

**BRITISH COLUMBIA UTILITIES COMMISSION**  
**IN THE MATTER OF THE UTILITIES COMMISSION ACT**  
**S.B.C. 1996, CHAPTER 473**

**And**

**An Application by British Columbia Hydro and Power  
Authority for Review of the F2009 and F2010 Revenue  
Requirements Application**

**Vancouver, B.C.**  
**January 16,2009**

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**Oral Argument**

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**BEFORE:**

<b>L. A, O’Hara,</b>	<b>Chairperson</b>
<b>B. Milbourne,</b>	<b>Commissioner</b>
<b>A. Rhodes,</b>	<b>Commissioner</b>

**VOLUME 15**

## APPEARANCES

G.A. FULTON, QC	Commission Counsel
J. CHRISTIAN I. WEBB	British Columbia Hydro and Power Authority
J. QUAIL	B.C. Branch, B.C. Old Age Pensioners' Organization, Council Of Senior Citizens' Organizations, Federated Anti-Poverty Groups Of B.C., West End Seniors' Network (BCOAPO)
R. B. WALLACE	Joint Industry Electricity Steering Committee (JIESC)
M. OULTON	Canadian Office and Professional Employees Union, Local 378
C. WEAVER	Commercial Energy Consumers of British Columbia <i>et al</i> (CEC)
D. AUSTIN	Independent Power Producers Association of British Columbia
W. J. ANDREWS	B.C. Sustainable Energy Association (BCSEA), Sierra Club of Canada, British Columbia Chapter (SCBC)
C. JOHNSON	Terasen Gas Inc (TGI), Terasen Gas (Vancouver Island) Inc. (TGVI), and Terasen Gas (Whistler) Inc. (Collectively Terasen Utilities)

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**CAARS**

VANCOUVER, B.C.

January 16, 2009

**(PROCEEDINGS COMMENCED AT 9:04 A.M.)**

THE CHAIRPERSON: Please be seated. Good morning, ladies and gentlemen, and welcome to the oral argument phase of the Commission's review process for B.C. Hydro's revenue requirements application for fiscal 2009 and fiscal 2010.

As you may recall, Exhibit A-19, which was circulated on September 15, 2008, provides participants in this proceeding with additional information to assist them in explaining the process. Specifically with respect to the oral argument phase, that document states, and I'll quote from that:

"The Commission Panel may hold an oral phase on the final argument after the delivery of the final argument, including any reply of B.C. Hydro. The purpose of this phase is to allow the Commission Panel an opportunity to ask any questions the Commission Panel may have arising from written final arguments. Participants are not allowed to reargue their respective positions taken in final arguments during this phase today, nor are participants allowed to comment on the final

1 argument of others during this phase unless  
2 in response to a question asked by the  
3 Commission Panel. The Commission Panel may  
4 not have questions of all participants."

5 At B.C. Hydro's request, the January 6,  
6 2009 date initially scheduled for this oral argument  
7 phase was postponed until today as indicated in  
8 Exhibit A-25. By letter dated December 30<sup>th</sup>, 2008,  
9 marked as Exhibit A-26, the Panel advised the  
10 participants of its determination that today's oral  
11 argument phase was required and described seven  
12 matters on which the panel is seeking oral submissions  
13 from the parties to assist the panel in making its  
14 determinations in respect of the application.

15 **Proceeding Time 9:07 a.m. T02**

16 You will have noted that several of the  
17 items are described by way of a hypothetical scenario.  
18 Please be sure that your submissions address the  
19 specific corollary questions to those scenarios,  
20 rather than addressing the scenarios themselves.

21 The letter further states that submissions  
22 are to be confined to the evidentiary record and that  
23 the parties may refer to authorities from other  
24 proceedings of the Commission or the courts, where  
25 they believe those authorities may be of relevance,  
26 but have not been entered.

1                   Parties were requested to advise the  
2                   Commission in writing with reference by item number by  
3                   January 12<sup>th</sup>, 2009 if they wished to make submissions  
4                   on an item. Eight parties responded that they wish to  
5                   make submissions on all or some of the issues.

6                   The letter also notes that the panel will  
7                   allow B.C. Hydro during reply or any other party that  
8                   it may allow to reply to the submissions of another  
9                   party on an item during the oral phase to refer to  
10                  authorities not identified by that party in its letter  
11                  to the Commission, provided the authorities are in  
12                  response to authorities referred to in the other  
13                  party's letter to the Commission.

14                  I trust that the Commission counsel, Mr.  
15                  Fulton, has organized with you the order of  
16                  submissions for today's proceeding.

17                  We plan to sit from nine to noon, as usual,  
18                  with the morning break, and then reconvene again at  
19                  1:30 p.m. for the afternoon session, should that be  
20                  required.

21                  Now, I'm going to ask Mr. Fulton to call  
22                  for appearances.

23 MR. FULTON:    Thank you, Madam Chair. Good morning,  
24                  panel. British Columbia Hydro and Power Authority.

25 MR. CHRISTIAN: Jeff Christian, C-H-R-I-S-T-I-A-N, for  
26                  B.C. Hydro and Power Authority. With me at counsel



1 table is Mr. Webb, W-E-B-B.

2 THE CHAIRPERSON: Thank you, Mr. Christian.

3 **Proceeding Time 9:10 a.m. T3**

4 MR. FULTON: British Columbia Old Age Pensioners'  
5 Association *et al.*

6 MR. QUAIL: Good morning. Jim Quail appearing.

7 THE CHAIRPERSON: Thank you, Mr. Quail.

8 MR. FULTON: Joint Industry Electricity Steering  
9 Committee.

10 MR. WALLACE: Good morning. R.B. Wallace appearing on  
11 behalf of the JIESC.

12 THE CHAIRPERSON: Thank you, Mr. Wallace.

13 MR. FULTON: Canadian Office and Professional Employees  
14 Union, Local 378.

15 MR. OULTON: Good morning. Mark Oulton, O-U-L-T-O-N,  
16 appearing on behalf of COPE.

17 THE CHAIRPERSON: Thank you, Mr. Oulton.

18 MR. FULTON: Commercial Energy Consumers Association of  
19 British Columbia.

20 MR. WEAFFER: Good morning, Madam Chair, members of the  
21 Commission. Chris Weaffer appearing for the Commercial  
22 Energy Consumers Association of British Columbia.

23 THE CHAIRPERSON: Thank you, Mr. Weaffer.

24 MR. FULTON: Independent Power Producers Association of  
25 British Columbia.

26 MR. AUSTIN: Good morning. David Austin appearing on

1           behalf of the Independent Power Producers of B.C.

2   THE CHAIRPERSON:   Thank you, Mr. Austin.

3   MR. FULTON:    B.C. Sustainable Energy Association, Sierra  
4           Club of Canada, B.C. Chapter.

5   MR. ANDREWS:   Good morning, Madam Chair and members of  
6           the Panel. William Andrews appearing for BCSEA, SCBC.

7   THE CHAIRPERSON:   Thank you, Mr. Andrews.

8   MR. FULTON:    Terasen Utilities.

9   MR. JOHNSON:   Good morning. Cal Johnson appearing for  
10           the Terasen Utilities.

11   THE CHAIRPERSON:   Thank you, Mr. Johnson.

12   MR. FULTON:    Madam Chair, I did have discussions with all  
13           counsel who submitted letters indicating that they  
14           wish to address one or more of the issues on Exhibit  
15           A-26. I have provided to the Commission Panel an  
16           order of submissions for this phase, and that order  
17           also indicates the issues that the parties have  
18           indicated they wish to speak to.

19                    In terms of issues 2 and 3, it has been  
20           suggested to me by several parties that perhaps those  
21           issues might be heard at the same time, and so I'm  
22           making that proposal to the Commission.

23                    Insofar as item 6 is concerned, the order  
24           will begin with Mr. Weafer on behalf of CEC, followed  
25           by Mr. Austin on behalf of the IPPBC, and then Mr.  
26           Oulton on behalf of COPE.



1 THE CHAIRPERSON: That's good.

2 MR. FULTON: So, having made those preliminary remarks,  
3 then, Madam Chair, I'll turn the mike over to Mr.  
4 Christian.

5 **ARGUMENT BY MR. CHRISTIAN:**

6 Good morning, Commission panel. I'd like  
7 to start first by expressing my gratitude to counsel  
8 and Commission panel for indulging B.C. Hydro's  
9 request to move the date of oral submissions. It was  
10 very much appreciated.

11 Today I will be speaking to items 1 through  
12 5 on Exhibit A-26 and Mr. Webb will be speaking to  
13 items 6 and 7.

14 Before I begin my submissions on item 1, I  
15 do want to note for the record a concern B.C. Hydro  
16 has with respect to the manner in which some of the  
17 issues were framed. And in making these submissions,  
18 I do have in mind the Commission's caution expressed  
19 in the cover to A-26 that the Commission hasn't pre-  
20 judged any of the issues. But, nevertheless, the way  
21 the issues have been framed, at least a couple of the  
22 issues, the way the couple of issues have been framed,  
23 raises some procedural concerns. And in particular,  
24 some of the issues as framed really suggest an  
25 invitation by the Commission panel to intervenors to  
26 sur-reply to B.C. Hydro's reply argument, despite the

1 fact that no intervenor actually sought an opportunity  
2 for sur-reply.

3 And that is a bit unusual, and I think to  
4 understand why that's unusual I'm going to refer to a  
5 document that I only got my hands on this morning, and  
6 it goes back to the time when the oral phase of  
7 argument was first brought forward by the Commission  
8 as something that it thought useful for its processes,  
9 and that was about four or five years ago. And I  
10 believe it was in -- the very first time it was  
11 actually employed was in B.C. Hydro's 05/06 revenue  
12 requirement proceeding, and at that time there was an  
13 exchange between the Commission Chair, Mr. Hobbs, and  
14 Mr. Wallace with respect to the nature of the oral  
15 phase of argument. And I'm going to refer to that  
16 now.

17 And that's at Volume 22 of the revenue  
18 requirement proceeding, the transcript from the 05/06  
19 RRA. The date was August 17<sup>th</sup>, 2004, and the page is  
20 4080. And at line 4, the Chair says the following:

21 "The procedural fairness is this, Mr.  
22 Wallace, and it's to support the quality,  
23 integrity of written argument."

24 And the next two sentences are the key ones that I  
25 think are germane to my submissions here on this  
26 point:

1           "The procedural role for these oral phases  
2           is that you are given an opportunity to  
3           comment on an invitation by the panel on  
4           your argument. You don't have an  
5           opportunity to re-argue, if you will."

6           And as I say, that's to ensure that argument is  
7           predominantly a written process.

8                         And so, as I say, I think despite the  
9           Commission's caution on the cover to A-26, clearly  
10          some of the issues that have been set forth for  
11          discussion today have been set up almost asking for  
12          sur-reply from intervenors. And I think item 3 is  
13          probably the best example of that -- excuse me --  
14          where BCOAPO specifically asked to respond to B.C.  
15          Hydro's reply submissions with respect to the prudence  
16          test.

17                                 **Proceeding Time 9:18 a.m. T5**

18                         And the invitation to sur-reply in the  
19          absence of application for an opportunity to sur-reply  
20          raises at least two types of problems, potentially.  
21          The first one is simply procedural fairness with  
22          respect to the scope of reply that B.C. Hydro would  
23          have. And there was an exchange between counsel  
24          yesterday that you may or may not hear about today,  
25          that went exactly to that point, to the extent to  
26          which B.C. Hydro was obliged to speak in substance to

1 each one of the seven matters, or whether it could  
2 save its thunder, as it were, for reply to the sur-  
3 reply. And on item number 3 in particular, the  
4 Commission Panel asked BCOAPO whether it had any  
5 authorities to support its position. I understand  
6 BCOAPO is going to be referring to such an authority  
7 when that was in fact referred to it by B.C. Hydro,  
8 and my submissions on that case will be in reply and I  
9 will object if any parties suggest that I need to  
10 speak to that case at the outset. It's not part of  
11 B.C. Hydro's case. In the normal course that case  
12 would have been argued by BCOAPO in its argument, and  
13 B.C. Hydro would have had a reply, and that's the way  
14 I intend to argue it today.

