an attempt to split out 2014 and say,
 25 well, that's not a general rate application,

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1 and to put it into a special category. In
 2 my submission, Mr. Chair, and panel members,
 3 there is only one general rate application
 4 here and it always has been only one general
 5 rate application. Yes, it was amended, but
 6 it is a general rate application first filed
 7 in 2013. It's not like one piece of this is
 8 not a general rate application, it's all the
 9 general rate application. Thank you for
 10 your patience.
 11 CHAIRMAN:
 12 Q. Mr. Young.
 13 MR. YOUNG:
 14 Q. Thank you, Mr. Chair. I just want to deal
 15 with two matters. The first matter is Mr.
 16 Luk's comment about the Labrador
 17 transmission rate and he's pointed out
 18 something which I think we would
 19 acknowledge, that the nature of the rate is
 20 perhaps too simplistic and doesn't consider
 21 some of the factors and some of the
 22 considerations that may be upon us in the
 23 future, and I say that may be upon us in the
 24 future because the circumstance of costs in
 25 the Labrador transmission system at present

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1 are fairly linear and fairly simple, and the
 2 way we have proposed to deal with them even
 3 though we are going to make a filing in the
 4 near future, I'm not sure it's going to be
 5 there by the end of the month, but it's
 6 going to be there soon, to make a slight
 7 change to it, but we are alive to the points
 8 that Mr. Luk raises, and as our facts
 9 change, we will be having to look at those
 10 issues and consider whether or not some of
 11 the principles he's referred to have to be
 12 incorporated. I think it's just premature,
 13 but we don't disagree in principle with the
 14 nature of the issues he's raised, and, in
 15 fact, we look forward to dealing with Mr.
 16 Luk and other customer groups in the
 17 Labrador Interconnected System when that
 18 time comes, and I do expect that time will
 19 come in the next few years because things
 20 will obviously become more complex in that
 21 regard as the system changes. The only
 22 other thing I would like to say, Mr. Chair,
 23 is really to reiterate some of the comments
 24 my learned friends have mentioned; it's been
 25 a long hearing, we very much appreciate

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1 everyone’s patience, we very much appreciate
 2 the fact that throughout everyone has been
 3 courteous, the Board, the Board staff, all
 4 the people representing all the customers,
 5 completely professional, and that’s not easy
 6 when you’re on such a long voyage to stay as
 7 friendly and as sensible as we all have
 8 been. I would like to extend out
 9 appreciation on that point.

10 CHAIRMAN:
 11 Q. A measure of great commonsense, you’re
 12 saying. We got some questions up here now.

13 MS. NEWMAN:
 14 Q. I have one question of Hydro. I wondered if
 15 you could clarify your position on the
 16 impact of the Order in Council as it relates
 17 to the rate of return of Hydro in each of
 18 the three years for 2014, 2015, and 2016, in
 19 terms of if the Board decides that some of
 20 the expenses haven’t been justified as being
 21 fully reasonable or prudent and decides that
 22 they should be reduced, this may impact the
 23 ultimate return enjoyed by Hydro for each of
 24 those years, and whether Hydro believes the
 25 Board doesn’t have that jurisdiction because

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1 of the OC or for some other reason?

2 MR. CASS:
 3 Q. Ms. Newman, if I could address it in this
 4 way. In my mind, the Board’s consideration
 5 of whether expenses can or should be
 6 disallowed is separate from the opportunity
 7 to earn a fair return issue. If the Board
 8 decides on the evidence before it that
 9 certain expenses are not reasonable and
 10 should be disallowed, that does not go to
 11 the return. Where there was some issue
 12 about the return, there were some
 13 suggestions actually take money out of the
 14 return, for example, to fund the rural
 15 deficit, that I would say is quite
 16 different. If the suggestion is, oh, you
 17 can take money out of the return to do this,
 18 I’d suggest that that is something that
 19 cannot be done. That is essentially
 20 indirectly not approving the return by
 21 deducting from it, but, no, the potential
 22 disallowance of expenses that are not
 23 reasonable or prudent does not say that
 24 there’s not an opportunity to earn the
 25 return.

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1 MS. NEWMAN:
 2 Q. Thank you very much.

3 VICE-CHAIR WHALEN:
 4 Q. I didn’t think I had a question, but now I’m
 5 not sure.

6 MR. CASS:
 7 Q. Did I make that very confusing? I’m sorry.
 8 I didn’t intend to make that confusing.

9 VICE-CHAIR WHALEN:
 10 Q. I think the record is – I think it will be
 11 fine. Thank you, it’s been very helpful.

12 CHAIRMAN:
 13 Q. I think I can say with some confidence that
 14 we may be at the end of the road. I think
 15 we’ve pretty well canvassed everything, so I
 16 thank everybody, and although I always
 17 remember what Dan Quail said that the
 18 universe is almost infinite, this may go on
 19 forever, but we don’t know, we’ll see.
 20 Thank you, everybody. Mr. Johnson.

21 JOHNSON, Q.C.:
 22 Q. Yes, just on my point –

23 CHAIRMAN:
 24 Q. Yes, that will be attended to. I think
 25 everybody has agreed that the matter you

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1 raised would be addressed, and you lawyers
 2 can get together and talk about that. It
 3 has been an interesting prospective. The
 4 prospect of a decision is – I don’t know
 5 where you came up with practicable, but I
 6 assume it’s an adverb, is it.

7 MR. CASS:
 8 Q. That’s my best effort to pronounce what’s in
 9 the statute.

10 CHAIRMAN:
 11 Q. Thank you.
 12 Upon conclusion at 1:05 p.m.

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CERTIFICATE

I, Judy Moss, hereby certify that the foregoing is a true and correct transcript of the Newfoundland and Labrador Hydro General Rate Application, heard on the 25th of January, A.D., 2016 before the Newfoundland and Labrador Board of Commissioners of Public Utilities, 120 Torbay Road, St. John's, Newfoundland and Labrador and was transcribed by me to the best of my ability by means of a sound apparatus.

Dated at St. John's, Newfoundland and Labrador this 1st day of February, A.D., 2016

Judy Moss

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