15 Procedural fairness issues aside, request  
16 to intervenors to sur-reply when no sur-reply was  
17 sought raises a potential other issue, and that issue  
18 is reasonable apprehension of bias. One can construe  
19 a request for sur-reply as a concern by the Commission  
20 Panel about the place that the argument of the utility  
21 is taking it and search for an opportunity to find a  
22 reason not to go there. And that's an issue that I'm  
23 not advancing as a reason to not proceed today, or to  
24 otherwise have resolved today, or certainly not asking  
25 for this Commission Panel to step down or otherwise  
26 deal with it. It's really a statement, as I say, for

1 the record, and to respectfully request that the  
2 Commission exercise caution when it sets out its  
3 issues in the manner in which it frames them going  
4 forward.

5 THE CHAIRPERSON: Thank you, Mr. Christian. Before you  
6 proceed, I just want to clarify. So clearly your  
7 observations and concerns are duly noted, then the  
8 Panel appreciates those. I just want to make sure  
9 that having all that noted and you know how we are now  
10 planning to proceed today, that plan is acceptable to  
11 B.C. Hydro.

12 MR. CHRISTIAN: Yes, I foresee only two possible issues,  
13 I suppose. One is, if there's an objection to me  
14 arguing in reply to Mr. Quail and other intervenors on  
15 the case that was referred to BCOAPO in my letter of  
16 Monday of this week. I do not intend to address that  
17 in my submissions in chief, I intend to address that  
18 in reply and if there's an objection to that I will be  
19 on my feet.

20 A second issue I think arises from -- and I  
21 don't know, I'm perhaps being premature here, but  
22 there was a handout this morning which essentially is  
23 a written argument on the seven issues, and I'm not  
24 sure whether the intention of the intervenor is to  
25 actually hand it up or not, but if there is an  
26 intention to hand up a 13-page written argument, I'll



1 be objecting to that as well. Because in my view if  
2 the Commission Panel asked for further written  
3 argument, it would have said so, and to enter into the  
4 record now, a further written argument would be unfair  
5 to those parties who understood today to be about oral  
6 submissions.

7 So those are the only two specific issues  
8 that I perceive arising from these comments I'm making  
9 today.

10 THE CHAIRPERSON: Thank you for that clarification. With  
11 that, we are now ready to proceed, thank you.

12 **ARGUMENT BY MR. CHRISTIAN ON ITEM 1:**

13 Excellent, thank you, so I'll deal with  
14 item 1 first. Item 1 has two paragraphs. Each  
15 paragraph raises a reasonably independent question so  
16 I will deal with those two in turn. The first  
17 question I think is relatively straightforward. I'm  
18 going to paraphrase it. As I understand what is asked  
19 in the first paragraph is simply whether or not the  
20 Commission could -- that is, has the legal authority  
21 to issue a further interim order regarding fiscal 2009  
22 rates prior to a subsequent final order, and thereby  
23 allow or require, sorry, B.C. Hydro to issue a refund  
24 before a final order is issued. And in B.C. Hydro's  
25 view the answer is yes, the Commission has that  
26 authority.

1 **Proceeding Time 9:23 a.m. T06**

2 MR. CHRISTIAN: I don't think this is going to be a  
3 controversial issue. I'm not going to make a lot of  
4 submissions on it. It's implicit in B.C. Hydro's  
5 argument, and I refer to our reply argument at Section  
6 2.11.1, and Section 2.11.2, and throughout the  
7 submissions in that part of the reply, I think it's  
8 apparent that B.C. Hydro believes it's possible for  
9 the Commission lawfully to set a new interim rate for  
10 fiscal '09 and issue a refund at that time.

11 And as I make these comments, I want to be  
12 clear that I'm commenting and really turning my  
13 submissions on the use of the Commission's panel  
14 "could", and the fourth line of paragraph 1, where the  
15 words are, "Are there any reasons why the panel could  
16 not rescind and/or vary or amend Order G-40-08?" So  
17 we're not -- and I'm not addressing whether or not the  
18 Commission panel should do that. That was fully  
19 argued and, in B.C. Hydro's argument, that appears at  
20 pages 130 to 131.

21 And I just also pause to note that this  
22 first question under paragraph -- or, item 1, doesn't  
23 raise any of the concerns about an invitation to sur-  
24 reply that I talked about, but arguably at least the  
25 second paragraph does.

26 And here, the Commission panel is asking

1 for argument on B.C. Hydro's position that it is open  
2 to the Commission to decide in this proceeding the  
3 appropriate level of recovery of the deferral account  
4 balances for fiscal 2009, and so this is an example of  
5 something that I take primarily to be an invitation to  
6 intervenors to respond, rather than a request for B.C.  
7 Hydro to clarify anything.

8 But nevertheless, I will take the  
9 opportunity to very briefly summarize the point that  
10 we made in the paragraph that's referred to there.  
11 And the point is simply this: that when the Commission  
12 said, when it ordered interim rates for fiscal 2009,  
13 that such rates were subject to refund or refundable,  
14 the Commission cannot be understood to have meant that  
15 a lower rate for fiscal 2009 would necessarily result  
16 in a refund. And the reason the Commission's words  
17 can't be construed that way is, if the Commission had  
18 said that, clearly -- if the Commission had said there  
19 will be a refund, if the final rate for fiscal 2009 is  
20 lower than the interim rate we're granting right now,  
21 that would be an unlawful fettering of the  
22 Commission's discretion, because it needs to decide  
23 whether there should be a refund or not at the time  
24 that it makes that later Order, whether it's a later  
25 interim Order or a later final Order. And that was  
26 really to the gist of the submission that B.C. Hydro

1           made in the paragraph referred to in paragraph 2 here  
2           of item number 1.

3                           And that's all I have to say on item 1 of  
4           the agenda today.

5 THE CHAIRPERSON:   Did you have a question?  Perhaps just  
6           again one more clarification, Mr. Christian.  There  
7           probably -- one of the reasons this first question is  
8           there still for B.C. Hydro and especially the second  
9           paragraph is that -- was it because B.C. Hydro's  
10          position seems to be that, yes, it's obvious that it's  
11          implicit that the Commission panel has that right to  
12          adjust the deferral account to -- in that particular  
13          test year, that in your final argument that point was  
14          not that strongly made.  It surfaced more in your  
15          reply.

16 MR. CHRISTIAN:    Right.  And even in the reply, I'll  
17          happily acknowledge that we never said it expressly,  
18          and it was only ever implicitly.

19 THE CHAIRPERSON:   Yes.

20 MR. CHRISTIAN:    Even in the reply.  And so, just to be  
21          clear, I believe the Commission has the authority, and  
22          I think that my friends are going to support me on  
23          this without exception.

24 THE CHAIRPERSON:   Right.  Yes.

25 MR. CHRISTIAN:    The Commission has the authority to do  
26          either, which is to say, to set a lower rate for

1 fiscal 2009 and either order a refund or require Hydro  
2 to apply the incremental revenue towards the deferral  
3 account balances.

4 THE CHAIRPERSON: And because it was implicit, it was not  
5 such a main feature --

6 MR. CHRISTIAN: Correct.

7 THE CHAIRPERSON: -- either in your reply -- your, sorry,  
8 argument or reply. Thank you, Mr. Christian.

9 **ARGUMENT BY MR. QUAIL:**

10 Madam Chair and panel members, first I want  
11 to address the procedural matters that my friend Mr.  
12 Christian has raised and first of all, his concerns  
13 about the framing of the questions and what he's  
14 characterized as an invitation to sur-reply.

15 The Commission is clearly master of its own  
16 process, subject to the general requirements of  
17 procedural fairness. And the procedure, the process  
18 that's been designed by the Commission is giving B.C.  
19 Hydro the last word regarding all of the questions on  
20 today's agenda. In my submission, subject to my  
21 friend's concerns about potentially being constrained  
22 in the scope of what he can say today, in my  
23 submission there could be no basis for B.C. Hydro of  
24 all parties to compare -- to complain of fairness.

25 Pardon me, I'm just recovering from a cold  
26 and I hope my voice is going to stand up. That's one

1 of the reasons --

2 **Proceeding Time 9:27 a.m. T7**

3 THE CHAIRPERSON: Now a second time. You also had a cold  
4 in October, Mr. Quail.

5 MR. QUAIL: I know. This seems to be a viral  
6 application. There was a cold sweeping everybody  
7 during the evidentiary phase, and at least I think a  
8 few others potentially at the same stage dealing with  
9 another virus now that we're back again for oral  
10 argument. So I don't know what to make of that.  
11 Anyway, and I'll be getting to that. That's germane.  
12 The question of my voice may be germane to the  
13 speaking notes. I don't know.

14 And in my submission, it is appropriate for  
15 the Commission to seek a better understanding of key  
16 issues in an important and complex proceeding, and as  
17 I say, you are master of the process and have scope  
18 and should have scope to design the process so that  
19 you have the understanding and hear the arguments that  
20 you need to make of this very important decision.

21 We have no problem with B.C. Hydro applying  
22 to anything that we have to say. And just as a  
23 general observation, I firmly believe that the last  
24 word, in quotes, is a highly overrated asset and we  
25 really don't care. We'll say what we have to say, and  
26 my friend will say what he has to say before or after

1 us, and frankly I don't think that that is really of  
2 enormous significance. Other people in the room may  
3 disagree strongly. So I'm only speaking from my own  
4 experience.

5 Regarding the issue of the written speaking  
6 notes, I'm a little surprised at my friend's objection  
7 because it is very common practice in oral arguments  
8 of all kinds for speaking notes or texts to be handed  
9 to the court or tribunal as an aid. In fact, a week  
10 ago today I was in court, B.C. Supreme Court, arguing  
11 a matter, and counsel for the Department of Justice  
12 had a written text that he presented orally and gave  
13 to the judge and to all the other participants. This  
14 is not uncommon.

15 Everything that I'm going to say is going  
16 to be faithfully transcribed, so one way of dealing  
17 with it is you could struggle and take notes and then  
18 go and read the text verbatim from Mr. Bemister's  
19 excellent work. But the other way is you can have the  
20 text I'm reading before you. You know, this is  
21 presented primarily as a matter of convenience to the  
22 Panel. I have difficulty seeing how it's of any  
23 disadvantage. In fact, the risk I suppose that I'm  
24 taking in handing it out, and I've distributed it  
25 around the room, is that my friend and everybody else  
26 knows now what I'm going to say and can prepare --

1           they could prepare their thoughts before I open my  
2           mouth on these different subjects. And that's the  
3           downside of a written text. The advantage is really  
4           it's a convenience to the tribunal. And also,  
5           frankly, it's a convenience as my voice is getting,  
6           you know, increasingly gravelly as we proceed through  
7           the morning.

8                           And with that, I do -- as I say, I have  
9           distributed, I've given Mr. Bemister copies for the  
10          Panel. I don't know if they've been given to you yet  
11          or not. But I would -- I mean, if the Panel doesn't  
12          want to receive it, go ahead sort of with Plan B which  
13          is I read it and you can see it later in the  
14          transcript. I'd suggest that the much more sensible  
15          process is for you to have it before you, but this  
16          isn't at least so much my issue as the Panel's issue.

17 THE CHAIRPERSON:   Hearing the submissions of both you,  
18          Mr. Quail, and B.C. Hydro, although it would be a  
19          convenience, I think we have invested a lot of time in  
20          this process so we don't want to risk that. And so,  
21          Mr. Bemister, can you please remove the documents?

22 MR. QUAIL:        Yes, understand they haven't been entered as  
23          an exhibit or in any other fashion put on the record,  
24          so. I do have extra copies if anybody else in the  
25          room wants it for themselves.

26                           It can be excruciating reading a text when



1 somebody is reading from it aloud, because of course  
2 the eye goes much faster than the mouth does. And so  
3 in a sense it probably makes for a less tedious  
4 morning for yourselves.

5 **Proceeding Time 9:32 a.m. T08**

6 **ARGUMENT BY MR. QUAIL ON ITEM 1:**

7 Anyway, on this item I'm going to be much  
8 longer in this preliminary stuff in dealing with the  
9 question number 1 where we essentially agree with what  
10 my friend Mr. Christian has said. We say that it is  
11 highly desirable that whatever rates are in place at  
12 the time, at any time, or as closely tuned to B.C.  
13 Hydro's ultimate revenue requirement for the current  
14 fiscal year as possible, to avoid over- or under-  
15 collection of current rates from current customers.  
16 Thus, there is no reason not to proceed in the fashion  
17 outlined in the question. The Commission response to  
18 the second paragraph, the Commission has clear  
19 statutory authority to vary the interim rate, pursuant  
20 to Section 99 of the *Utilities Commission Act*, which  
21 is the power to reconsider, vary or rescind a  
22 decision, order, rule or regulation. And the natural  
23 consequences of the flow from that will flow. For  
24 example, the implications for deferral accounts and  
25 other matters. So, in my submission, there is no  
26 basis for controversy around either of the questions

1 posed under heading 1.

2 THE CHAIRPERSON: Thank you, Mr. Quail.

3 **ARGUMENT BY MR. WALLACE:**

4 Madam Chair, Commissioners, I'd like to  
5 start out by briefly addressing some of the procedural  
6 matters that Mr. Christian raised also. First, I  
7 think he -- well, he has suggested that this  
8 invitation to answer questions is to give effectively  
9 sur-reply. I was shocked when he first raised that, I  
10 guess yesterday, didn't understand it and only got a  
11 slightly better understanding today.

12 We reject completely that the process  
13 should be suggested to be sur-reply. The process that  
14 you've instituted is an appropriate use of your power  
15 to ask questions, to seek clarity and to test  
16 positions. And I know I've learned through time that  
17 reading anything into questions is a very dangerous  
18 practice in court or in a regulatory proceeding --  
19 that in fact Commissioners may well simply be testing  
20 a proposition or seeking the evidence as they properly  
21 should.

22 Also, I strongly object to Mr. Christian's  
23 suggestion that asking questions of any sort is an  
24 indication of a reasonable apprehension of bias. I'm  
25 concerned that he even put that out there. It may not  
26 be his intention, but it appears to be an attempt to

1 discourage questions, to potentially intimidate, and I  
2 think that's just totally inappropriate. The  
3 Commission should feel free to ask whatever questions  
4 it wishes today, or at any time, through a written  
5 process or any other way of doing it. The fundamental  
6 goal of this process is to get to the correct answer  
7 and the truth, and if that takes questions and it  
8 takes questions after questions, or after written  
9 argument, we still encourage you to do what you feel  
10 you need to do in order to reach a conclusion.

11 **ARGUMENT BY MR. WALLACE ON ITEM 1:**

12 That being said, I'd like to turn to  
13 question 1, and to both aspects of the question. I'll  
14 deal with them separately, though. First, there's  
15 clearly a consensus that the Commission can order a  
16 refund, and we agree with Hydro, and we will agree  
17 with BCOAPO on that. It is an appropriate action, and  
18 we won't get into the merits.

19 The second part of it is, can -- is it open  
20 to the Commission to decide in this proceeding the  
21 appropriate level of recovery of deferral account  
22 balances for F2009? In our submission, the answer to  
23 that is: Yes, the Commission can decide that.  
24 Corollary to that, and I don't want to repeat our  
25 argument, but we submit that it would be inappropriate  
26 to set a deferral account based on the amount of the

1 refund. The deferral accounts should be set on the  
2 merits of the deferral accounts, the appropriate  
3 amortization and the characterization of them, not on  
4 the amount of revenue collected.

5 Setting it on the amount of the revenue  
6 collected, in our view, is not a legitimate decision  
7 as to the necessary or appropriate level of deferral  
8 accounts, but rather is a way of avoiding making a  
9 promised refund. And in our submission, that would be  
10 wrong. Thank you.

11 **Proceeding Time 9:37 a.m. T09**

12 THE CHAIRPERSON: I'm still pausing here, Mr. Wallace,  
13 because that comes back to my earlier question to Mr.  
14 Christian, that was this assumption that the  
15 Commission has the power to set the balance of  
16 deferral accounts for the test year. It was not  
17 clearly -- it didn't really get that much air time  
18 during the proceeding, because it sounds like from  
19 B.C. Hydro's position that was implicit there.  
20 Because now with your position, Mr. Wallace, you say  
21 that we have the power to set -- as a rule, we do have  
22 the power to set the deferral accounts. But then you  
23 are saying that there are certain rules, the way we  
24 should go about it, and that has not been addressed in  
25 the proceeding.

26 MR. WALLACE: No, and probably in part it wasn't really

1           addressed because this arose after the hearing of what  
2           should be done with the refund. At the very end of  
3           the hearing --

4   THE CHAIRPERSON:   That's right.

5   MR. WALLACE:   -- and at that point, B.C. Hydro's position  
6           was not the one it settled on in argument. So, you're  
7           quite correct, during the hearing, it was not  
8           advanced.

9   THE CHAIRPERSON:   Mm-hmm.

10  MR. WALLACE:   And our submission to you at this point is  
11           that, as the Commission knows, there's a long history  
12           of deferral accounts, how they're used and how they're  
13           administered, and in our view, deferral accounts  
14           usually are administered for specific purposes. You  
15           have the Heritage deferral account, and money comes  
16           into it in certain circumstances, and there are  
17           formulas for transferring it out, or for recovering  
18           it, and they're generally based on the nature of that  
19           deferral account, what is appropriate for it. What's  
20           an appropriate amortization period? And in our  
21           submission, what Hydro is doing here, or suggesting  
22           here, you have the power to do. We don't argue with  
23           that. But what we do submit is that it's an  
24           inappropriate use. You are accruing it for a reason,  
25           to -- which basically would be to use that money in  
26           another way than a refund. And in our submission, it

1 was a refundable interim if the rates were too high,  
2 and that that is what should be done. And to use the  
3 deferral account power to get around that Order would  
4 be a wrong way of using the deferral account power.

5 THE CHAIRPERSON: Thank you, Mr. Wallace. That's  
6 helpful.

7 MR. WALLACE: Thank you.

8 THE CHAIRPERSON: Next we have -- is it Mr. Oulton?

9 **ARGUMENT BY MR. OULTON:**

10 COPE didn't indicate that it was going to  
11 take any position on issue 1. I just wish to indicate  
12 that, on the preliminary matters that my friend Mr.  
13 Christian raised, COPE does support the positions  
14 taken by Mr. Quail and by Mr. Wallace, particularly  
15 with respect to characterization of this as sur-reply.  
16 Really, from COPE's perspective, this is simply a  
17 matter of the Commission trying to get to the bottom  
18 of issues that are troubling it, and it should be open  
19 to the Commission to ask whatever questions it chooses  
20 to, in whatever form it chooses to, whether it's by  
21 further written submissions or through this oral  
22 phase, to explore those issues and to give the parties  
23 the opportunity to respond. And any procedural  
24 fairness, in our submission, is addressed by the fact  
25 that B.C. Hydro gets, in the oral phase as it does in  
26 the written phase, two kicks at the can. It gets to

1 set forward its position, hear what the intervenors  
2 have to say, and then reply.

3 And the only other point that I wish to  
4 make -- the reason COPE didn't take -- wish to make  
5 submissions on point number 1 is that it felt it was  
6 clear that the Commission has the jurisdiction to do  
7 what it says, for the reasons that all of my friends  
8 have said.

9 THE CHAIRPERSON: Thank you, Mr. Oulton. Next we have  
10 Mr. Weafer.

11 **ARGUMENT BY MR. WEAFER:**

12 Madam Chair, members of the panel, I will  
13 be brief on most points this morning for two reasons.  
14 One, the CEC filed a very comprehensive written  
15 argument on the issues in the proceeding, and its  
16 thoughts in that argument, I think, deal with matters  
17 that are raised in the seven questions. So I'll  
18 intend to just refer you to the pages in our argument  
19 that deals with the issues.

20 And secondly, we'll be brief because there  
21 are very capable counsel speaking ahead of me. The  
22 day, I think, will reflect responses that we will  
23 support. And the first one of those -- and I  
24 particularly align myself with Mr. Wallace's comment --  
25 we strongly oppose B.C. Hydro's counsel's position in  
26 terms of the role of this oral process. Absolutely,

1 this is helpful to the Commission's understanding of  
2 the issues that are before the Commission, and in the  
3 hearing and clearly the evidence record is closed and  
4 nobody is adding to the evidence. Your interpretation  
5 of that evidence it is fairly -- you take this  
6 opportunity to ask questions of those who have filed  
7 argument.

8 **Proceeding Time 9:42 a.m. T10**

9 **ARGUMENT BY MR. WEAVER ON ITEM 1:**

10 With respect to issue 1, there is, I don't  
11 think, any issue that the Commission has that the  
12 jurisdiction to do what it speaks of doing in these  
13 hypothetical proposals in questions A and B in item 1.  
14 We say the Commission has that authority. Our  
15 preference with respect to how that authority should  
16 be dealt with is -- and particularly with respect to  
17 the interaction of the LTAP decision and the revenue  
18 requirement application as set out at page 129 of our  
19 argument, that states our preference not to  
20 intermingle the two issues. The LTAP issues can be  
21 dealt with separately.

22 With respect to the definition of deferral  
23 accounts, which is really, I think, what Mr. Wallace  
24 was speaking to, we would strongly support his  
25 position. It is important that in establishing  
26 deferral accounts, that all parties understand what



1 they relate to, that they are expenses prudently  
2 incurred, and that there is an ability to monitor the  
3 separate items. And we think the appropriate approach  
4 is if there's a refund to be had, the refund should be  
5 issued and it should not be commingled with other  
6 matters identified in deferral accounts. It is very  
7 important to all stakeholders that we be able to  
8 review the prudence of deferral accounts on a go-  
9 forward basis. And it's also important that we be  
10 able to clearly identify what amount of rate refunds  
11 should be returned to customers independent of any  
12 established deferral account.

13 Those are our submissions on issue 1.

14 THE CHAIRPERSON: Thank you, Mr. Weafer.

15 **ARGUMENT BY MR. ANDREWS ON ITEM 1:**

16 Madam Chair, members of the Panel, BCSEA,  
17 just for context, support the concept of using  
18 deferral account recoveries to stabilize the F09 rate  
19 so as to coincide with the interim F09 rates. And I  
20 refer to paragraphs 4 to 12 of BCSEA's final argument.

21 Regarding the specific questions posed in  
22 issue 1(1), to the extent that this can be divided  
23 into questions of whether the Commission has the power  
24 versus whether it should, BCSEA says yes, the  
25 Commission has the power. And regarding whether it  
26 should, I simply refer the Commission to the

1 submissions BCSEA has already made on the substance of  
2 that issue.

3 And likewise with sub (2) of issue 1, yes,  
4 the Commission does have the authority to use deferral  
5 account recovery for fiscal '09 in the manner  
6 suggested, and whether it ought to is a different  
7 issue which we've already addressed.

8 If I may at this point say that BCSEA is  
9 down on the list as proposing to address issue 7, and  
10 in particular 7(2) having to do with intergenerational  
11 equity and the objective mechanism for deferral  
12 account recovery. In the interest of regulatory  
13 efficiency, I think that the point that we were going  
14 to make there is so simple that it will have been made  
15 by other counsel, and so I don't propose to address  
16 issue 7.

17 And with the leave of the Panel, after  
18 issue 1 is dealt with, I would retire from this oral  
19 argument.

20 THE CHAIRPERSON: All right, please proceed.

21 MR. ANDREWS: Thank you.

22 **ARGUMENT BY MR. JOHNSON:**

23 I will only comment briefly on the  
24 procedural matters. If this hearing had concluded  
25 with oral argument as opposed to written argument, and  
26 oral argument has always been my general preference

1 but in recent years not often adopted by the  
2 Commission, if there had been oral argument then it  
3 would be expected as a matter of course that during  
4 that oral argument the Commission Panel would ask  
5 questions. So I think the concept of questions has  
6 sort of been blown out of proportion here. Questions  
7 are a normal event in the course of argument.

8 Beyond that comment, I'm staying out of the  
9 procedural bun-fight.

10 **Proceeding Time 9:47 a.m. T11**

11 **ARGUMENT BY MR. JOHNSON ON ITEM 1:**

12 With respect to the issue in paragraph  
13 number 1 of item 1, Mr. Quail has also already  
14 referred to Section 99 of the Act, which allows --  
15 which clearly grants the Commission authority to vary  
16 its Orders, and the Terasen Utilities submit that the  
17 jurisdiction to vary Orders and, in particular, Orders  
18 relating to interim rates, extends both to increasing  
19 and decreasing the amount set in the interim Order, as  
20 long as there is material before the Commission which  
21 shows that in the circumstances that there's been some  
22 changed circumstances, and sort of an evidentiary  
23 basis for changing the Order.

24 With respect to the item in the second  
25 paragraph, the wording of that question, or the  
26 reference there to B.C. Hydro's position, in essence

1           throws into the question, or it creates a question  
2           which appears to be in part jurisdiction and in part  
3           merits, or should this happen. With respect to the  
4           jurisdiction, it appears to be the consensus of all  
5           parties that the Commission does have jurisdiction to  
6           do what's being discussed in that paragraph.

7                         With respect to the merits, the Terasen  
8           submissions -- or, excuse, the Terasen Utilities have  
9           no submission on the merits, and that largely reflects  
10          my lack of involvement in the proceeding, and I don't  
11          feel qualified in any way to comment on the merits of  
12          that point. Thank you.

13 THE CHAIRPERSON:    Okay, thank you, Mr. Johnson. Who goes  
14           next? I think it is now your turn.

15 MR. CHRISTIAN:      I think I get -- especially in light of  
16           the comments on procedural issues.

17 THE CHAIRPERSON:    That's right.

18 **REPLY BY MR. CHRISTIAN:**

19                         I just need to respond to one thing on the  
20           procedure -- the submissions that I made, and that is,  
21           Mr. Wallace characterized my submissions as an attempt  
22           to intimidate this Commission panel. That's a very  
23           serious charge. In my submission, it's utterly  
24           unfounded.

25                         I quoted from the Commission, or the  
26           transcript of a proceeding with B.C. Hydro from almost

1 five years ago now that clearly, at that time at  
2 least, prescribed what the scope of oral submissions  
3 is meant to be. It wasn't for the purpose of saying  
4 it can never be anything different, but just to remind  
5 the Commission that it started off on this path of  
6 asking for oral submissions from a very narrow  
7 perspective. And it strikes me that it's gotten a lot  
8 broader and in the particular manner in which some of  
9 the questions were framed, in A-26, potentially lends  
10 itself to some procedural issues.

11 And so I wasn't raising an objection in the  
12 sense that I was saying that the Commission panel had  
13 done something wrong, that we would not be willing to  
14 proceed, rather, a caution to the Commission panel to  
15 exercise care in the manner in which it expresses  
16 those questions, because it can lead to procedural  
17 problems. And so I think, as I say, that the charge  
18 that there is an attempt to intimidate is simply  
19 unwarranted.

20 THE CHAIRPERSON: Thank you, Mr. Christian. Then we are  
21 ready to proceed to issue number two.

22 **ARGUMENT BY MR. CHRISTIAN ON ITEM 2:**

23 Thank you, Commission panel. I'm calling  
24 issue number 2 the Section 60(1)(b)(iii) issue, as I  
25 understand that's primarily how the Commission is  
26 concerned -- or that's the issue the Commission is

1 primarily concerned about, and in particular whether  
2 or not that provision of the Act suggests a different  
3 reading of *Hemlock* than would have been the case prior  
4 to that Section coming into force.

5 Before I go to the substance of my  
6 comments, though, I need to clarify two things. And  
7 that is, in the very first sentence of issue number 2,  
8 it seems that the Commission has -- perhaps it's  
9 reading too much into it. As Mr. Johnson suggested  
10 that that can be done. But it seems to me that the  
11 Commission perhaps has misunderstood B.C. Hydro's  
12 position in two ways. And firstly, there is a  
13 statement here about:

14 "Unless a forecast expenditure can be  
15 determined to be demonstrably imprudent..."  
16 suggesting that all forecast expenditures have the  
17 benefit of the presumption of prudence. And that's  
18 not the case. That's not B.C. Hydro's position.

19 **Proceeding Time 9:52 a.m. T12**

20 And the second concern I have with that  
21 first sentence of item number 2 which I think is a  
22 mischaracterization of B.C. Hydro's argument or  
23 misunderstanding of it is that with respect to the  
24 prudence test, B.C. Hydro is not relying on *Hemlock*.  
25 So I'll deal with those issues in turn.

26 Firstly, it's not B.C. Hydro's position

1       that all forecast expenditures get the benefit of the  
2       prudence test as described in its argument. In  
3       particular at page 26 of its argument, lines 2 to 13,  
4       B.C. Hydro distinguishes between forecasted  
5       expenditures that are arising from circumstances out  
6       in the world at large, which really Hydro can't do  
7       anything about but simply must respond to and plan  
8       for. And examples of that are wholesale market prices  
9       of electricity and interest rates. And so we said in  
10      our argument that B.C. Hydro's forecast of interest  
11      rates and B.C. Hydro's forecasts of wholesale  
12      electricity market prices do not get the benefit of  
13      the presumption of prudence. On those types of  
14      matters, B.C. Hydro bears the balance of persuasion,  
15      or the burden of persuasion on a balance of  
16      probabilities, and the Commission must satisfy itself  
17      on the evidence what the interest rates should be for  
18      the purpose of setting Hydro's revenue requirement, or  
19      what the wholesale market prices should be.

20                Operating costs, which are really the nub  
21      of this issue, are not, in B.C. Hydro's submission, a  
22      forecast of that type at all. The operating costs  
23      that are at issue in this case are the operating costs  
24      that B.C. Hydro was planning to incur as a result of  
25      its budgeting processes that it's obliged to do, that  
26      it's obliged to undergo for the purpose of providing

1 service, and that its management has the legal  
2 responsibility to do.

3 So I will distinguish between operating  
4 cost budgets and plans, and forecasts of operating  
5 costs. And we say what's relevant in this case is  
6 B.C. Hydro's plans on what it wants to spend, and that  
7 the plans on what it wants to spend is what is in the  
8 application, and that's what the Commission is opining  
9 on.

10 Now, forecasts of operating costs do exist  
11 and they are relevant in this way. In the course of a  
12 year, in the course of a fiscal year, it's fair in a  
13 proceeding like this for the Commission to say or  
14 intervenors to ask, "How are you doing against budget?  
15 You plan to spend X number of dollars on this  
16 particular project, and you're six months into the  
17 fiscal year, so what's your forecast of what you're  
18 going to spend having made the plan?" And so the  
19 evidence on the forecasts of what will be spend can be  
20 relevant to what the plan is and whether the plan is  
21 prudent or not. And indeed in this proceeding there  
22 were a number of questions asked primarily by Mr.  
23 Fulton with respect to some of our panels on discrete  
24 operating cost items where the questions were, "Okay,  
25 you've planned to spend this amount, so aside from  
26 whether the decision at the time was the right one,



1 are you actually going to spend it?" And if Hydro was  
2 saying, for example, that it wasn't going to be  
3 spending it, then there would be a basis to say that  
4 the planned expenditure was imprudent because it  
5 couldn't have been carried out, or wasn't able to be  
6 carried out.

7 So the first point is, there are types of  
8 forecasts that simply do not get the benefit of the  
9 presumption of prudence because they are not forecasts  
10 of planned expenditures. And it's only the planned  
11 expenditures that do get that presumption.

12 Another example I think that would be  
13 useful to put to the Commission to kind of explain the  
14 distinction between the type of expenditures that do  
15 get the benefit of the presumption of prudence and  
16 those that don't, arises from the line of cross-  
17 examination by Mr. Fulton with respect to the  
18 corporate donations of a gas utility. And you'll  
19 recall that Mr. Fulton put to Ms. Yurkovich an extract  
20 from a Commission decision from the 1990s with respect  
21 to a gas utility's corporate donation expense. And in  
22 that decision, that early 1990 decision, the  
23 Commission concluded on the evidence that the  
24 utility's corporate donation expense was not to do  
25 with providing service, was not to do with the  
26 exercise of management's responsibility to provide the

1 service and make the decision necessary to provide the  
2 service. Rather it was about essentially maximizing  
3 or increasing the market share of that utility. It  
4 had nothing to do with providing service. And that  
5 type of expenditure does not get the benefit of the  
6 presumption of prudence.

7 **Proceeding Time 9:57 a.m. T13**

8 So as I say, it's an incorrect  
9 characterization of Hydro's argument to say that all  
10 forecast expenditures get the benefit of the  
11 presumption of prudence. It's those that result from  
12 the planning obligations on B.C. Hydro that it has, in  
13 order to meet its legal obligation to serve.

14 Now, the second point that I need to bring  
15 to the Commission's attention arises from the  
16 reference to *Hemlock* in that first sentence. And the  
17 gist of my submissions on *Hemlock* is that *Hemlock*  
18 doesn't say anything about how the prudence test is  
19 applied. *Hemlock* merely stands for the proposition  
20 that, having established the revenue requirement, and  
21 therefore having established what is the fair amount  
22 of return on its investment that a utility ought to be  
23 able to recover in rates, the utility -- sorry, the  
24 Commission -- must set the rates to allow that  
25 reasonable opportunity. And that it may not trade off  
26 other factors against that right for the opportunity

1 to earn a rate of return. Nowhere in *Hemlock* does it  
2 talk about the prudence test. And certainly B.C.  
3 Hydro does not rely on *Hemlock* in support of the  
4 prudence test as articulated in its argument.

5 And so that's all I think I need to say  
6 about *Hemlock*, and the concern, as I say, arose from  
7 the first sentence there, in which it appears that the  
8 Commission understands that Hydro is relying on  
9 *Hemlock* for the prudence test, and that's not the  
10 case.

11 Now, what *Hemlock* does stand for is that,  
12 because the Commission is required to have due regard  
13 to the setting of a rate that allows a fair return,  
14 means that other factors may not be traded off against  
15 that requirement. And if I could have the Commission  
16 panel turn to paragraph 56 to 58 of the *Hemlock*  
17 decision, that's at tab 5 of B.C. Hydro's Book of  
18 Authorities.

19 THE CHAIRPERSON: Paragraph 50 --?

20 MR. CHRISTIAN: Paragraphs 56 through 58.

21 THE CHAIRPERSON: Thank you.

22 MR. CHRISTIAN: That's at tab 5.

23 And those three paragraphs summarize the  
24 argument that was made by counsel for Hemlock Valley  
25 to the Commission, or to the Court of Appeal, on this  
26 very point under a slightly different statutory regime

1       some years ago. And in particular, in paragraph 56,  
2       the court is quoting counsel for Mr. Hemlock, and says  
3       that:

4               "The Commission, in directing the three-year  
5               phase-in of the rate adjustment, with no  
6               offsetting provision to permit Hemlock  
7               Valley to obtain sufficient revenue to  
8               recover the shortfall, the Commission has  
9               committed the very sin which Mr. Foy charged  
10              against the utility, namely, that instead of  
11              having due regard, that is, giving effect to  
12              the specific matters set out in Section  
13              65(4), it has accorded priority to..."

14       and then it refers to two other sections, relegating  
15       Section 65(4)(b) to simply a matter to be considered.  
16       And 65(4)(b) is the provision that the statutory  
17       regime at the time required that the Commission give  
18       due regard to the setting of a rate that allowed a  
19       fair return to the utility.

20               And then down on paragraph 63, after the  
21       Court of Appeal has referred to Mr. Sanderson's  
22       submissions, the Court of Appeal concludes:

23               "In my view, Mr. Sanderson's submissions are  
24               sound and must be accepted."

25               And now, to take that argument and put it  
26       in the context of our current statute, I need to ask

1 the Commission to turn to the *Utilities Commission*  
2 *Act*. And again, the relevant extracts are in the same  
3 book of authorities at tab 10. If I could have the  
4 Commission panel turn first to Section 60(1)(b), and  
5 Section 61 -- sorry, Section 60(1) at the outset says:

6 "In setting a rate under this *Act*:"

7 And then 60(1)(b) states:

8 "The Commission must have due regard..."

9 remember, "due regard" having been interpreted by the  
10 Court of Appeal to mean "give effect to",

11 "The Commission must have due regard to the  
12 setting of a rate that

13 (i) is not unjust or unreasonable within the  
14 meaning of Section 59..."

15 Unfortunately it's a little bit more complicated  
16 scheme than it was back when *Hemlock Valley* was  
17 decided, because now we have to go back to Section 59.  
18 It's just a paragraph up on the same page.

19 **Proceeding Time 10:02 a.m. T14**

20 Paragraph 59 says in the relevant part,  
21 that is, subsection (5):

22 "In this section a rate is unjust or  
23 unreasonable if the rate is..."

24 and there in subparagraph (b),

25 "...insufficient to yield a fair and  
26 reasonable compensation for the service

1           provided by the utility, or a fair and  
2           reasonable return on the appraised value of  
3           its property."

4           So my submission is that despite the  
5           changes in the structure of the Act, the obligation on  
6           this Commission to have due regard to the setting of a  
7           rate that affords the utility an opportunity to earn a  
8           fair return on its capital has not changed. The  
9           Commission still must have due regard to that  
10          provision. It's just in a different place now. And  
11          "having due regard" means "giving effect to", and in  
12          particular "giving effect to" means "not trading it  
13          off against other factors or criteria".

14          In the last sentence of issue number 2, the  
15          Commission also invites argument or refers parties to  
16          the *ATCO Electric* case, that is, the 2004 *ATCO* case  
17          from the Court of Appeal. That is the Alberta Court  
18          of Appeal. Just by way of background, the particular  
19          dispute there arose because of certain negotiated  
20          settlement agreements that ATCO entered into with  
21          intervenors in a revenue requirement proceeding in  
22          which the parties agreed to establish deferral  
23          accounts but did not expressly say that those deferral  
24          accounts would attract interest. "Carrying charges"  
25          is how it's referred to in the decision.

26          And then subsequently when ATCO tried to

1 claim interest on those deferral accounts, the board  
2 as it was in the AEUB, as the board, declined to allow  
3 recovery of interest. ATCO said, "Well, board,  
4 either you erred in approving this negotiated  
5 settlement, it didn't allow us the recovery of  
6 interest, or alternatively you erred in not allowing a  
7 variation of that negotiated settlement to expressly  
8 provide for their recovery of interest charges on  
9 deferral account balances." And they said that, "You,  
10 the board, erred because by denying us that interest  
11 you are effectively denying us a reasonable  
12 opportunity to earn a return on our invested capital."

13 And the essence of the Court of Appeal's  
14 decision in this case can be found in paragraph 9 of  
15 that decision. The Court of Appeal states at the  
16 beginning of paragraph 9 of page 3 of the decision  
17 referred to in item 2:

18 "I have concluded that when the board is  
19 presented with a package deal negotiated  
20 settlement agreed to by a utility, the board  
21 is under no obligation to consider the  
22 utility's economic interest in assessing  
23 whether that negotiated settlement is in the  
24 public interest."

25 And of course the reason the board is under  
26 no obligation is because the utility has already

1 signed off on the agreement. It's already said, "This  
2 serves my purposes." And in that sense I'd say the  
3 *ATCO* case that we're looking at here is completely  
4 consistent with *Hemlock*.

5 In *Hemlock* remember the issue was, having  
6 decided what the revenue requirement is, which  
7 includes the fair rate of return, the return on  
8 investment, the return on capital; the Commission has  
9 to set the rates to allow recovery of it. The issue  
10 in this *ATCO* case was whether or not the revenue  
11 requirement was set properly at the outset. It's a  
12 different issue and it's one that on the facts of *ATCO*  
13 I think it's quite reasonable to see how the Court of  
14 Appeal got to where it was. *ATCO* is a sophisticated  
15 utility represented by counsel in a negotiated  
16 settlement process, and by error and inadvertence  
17 simply failed to note that the deferral account  
18 balances ought to, in its view, have attracted  
19 carrying charges.

20 In particular, and this is why at the end  
21 of the day and my submission is that the *ATCO* case  
22 referred to here is of no assistance on this question  
23 of how to interpret Section 60(1)(b), nothing in the  
24 *ATCO* case requires the consideration of whether or not  
25 a tradeoff is allowable or not. There's no issue in  
26 the *ATCO* case of whether or not the statute is being



1       interpreted to allow a tradeoff or not. I think quite  
2       clearly the Court of Appeal would agree, or it can't  
3       be said anywhere in the decision that the Court of  
4       Appeal says, "No, your right to earn a reasonable  
5       return on your invested capital is something that has  
6       to be allowed in the rates." They agreed to that.  
7       The disagreement was whether or not the revenue  
8       requirement as set by the board, through the approval  
9       of the negotiated settlement agreements, in fact did  
10      that. It's a different dispute.

11                               And that's all I have on issue 2.

12   **Proceeding Time 10:07 a.m. T15**

13 MR. CHRISTIAN:    Now, I understand I'm to address issue 3  
14       now, and then we'll hear all the intervenors on issues  
15       2 and 3 in turn. But I'm happy to take any questions  
16       at this point that the Commission panel has any.

17 COMMISSIONER MILBOURNE:   I'm still at a bit of a loss on  
18       the -- as to the basis on which you interpret "due  
19       regard" as precluding trade-offs, Mr. Christian. I  
20       can't -- maybe it's just my understanding of English  
21       from some years back, but I just don't find that  
22       implicit that "due regard" equals "no trade-offs".

23 MR. CHRISTIAN:    Well, I agree one can't take the words  
24       "due regard" means "no trade-offs" and simply apply  
25       the latter to the former, as a matter of grammar. But  
26       what the Court of Appeal did in the *Hemlock* case is

1 look at the overall structure of the statute. They  
2 looked at the purpose of the statute, and they applied  
3 meaning to the words in the statute that were  
4 consistent with that purpose. And therefore they  
5 said, "In this case, in this context, when you're  
6 setting the rates of a regulated utility, 'having due  
7 regard for' means 'giving effect to without any trade-  
8 offs'."

9 And so, my answer, with respect,  
10 Commissioner Milbourne, isn't so much that I think  
11 that I'm making that argument today. My submission  
12 today is, that argument has been decided by the B.C.  
13 Court of Appeal, and that decision is binding. It's  
14 the law in this province on how to interpret those  
15 words of this statute. And so, again --

16 COMMISSIONER MILBOURNE: That's fine. I may come back to  
17 you after I hear more people. Thank you.

18 MR. CHRISTIAN: I dare say if I had been re-arguing the  
19 case of *Hemlock Valley*, I would have come with a much  
20 lengthier submission. As is apparent from that case,  
21 counsel in that case argued extensively the original  
22 versions of the statute and how they changed over  
23 time, and the purpose of the statute was very much in  
24 issue. My submission doesn't rely on that. I'm not  
25 making the argument that was already made and  
26 determined by the Court of Appeal. I'm relying simply

1 on the fact that the Court of Appeal has decided what  
2 those words mean.

3 THE CHAIRPERSON: Mr. Christian, I'll come back with more  
4 questions after I have heard from the other parties,  
5 but just once more, for clarification, when your  
6 submission essentially sort of re-supported the  
7 earlier position B.C. Hydro took in argument, is that  
8 *Hemlock* is the primary case here, and --

9 MR. CHRISTIAN: On this point. On this point.

10 THE CHAIRPERSON: That's right. On this point, that even  
11 we now have the new Section 60(b)(iii) in the amended  
12 Act, and we read about how the -- when Commission is  
13 setting rates, it must have due regard to the setting  
14 of rate that encourages public utilities to increase  
15 efficiency, reduce costs, and enhance performance.  
16 Having looked at that, we still have to come back,  
17 then, to Section 59(5), which emphasizes that the rate  
18 is unjust or unreasonable if it is insufficient to  
19 yield a fair and reasonable compensation for the  
20 service provided by the utility, or a fair and  
21 reasonable return on the appraised value of its  
22 property.

23 MR. CHRISTIAN: Well, let me -- maybe I can get at it  
24 this way. The specific words in 60(1)(b)(iii) that my  
25 friend refers to, Mr. Oulton, as requiring the trade-  
26 off, as I understand his argument -- and there was

1           some uncertainty in my own mind as to whether or not  
2           this is the case. But I'll put it in -- for lack of a  
3           better expression, the more aggressive kind of  
4           interpretation one might give to Mr. Oulton's  
5           argument.

6                        As I understand it, he's saying even if all  
7           expenditures B.C. Hydro plans to incur are prudent,  
8           nevertheless the Commission, in order to give effect  
9           to the words "reduce costs" must take some money out  
10          of the revenue requirement. Now, that's, I think -- I  
11          don't know if that's the final point he's saying, but  
12          because he also talks about the right of the utility  
13          in his argument to earn a reasonable return on its  
14          capital. So it struck me that his argument was a  
15          little inconsistent on those.

16                       But let's assume for my purposes right now  
17          that what he's saying is that the words "reduce costs"  
18          must be given effect, and therefore otherwise prudent  
19          dollars that Hydro would spend have to be taken out of  
20          the revenue requirement to serve this statutory  
21          provision. And I say that's a wrong way to interpret  
22          the statute. It's wrong, for the reasons I've already  
23          articulated, but it's wrong because it requires a  
24          conflict. Like, it sets up the conflict. On one  
25          hand, one provision of the Act says you need to get  
26          all the money that you say you're going to spend, and

1 enough to allow you to earn a return on your capital,  
2 subject to imprudency. And then another provision  
3 says you must reduce costs, somewhat arbitrarily.

4 **Proceeding Time 10:12 a.m. T16**

5 And I say that the way to interpret those  
6 words is not to find a conflict and therefore require  
7 a trade-off, and go against what the Court of Appeal  
8 said, but rather to put meaning to those words that  
9 doesn't require that. And if I have to interpret  
10 60(1)(b)(ii), I say it speaks not to revenue  
11 requirements but to rate design. Considering the  
12 rate --

13 THE CHAIRPERSON: Can you repeat that?

14 MR. CHRISTIAN: In setting a rate under this Act, the  
15 Commission must have due regard to setting a rate that  
16 encourages public utilities to increase efficiency,  
17 reduce costs and enhance performance. And each of  
18 those three things can be accomplished by rate  
19 structures that have nothing to do with the overall  
20 level of rates, but rather by whether or not the rates  
21 are, for example, stepped rates, which might encourage  
22 conservation, by a PBR-type structure for rates which  
23 might encourage utilities to reduce costs in a way  
24 they might not otherwise do.

25 THE CHAIRPERSON: All right, thank you. And obviously we  
26 will hear lots more argument on that, so we will get

1 back to you. Thank you, Mr. Christian.

2 **ARGUMENT BY MR. CHRISTIAN ON ITEM 3:**

3 So then issue 3 raises directly the  
4 question of whether or not the prudence test as  
5 articulated by B.C. Hydro applies to expenditures that  
6 are planned but have not yet been incurred.

7 And so, again, I need to clarify B.C.  
8 Hydro's position here. I think the characterization  
9 by the Commission of B.C. Hydro's position is slightly  
10 inaccurate. Again, in item 3 here, the Commission  
11 states that:

12 "B.C. Hydro's position that all its forecast  
13 expenditures are immunized by this prudence  
14 standard.."

15 And firstly, as I've already gone through at some  
16 length, it's not all of B.C. Hydro's forecast  
17 expenditures that get the benefit of the presumption  
18 of prudence. Rather, it's those planned expenditures  
19 that arise from management's legal obligation and the  
20 utility's legal obligations with respect to providing  
21 service and operating the assets, respectively.

22 And of course, nowhere in Hydro's argument  
23 does it use the word "immunized". Its plans,  
24 expenditure plans, are not immunized. In fact, they  
25 are very much the subject of this hearing that we're  
26 in today.

1                   Now, the only kind of point that I'm going  
2                   to make here, I've already indicated that the --  
3 THE CHAIRPERSON:   My panel member is asking me to remind  
4                   you, or explain, Mr. Christian, that's why this is in  
5                   quotes there, "immunized" is in quotes.  
6 MR. CHRISTIAN:    I don't believe it was from our argument.  
7                   I mean, I didn't say the word "immunized" in my  
8                   argument. B.C. Hydro didn't say that. And I don't  
9                   think it's a fair characterization, because  
10                  "immunized" suggests that it's not subject to review.  
11                  And all B.C. Hydro's planned expenditures are very  
12                  much subject to review. The question is, how are they  
13                  to be reviewed, and what is the burden that Hydro  
14                  bears with respect to demonstrating that its planned  
15                  expenditures ought to be recovered in rates. And I  
16                  don't think it's an accurate characterization to say  
17                  that the prudence test as articulated by B.C. Hydro  
18                  results in an immunization of those planning  
19                  decisions.  
20                         So, as I've already indicated, B.C. Hydro  
21                         became aware of an ATCO-- or, sorry, an Alberta  
22                         Utilities Commission decision from November of this  
23                         year regarding ATCO Gas again. Mr. Quail will be  
24                         making submissions on that, and I intend to respond in  
25                         reply, as is my right, I believe, and I submit.  
26                                 But I want to just add one comment here

1 with respect to the few words that the Commission does  
2 quote from the respective parties' arguments. The  
3 Commission cites B.C. Hydro's position that the  
4 BCOAPO's position is simply incorrect, and that none  
5 of the B.C. authorities -- and points out that B.C.  
6 Hydro's -- BCOAPO couldn't find any proposition in any  
7 of the cases that Hydro relied on to say that the  
8 prudency test applied only to expenditures that have  
9 already been incurred. And I just want to say that  
10 that is the case. None of the authorities B.C. Hydro  
11 relies on draws the distinction that Mr. Quail draws.  
12 And that's what I was trying to say in our argument.

13 **Proceeding Time 10:17 a.m. T17**

14 As it turns out, one of the cases referred  
15 to by the panel in A-26, the *Nova Scotia Power* case,  
16 2004, N.S.U. A.R.B. 27, does in fact adopt the  
17 prudency test as articulated by B.C. Hydro in the  
18 context of forecast expenditures. Again, the issue  
19 isn't debated, it's taken for granted effectively that  
20 the prudency test applies to any type of expenditure  
21 that has been planned, regardless of whether it has  
22 yet to be incurred or not. But it's absolutely  
23 consistent with B.C. Hydro's view.

24 At paragraph 47 of that decision it states:  
25 "The cost of fuel and purchase power is the  
26 single largest cost borne by Nova Scotia



1           Power Inc. (NSPI). In its June 23<sup>rd</sup>, 2004  
2           revised application filing, NSPI confirmed  
3           this cost to be \$377.1 million for the 2005  
4           test year."

5           So my point only is to observe that in that  
6           case that the Commission Panel referred to, the issue  
7           was forecast costs, or sorry, planned costs. And the  
8           later discussion at paragraphs 87 through 88 confirms  
9           that the Nova Scotia board endorses the -- and  
10          applies, in fact, the prudence test that B.C. Hydro  
11          applied, and there was no issue in that case as to  
12          whether or not the prudence test applied to  
13          expenditures planned but not yet incurred.

14          And subject to what I have to say in reply  
15          on the recent *ATCO* case, those were my submissions on  
16          issue number 3.

17 THE CHAIRPERSON: We have no further questions right now,  
18 Mr. Christian, but we are looking at the clock here  
19 and how long do you think you will be, Mr. Quail?

20 MR. QUAIL: I'm going to be a while. I always seem to  
21 take longer to the people listening to me than I do to  
22 myself, but I will be some time.

23 THE CHAIRPERSON: So it might be a good time to take our  
24 15-minute break right now, so we'll return at 25 to  
25 11.

26 (PROCEEDINGS ADJOURNED AT 10:19 A.M.)

1 (PROCEEDINGS RESUMED AT 10:37 A.M.) T18 & T19  
2 THE CHAIRPERSON: Mr. Quail.  
3 **ARGUMENT BY MR. QUAIL ON ITEM 2:**  
4 MR. QUAIL: Yes, Madam Chair and Panel members. I'll be  
5 addressing each of the questions in turn, and first  
6 with respect to question number 2.  
7 We disagree fundamentally with the way that  
8 B.C. Hydro is interpreting the *Hemlock Valley*  
9 decision. We say that it does not say -- these aren't  
10 necessarily the words that we would select, but it  
11 does not stand for the proposition that there are not  
12 necessary tradeoffs that you are required to make as a  
13 Commission in setting B.C. Hydro's rates, including  
14 tradeoffs that could impinge on return on capital,  
15 return on equity.  
16 What *Hemlock* says is that you may not make  
17 tradeoffs that are extraneous to the decision-making  
18 process mandated by the statute. There's a particular  
19 process that's laid out. And I'm going to spend some  
20 time looking at what *Hemlock* really says and what was  
21 really happening. The problem there was that the  
22 Commission had gone through the process and determined  
23 the revenue requirement, looking not only at return on  
24 equity. But then it purported to set a rate that did  
25 not square up with the revenue requirement. That was  
26 the problem.

1                   It does not create a hierarchy of  
2 entitlements that place the utility return at the top.  
3 And developments in the statute since then make the  
4 issue even more complex than that.

5                   It is trite law that a statute must be read  
6 as a whole and in its context, in order to give due  
7 effect to all of its provisions, working harmoniously  
8 to achieve its legislative intent. The leading case  
9 on statutory interpretation is *Re: Rizzo and Rizzo*  
10 *Shoes Ltd.* (1998) 1 SCR 27. It's only about 11 years  
11 old or 10 years old but it's already -- I think it  
12 qualifies as an old chestnut, which includes this  
13 often quoted passage, and I am reading from paragraph  
14 number 21 which is the pronouncement of the court  
15 that's frequently referred to in terms of statutory  
16 interpretation principles:

17                   "Although much has been written about the  
18 interpretation of legislation, Elmer  
19 Driedger in *Construction of Statutes*, 2d  
20 edition, 1983, best encapsulates the  
21 approach upon which I prefer to rely. He  
22 recognizes that statutory interpretation  
23 cannot be founded on the wording of the  
24 legislation alone. At page 87 he states..."  
25 Here's the important -- here's the letters on the  
26 golden tablet:

1           "'Today there is only one principle or  
2           approach, namely the words of an Act are to  
3           be read in their entire context and in  
4           their grammatical and ordinary sense,  
5           harmoniously with the scheme of the Act,  
6           the object of the Act, and the intention of  
7           Parliament.'"

8           So you could have saved yourselves a lot of writer's  
9           cramp here. But anyway, I'm not going to belabour  
10          anything.

11          "Broadly stated, the legislative intention  
12          underlying the *Utilities Commission Act* is  
13          to create a fair and transparent process to  
14          balance the interests of monopoly providers  
15          of essential energy services and car  
16          insurance against the interests of their  
17          captive customers and against other societal  
18          interests."

19          And I would underscore the word "balance" and that  
20          word is frequently used by the courts in the Supreme  
21          Court of Canada, B.C. Court of Appeal, and many courts  
22          in describing the process.

23          "Much of that balancing process involves the  
24          oversight of the well-known regulatory  
25          compact which is discussed in the Supreme  
26          Court of Canada's *ATCO* decision. The Act

1 needs to be interpreted so as to give effect  
2 to that intention, and interpretations which  
3 would thwart that intention must be  
4 avoided."

5 **Proceeding Time 10:41 a.m. T20**

6 The Act sets out a complex set of factors  
7 that the Commission is required to take into account  
8 in setting rates. And that list of factors has  
9 expanded considerably since the time when *Hemlock*  
10 *Valley* was decided. But still the reasoning -- the  
11 core reasoning underlying *Hemlock Valley*, I would  
12 agree, still applies, but it doesn't lead to the  
13 conclusion that my friend has suggested.

14 The question cannot be answered by  
15 simplistically, by mechanically asserting that return  
16 on equity -- that the return on equity question which  
17 was the central concern, the factor that the court was  
18 concerned with in *Hemlock Valley*, but that that  
19 factor, laid out in a statute, trumps the others.  
20 That is, there is no hierarchy of factors of  
21 obligatory factors in the statute.

22 So, first, it is important to note  
23 carefully what *Hemlock Valley* actually says. And it's  
24 a case that's often relied on, not just by present  
25 company, but utility counsel generally, in attempting  
26 to claim some special privilege for their client's

1 return on equity.

2 *Hemlock Valley* simply says that the  
3 Commission must follow the *Utilities Commission Act*.  
4 The court was faced with a situation where the  
5 Commission had determined the utility's appropriate  
6 revenue requirement, including the amount it needed to  
7 give to have an opportunity to recover a reasonable  
8 return on its investment, but then declined to set  
9 rates at that level out of concern that this would  
10 inflict rate shock on customers. Instead, the  
11 Commission set rates so as to phase in the increases  
12 needed to fully provide the utility with the revenue  
13 it required, and to which it was entitled. There was  
14 no basis under the Act for the Commission to do that,  
15 and the Court of Appeal confirmed that this was so.

16 The nub of the decision is at paragraph 66  
17 of the *Hemlock Valley* case. And *Hemlock Valley* is at  
18 tab 5 of B.C. Hydro's Book of Authorities they  
19 supplied with their argument.

20 THE CHAIRPERSON: Thank you.

21 MR. QUAIL: So, paragraph 66 reads:

22 "Firstly, in directing the three-year phase-  
23 in, the Commission was not balancing  
24 interests or, if it was purporting to do, it  
25 acted improperly. The proper balancing of  
26 interests which the Commission carried out

1           was done and completed when it settled the  
2           rate base, fixed the rate of return and  
3           determined the costs of operation allowable  
4           for rate-making purposes."

5           So in other words, there is a balancing act. There is  
6           a trade-off, if that is a correct phrase for it. But  
7           that happens at a particular stage in the process, and  
8           that involves balancing interests in terms of the  
9           dealing with the costs of operation, and dealing with  
10          the return on equity.

11                        It must be remembered that the rate base  
12          itself was the subject of much contention at the  
13          public hearing, and that only after the Commission had  
14          considered alternative calculations for rate base did  
15          it decide to accept HVES's evidence in this regard.  
16          It must be remembered as well that HVES had proposed a  
17          rate of return of 13 percent on the debt component and  
18          15 percent on the equity component of the rate base.  
19          The Commission denied both components -- denied HVES's  
20          request and fixed 13 percent as the just and  
21          reasonable rate of return on both components. And I'd  
22          underscore this.

23                        "In addition, as can be seen from sheet 5 of  
24          the appendix to these reasons, the  
25          Commission made substantial downward  
26          adjustments to many of HVES's estimates of

1           its costs of operation."  
2           So the Commission had looked at the various components  
3           and, at least at that time, the principal components  
4           that the Act contained was -- and this is the classic  
5           regulatory compact -- what is the reasonable cost of  
6           operation? And what is a reasonable rate of return?  
7           They calculated that and then, as I said, they set a  
8           rate that didn't add up to the outcome of that  
9           process.

10                       *Hemlock Valley* does not stand for the  
11           proposition that there is a hierarchy of statutory  
12           factors that the Commission takes into account.  
13           Rather, it says that the Commission must follow the  
14           statute and must not substitute its own judgment to  
15           deviate from what the legislature has mandated.

16                                       **Proceeding Time 10:46 a.m. T21**

17           The point is that, once the process is done  
18           and the Commission determines the revenue requirement  
19           of the utility according to its mandate, it must not  
20           set rates that are inadequate to meet that revenue  
21           requirement on the basis of considerations which are  
22           nowhere provided in the Act. And that's plain enough  
23           from the wording and the scheme of the statute. The  
24           panel has already had its attention brought to Section  
25           60(1)(b).

26           "The Commission must have due regard to the



1           setting of a rate that..."  
2           and then there are three sub-sections.  
3           "...is not unjust or unreasonable within the  
4           meaning of Section 59."  
5           That is compulsory. The Commission must have due  
6           regard to that. On an equal footing, exactly the same  
7           process applies with respect to subsection (ii):  
8           "...provides to the public utility for which  
9           the rate is set a fair and reasonable return  
10          on any expenditure made by it to reduce  
11          energy demands, and  
12          (iii) encourages public utilities to  
13          increase efficiency, reduce costs, and  
14          enhance performance."  
15          So the Section 59 is an obligatory requirement, a set  
16          of factors that must be taken into account. And that,  
17          again, does not give special prominence or special  
18          privilege to the one factor, which is obviously an  
19          important one, of the rate of return the utility is  
20          entitled to. That is one of the factors that you must  
21          take into account.  
22                 You must also take into account under  
23          59(5), subsection (5), that the rate is not more than  
24          a fair and reasonable charge for the service of the  
25          nature and quality provided by the utility, for  
26          example.

1                   There is nothing in the statutory scheme  
2                   which says that the return on equity trumps the other  
3                   requirements of the *Act*, and that includes 50(b)(iii),  
4                   "encourages utilities to increase efficiency". And  
5                   I'm fascinated to hear that there should be imported  
6                   into that the words, I guess written in invisible ink,  
7                   "with respect to rate design". I found that an  
8                   intriguing suggestion.

9   THE CHAIRPERSON:    I believe you meant 60(b).

10   MR. QUAIL:        Pardon me, that's right. 60.

11   THE CHAIRPERSON:    Thank you.

12   MR. QUAIL:        Again, I'll blame my cold for any place where  
13                   I become unintelligible or go astray here, whether --  
14                   I'll milk it for what it's worth here.

15                   Again, those are all obligatory, and this  
16                   includes factors that were not there at the time of  
17                   *Hemlock Valley*, but the basic reasoning of *Hemlock*  
18                   *Valley* applies to the statute as it reads now, and it  
19                   points in exactly the opposite direction from where  
20                   B.C. Hydro has urged.

21                   And so, for example, nowhere does the Court  
22                   of Appeal suggest in *Hemlock Valley* that the utility  
23                   has a right to an opportunity to recover a reasonable  
24                   return on its prudently-invested capital even if that  
25                   results in a rate that is more than a fair and  
26                   reasonable charge for service of the nature and

1        quality provided by the utility, which was a section  
2        we've already visited. That is a balancing process  
3        which the statute requires the Commission to undertake  
4        as part of the oversight of the regulatory compact.  
5        Perhaps in the most extreme situation, where the  
6        genuine cost of a utility's operations would price its  
7        services outside of their fair value, this could  
8        present a dilemma, but that would be an extreme case.  
9        That is, one might imagine a situation where things  
10       have really gone wrong with a utility's rate-to-cost  
11       structure, to the point where the price -- unit price  
12       for electricity that it would require to charge in  
13       order to cover its costs would be astronomical and out  
14       of bounds in terms of what is reasonable. That is an  
15       excessive cost. And we're not saying that that's --  
16       that comes into play here, that there is plenty of  
17       room for balancing interests here.

18                    It did not say that the resultant rate if  
19       the utility were to cover its entire revenue  
20       requirement would be out of line with the fair and  
21       reasonable value of delivered electricity. And it's  
22       also helpful in understanding *Hemlock* to look at the  
23       Supreme Court of Canada, what is really the leading  
24       decision in this area, which is the *B.C. Electric*  
25       *Railway* case, which was relied upon extensively by the  
26       Court of Appeal in *Hemlock Valley*. And I would take

1       you to paragraph 48 of *Hemlock Valley*, which has one  
2       of the quotes from *B.C. Electric Railway*.

3     THE CHAIRPERSON:    Sorry, can you repeat that reference?

4     MR. QUAIL:        If you go to paragraph 48 of *Hemlock*  
5       *Valley* --

6     THE CHAIRPERSON:    Thank you.

7     MR. QUAIL:        There is a quote from Mr. Justice Martland of  
8       the Supreme Court of Canada in the *B.C. Electric*  
9       *Railway* case, which is really the foundation --  
10       *Hemlock Valley* really adds nothing to *B.C. Electric*  
11       *Railway*. So at paragraph 48 of *Hemlock Valley*, at  
12       pages 855 to 57 again, of the *B.C. Electric Railway*  
13       case, Mr. Justice Martland said:

14                                **Proceeding Time 10:51 a.m. T22**

15       "Section 16, the Section with which we are  
16       concerned in this appeal, also deals with  
17       this matter of fairness in rates. In  
18       addition, it spells out the method by which  
19       a public utility is to obtain fair  
20       compensation for its service; i.e., by a  
21       fair and reasonable return upon its rate  
22       base, which rate base pursuant to Section  
23       45, the Commission could determine by  
24       appraisal. Section 16 deals with the duties  
25       of the Commission in fixing rates. Clause  
26       (a) of subsection (1) states that the

1 Commission shall consider all matters which  
2 it deems proper as affecting the rate. It  
3 confers on the Commission a discretion to  
4 determine the matters which it deems proper  
5 for consideration, and it requires the  
6 Commission to consider such matters.

7 Clause (b) of subsection (1) does not  
8 use the word 'consider' which is used in  
9 clause (a), but directs that the Commission,  
10 shall 'have due regard', among other things,  
11 to two specific matters.

12 I'm not sure exactly where this leads, but  
13 the Supreme Court of Canada seemed to think that "have  
14 due regard" did not mean the same thing as "you must  
15 consider".

16 :  
17 "These are:

18 (i) The protection of the public from rates  
19 that are excessive as being more than a fair  
20 and reasonable charge for services of the  
21 nature and quality furnished by the public  
22 utility."

23 So the Supreme Court of Canada is saying that is one  
24 of the issues that the Commission shall have due  
25 regard to.

26 "(ii) To giving the public utility a fair

1 and reasonable return upon the appraised  
2 value of its properly used or prudently and  
3 reasonably acquired to enable the public  
4 utility to furnish the service."

5 As I read them, the combined effect of  
6 the two clauses is that the Commission, when  
7 dealing with a rate case, has unlimited  
8 discretion as to matters which it may  
9 consider as affecting the rate, but that it  
10 must, when actually setting the rate, meet  
11 the two requirements specifically mentioned  
12 in clause (b). It would appear reading  
13 Sections 8, 16 and 20 together, the Act  
14 contemplates these two matters to be of  
15 primary importance in the fixing of rates."

16 And as I've suggested, the Act since has added a  
17 number of other societal concerns which are placed on  
18 the same footing in the structure of the Act with  
19 these.

20 "In my opinion, therefore, these two factors  
21 should be given priority over any other  
22 matters which the Commission may consider  
23 under clause (a), or any other things to  
24 which it shall have due regard under clause  
25 (b) when it is fixing any rate. The second  
26 portion of question 1(a) was as to whether,

1 in the case of conflict among the matters  
2 and things referred to in clauses (a) and  
3 (b) of Section 16(1), it was the  
4 Commission's duty to act to the best of its  
5 discretion. I have already expressed my  
6 view regarding the priority as between those  
7 things, specifically mentioned clause (b),  
8 and the other things, matters or things  
9 referred to in clauses (a) and (b). This  
10 leaves the question as to the possible  
11 conflict as between the two matters  
12 specifically mentioned in clause (b).

13           Clearly as between these two matters,  
14 there is no priority directed by the Act..."  
15 That phrase, in my submission, actually effectively  
16 settles the interpretive question that we're dealing  
17 with here. And I might add that it may or may not be  
18 that the question of priority between those may or may  
19 not, in the end, have a real impact on the outcome of  
20 this application. But in my submission it is  
21 extremely important, of paramount importance, for the  
22 Commission to be very clear as to what the proper  
23 decision-making process is in revenue requirement, and  
24 to avoid the false notion that there is a hierarchy of  
25 rights with utility shareholders being at the apex.

26           "Clearly as between these two matters, there

1 is no priority directed by the Act, but  
2 there is a duty imposed upon the Commission  
3 to have due regard to both of them. The  
4 rate to be imposed shall be neither  
5 excessive for the service, nor insufficient  
6 to provide a fair return on the rate base.  
7 There must be a balancing of interests."

8 Call that tradeoffs if you wish.

9 "In my view, however, if a public utility is  
10 providing an adequate and efficient service,  
11 as it is required to do by Section 5 of the  
12 Act, without incurring unnecessary,  
13 unreasonable or excessive costs in so doing,  
14 I cannot see how a scheduled of rates which  
15 overall yields less revenue than would be  
16 required to provide that rate of return on  
17 its rate base which the Commission has  
18 determined to be fair and reasonable, can be  
19 considered overall as being excessive."

20 So backing up really, what we've got here  
21 is, in terms of simple arithmetic, the Supreme Court  
22 of Canada is saying one and one does not equal three,  
23 that if we've got a reasonable cost of providing  
24 service and a reasonable return, that cannot add up to  
25 an excessive or not unreasonable rate.

26 Now in my submission, that is dealing with



1 the statutory schemes then, and since then there have  
2 been other factors such as efficiency and  
3 environmental concerns and other societal concerns  
4 which are thrown into the mix under 60(b)(i) to (iii).

5 **Proceeding Time 10:56 a.m. T23**

6 And so the arithmetic may not be quite so  
7 simple. And it may well be that there will be  
8 instances where factors will make this more complex  
9 and, in fact, it may be impossible to totally satisfy  
10 all of these obligatory concerns. But you are as much  
11 bound to take into account public utility efficiency,  
12 reducing costs and enhancing performance, as you are  
13 bound to take into account their fair return on  
14 equity.

15 Back to the text quoted from the Supreme  
16 Court of Canada.

17 "It may be that within the schedule, certain  
18 rates may operate unfairly relatively as  
19 between the different classes of service, or  
20 different classes of consumers."

21 Again here we're talking about rate design. But *B.C.*  
22 *Electric* was about revenue requirement.

23 "If so, the Commission has the duty to  
24 prevent such discrimination. But this can  
25 be accomplished by adjustments of the  
26 relative impact of the various rates in the

1           schedule, without having to reduce the total  
2           revenues which the whole Schedule of Rates  
3           is designed to produce."

4           So the Supreme Court is saying, "Well, the scheme of  
5           the *Act*, as one would expect, produced something that  
6           adds up to a fair balancing of interests." As I say,  
7           that may or may not always be the case in the present  
8           scheme.

9           So the Supreme Court and, following it, the  
10          Court of Appeal in *Hemlock Valley* has said that both a  
11          reasonable return and non-excessive rates must both be  
12          balanced and achieved. It has also said, as a  
13          practical matter, a utility rate that covers operating  
14          costs, which the regulator has found necessary or  
15          reasonable and not excessive, plus a rate of return  
16          which the regulator has found to be reasonable, would  
17          be hard to construe as an excessive rate for the  
18          service provided. And that really describes where  
19          things were at in the *Hemlock Valley* case once the  
20          Commission had determined the revenue requirement.  
21          That was really the end of the story.

22          Above all, nothing in *Hemlock Valley* says  
23          what B.C. Hydro claims, that the Commission must set  
24          its rates high enough to recover all of the  
25          expenditures the utility plans to make, unless they  
26          are shown to be imprudent. And there we get into

1 question 3, so I'll be saying more about that in a  
2 moment. *Hemlock Valley* says nowhere that the utility  
3 is entitled to any form of deference in relation to  
4 its projection of the amount of revenue it feels it  
5 should receive in a test period. And in fact, in the  
6 facts in *Hemlock Valley*, the Court of Appeal recites  
7 the fact that the Utilities Commission had  
8 significantly reduced a number of operating expense  
9 projections that B.C. Hydro -- that *Hemlock Valley* had  
10 made.

11 What the court has clearly said, clearly in  
12 the quoted paragraph, is that once all of the factors  
13 are determined which contribute to the utility's  
14 revenue requirement according to the judgment of the  
15 Commission -- and up to that point it involves a great  
16 deal of exercise of judgment and expertise by the  
17 Commission -- including the estimates of the cost of  
18 operation, and when the appropriate revenue  
19 requirement is set, that is essentially the end of the  
20 matter, and the Commission cannot invoke extraneous  
21 concerns or considerations, and set rates which are  
22 inadequate to achieve the revenue recovery which it  
23 has already determined to be proper. To do so would  
24 violate the *Act* and the regulatory compact. And that  
25 is really all that *Hemlock Valley* says.

26 Now, I'll just comment very briefly on the

1           2005 *ATCO* decision that is cited in question 2. And  
2           all I'll say is that it also -- it essentially says  
3           the same thing. There is absolutely nothing new or  
4           startling introduced in that. And I'll just take you  
5           to paragraphs 131 and 132 of that decision, where the  
6           Alberta Court of Appeal said:

7                   "Thus both then and now, in assessing  
8                   utilities' legitimate needs, the Board is  
9                   required to ensure that the utility has a  
10                  reasonable opportunity to recover its costs,  
11                  providing they are prudent."

12          And then cites the *British Columbia Electric Railway*  
13          case.

14                  "Within the statutory framework, the Board's  
15                  discretion in fixing just and reasonable  
16                  rates is relatively wide. As explained by  
17                  this court in *Trans-Alta Utilities Corp. v.*  
18                  *Alberta Public Utilities Board*, the key  
19                  power of this Board is to fix fair and  
20                  reasonable rates.

21          That is a good example of a wide discretion. And at  
22          132, under the heading "Board's Duty To Act in the  
23          Public Interest":

24                  "In fixing just and reasonable rates, the  
25                  Board is to exercise its discretion in what  
26                  is typically characterized as the public

1 interest. For example, the Board's mission  
2 statement provides in regulating utility  
3 services it will ensure that this is done in  
4 the public interest. Considerable attention  
5 has been paid to the definition of this  
6 public interest standard, under a regulated  
7 public utility system."

8 And cites a number of cases.

9 "When used in this context, the fixing of  
10 rates in the public interest has  
11 historically meant consideration of both  
12 sides of the rate-paying equation, the  
13 payors, that is, the customers receiving the  
14 utility service and their right to fair and  
15 reasonable rates and the payee. That is,  
16 the utility providing the service and its  
17 right to recover its prudent costs and  
18 expenses associated therewith."

19 **Proceeding Time 11:01 a.m. T24**

20 In my submission, this actually should all  
21 be pretty obvious, and I'm frankly surprised that B.C.  
22 Hydro has suggested otherwise.

23 Now, if B.C. Hydro's position were correct,  
24 looking at Section 60(1)(b), and for example the  
25 status of subsection (iii) "encourages public  
26 utilities to increase efficiency, reduce costs, and

1       enhance performance," B.C. Hydro is suggesting that  
2       somehow this is some kind of a footnote or tangential  
3       issue in relation to the setting of a revenue  
4       requirement. And as I've argued, there's really no  
5       basis whatsoever for that interpretation. And if you  
6       apply the analysis of the courts in *B.C. Electric* and  
7       in *Hemlock Valley*, you will come to the opposite  
8       conclusion that they are to be given equal footing.

9               But if B.C. Hydro's position were correct  
10       and the Commission cannot apply 61(b)(3) to expect a  
11       utility to operate efficiently -- and I would argue  
12       strenuously that there are revenue requirement as well  
13       as rate design issues which can be used to prompt a  
14       utility to tighten its belt and operate efficiently.  
15       It would seem obvious to me.-- we would be left with  
16       an absurd outcome, which is one of the things the  
17       Supreme Court of Canada tells us in *Rizzo Shoes* is not  
18       an option. I say an absurd outcome because the whole  
19       scheme of the *Act*, especially the present *Act* as  
20       recently amended, underscores the legislative intent  
21       of making sure that our energy utilities operate in an  
22       efficient way and one that has proper regard to the  
23       impact on the environment, for example.

24               So to say that somehow the provisions of  
25       the *Act* that address that somehow take a back seat,  
26       for example, to the utility's entitlement to recover

1 its rate of return, is simply unfounded and is absurd  
2 in the sense that it contradicts the entire thrust of  
3 the current statute.

4 In *Rizzo Shoes* I'd refer you to paragraph  
5 27 of the Supreme Court of Canada decision:

6 "It is a well-established principle of  
7 statutory interpretation that the  
8 legislature does not intend to produce  
9 absurd consequences. According to Côté,..."  
10 which is another text on interpretation of statutes,  
11 "...an interpretation could be considered  
12 absurd if it leads to ridiculous or  
13 frivolous consequences, if it is extremely  
14 unreasonable or inequitable, or if it is  
15 illogical or incoherent, or if it is  
16 incompatible with other provisions or the  
17 object of the legislative enactment.  
18 Sullivan echoes these comments noting that a  
19 label of absurdity can be attached to  
20 interpretations which defeat the purpose of  
21 a statute or render some aspect of it  
22 pointless or futile."

23 And pausing for breath and subject to  
24 questions you might have regarding question 2, I'm  
25 ready to launch into question number 3.

26 THE CHAIRPERSON: Not at this moment, so please proceed,

1 Mr. Quail.

2 **ARGUMENT BY MR. QUAIL ON ITEM 3:**

3 MR. QUAIL: I'll begin my submissions on question 3 with  
4 an observation about B.C. Hydro's suggestion that  
5 somehow there's something wrong if we cannot come up  
6 with authority for the proposition that there is no  
7 deference to be given to their proposed expenditures.  
8 In my submission, that has things exactly backward.  
9 For example, we have no authority that B.C. Hydro is  
10 unable to walk on water. That doesn't make it somehow  
11 default is presumptively true.

12 B.C. Hydro's position on this issue would  
13 reverse the well-established burden of proof in a  
14 utility rate application. That is, it would reverse  
15 the principle that the onus lies on the utility to  
16 justify a rate increase which it seeks to extract from  
17 captive customers. This is contrary to many, many  
18 decades of regulatory principle and practice and  
19 contrary to reason.

20 Now, I'm intrigued by the Nova Scotia case  
21 which my friend has referred to, and this is the first  
22 that I've-- the only familiarity I have with it is my  
23 friend's discussion. But it is interesting that in  
24 that case, the Nova Scotia board appears to have  
25 assumed, without anybody really addressing their mind  
26 to it, that there was deference due to forecasts made



1 by the utility's management. But this was in a  
2 category of forecasting where B.C. Hydro itself says  
3 this morning no deference is due. The issue there was  
4 the forecast of market costs. And my friend prefaced  
5 his comments on questions 2 and 3 by saying, "B.C.  
6 Hydro agrees that there is no deference due to their  
7 projections in exactly that kind of subject matter."

8 **Proceeding Time 11:06 a.m. T25**

9 So I say, if that's the thread that they're  
10 hanging this on to achieve this enormous reversal of  
11 onus, I submit it is the slenderest conceivable  
12 thread.

13 Given the underlying legislative purpose of  
14 the *Utilities Commission Act*, which I have already  
15 discussed, it makes sense that a regulator will have  
16 to deal differently with expenditures that are water  
17 under the bridge and beyond redemption by gentle  
18 means, and proposed future expenditures where  
19 corrective action by the regulator can avoid tipping  
20 the regulatory compact equation onto the side of  
21 excessive cost to consumers.

22 B.C. Hydro's position in this respect is a  
23 direct challenge to the very notion of meaningful rate  
24 regulation, in my submission. That is, it means that  
25 the Commission must defer to the utility's word as to  
26 how much money it wants to spend on operations in the

1 coming period unless the Commission or another party  
2 can meet an evidentiary onus to demonstrate the  
3 utility's revenue should be less than applied for.  
4 This is a total reversal of the well-established onus  
5 that rests on the shoulders of a utility to justify  
6 its applied-for revenue requirement.

7 Everyone involved in utility regulation  
8 knows full well that there is a world of difference  
9 between prospective rate setting and retrospective  
10 disallowance of past expenditure. Suggesting somehow  
11 that there is not a meaningful line between those, in  
12 principle, is baffling to me.

13 They know that retrospective prudence  
14 reviews are generally futile, but the prospective  
15 considerations of proposed utility expenditures can be  
16 an effective regulatory process precisely because they  
17 are not constrained by the reversal of onus in favour  
18 of the utility's management. We all know that. The  
19 Commission's own publication, which is entitled  
20 "Understanding Utility Regulation: A Participant's  
21 Guide to the British Columbia Utilities Commission" --  
22 I would have made copies of all these things, but the  
23 text is all in this document, but again, I'm not going  
24 to belabour that issue -- which was the collaborative  
25 work of a diverse group of regular participants in its  
26 process, directly contradicts B.C. Hydro's placement

1 of the onus in relation to the approval of prospective  
2 utility expenditures. For example, it says:

3 "Most Commission hearings are initiated..."  
4 this is at page 26.

5 "Most Commission hearings are initiated in  
6 response to an application by a utility.  
7 When a utility applies to the Commission for  
8 approval of changes to its business, e.g.,  
9 rate increase, changes in its tariff, terms  
10 and conditions or system extensions, the  
11 burden of proof is on the utility to justify  
12 its application to the Commission."

13 Again, I don't think that's a startling proposition.

14 "For this reason, the utility is expected to  
15 include the written evidence necessary to  
16 support its request as part of the  
17 application it files with the Commission."

18 And the point there is, if the burden were the other  
19 way around, strictly speaking in terms of a fair  
20 hearing, all that would be required for the utility to  
21 do is to say, "Here's what we say we're entitled to,"  
22 and if the evidentiary burden is on the intervenors,  
23 we are the ones who would somehow have to muster all  
24 the evidence that probes into the reasonableness of  
25 those proposed expenditures.

26 "In principle, this application..."this is

1 back to the "Understanding Utility Regulation"  
2 document:

3 "In principle, this application should  
4 constitute the utility's case; although it  
5 is not unusual for the utilities to request  
6 permission to file additional documents or  
7 make changes to its application at the  
8 hearing. In deciding whether to accept late  
9 changes, the Commission must consider the  
10 significance of the change in the utility's  
11 position or evidence and the prejudice it  
12 may cause to other participants who have  
13 prepared for the hearing based on the  
14 original application. When the utility..."  
15 and this is at page 38.

16 "When the utility applies for an increase in  
17 rates to be charged to its customers, it  
18 must justify the revenue requirement that  
19 support the request for an increase."

20 *Hemlock Valley* zeroed in on the issue of a  
21 utility's right to recover a fair return on the  
22 capital it has prudently invested. That's because  
23 that's the utility's concern, and the utility felt  
24 short-changed with the rate that was set, and took  
25 that issue to the Court of Appeal. At paragraph 55,  
26 again going back to the Court of Appeal's quote from

1           *B.C. Electric*, 55 of *Hemlock Valley*, reads as follows:

2           "Mr. Justice Locke continued at page 847:

3                 'Rates that failed to yield fair  
4                 compensation for the service rendered  
5                 are declared by section 2 to be unjust  
6                 and unreasonable as they were by  
7                 section 2 of the *Water Act, Amendment*  
8                 *Act*. The Commission is directed by  
9                 section 16.b to have due regard to  
10                fixing a rate which will give the  
11                utility a fair and reasonable return  
12                upon the appraised value of its  
13                property used or prudently and  
14                reasonably acquired to enable it to...' "

15   **Proceeding Time 11:11 a.m. T26**

16 THE CHAIRPERSON:     Mr. Quail, could you please repeat that  
17                           reference please?

18 MR. QUAIL:            The words I am underscoring, and again, there  
19                           is nothing magic to them, is that when the utility  
20                           seeks a rate increase, it is only entitled to an  
21                           increase to cover expenses including, in this case  
22                           , value of property used or prudently and reasonably  
23                           acquired; that is, the question is always whether it  
24                           is prudent and reasonable.

25                                 Again, the reference there is paragraph 55  
26                           of *Hemlock Valley*.

1 THE CHAIRPERSON: Thank you.

2 MR. QUAIL: Which is tab 5 in B.C. Hydro's material.

3 THE CHAIRPERSON: Up to 6, that is right.

4 MR. QUAIL: And I am not going to spend any more time  
5 with that reference, but just for the record, that is  
6 where it is to be found, and again, nothing unique  
7 about that. This is a kind of phrase that appears  
8 throughout the legislative scheme and throughout the  
9 jurisprudence.

10 Similarly, the *ATCO* Supreme Court of Canada  
11 decision, was about the utility's write to gains in  
12 the value of its capital assets which had been  
13 acquired into rate base as approved capital  
14 expenditures. None of the cases cited by B.C. Hydro  
15 with respect to this aspect of its argument involve  
16 any deference to the utility's proposed future  
17 expenditures on operations. And I can say that with  
18 total confidence on hearing the one exception my  
19 friend was able to find, the Nova Scotia decision,  
20 which does not concern projected or proposed future  
21 expenditures on operations.

22 As I have suggested, such a notion would  
23 gut the entire regulatory regime, especially given the  
24 extreme imbalance of information and access to  
25 evidence as between the utility on one side, and the  
26 commission and intervenors on the other. It is

1 instructed to look at what the courts actually said in  
2 the *Enbridge* case and in all these cases. This is  
3 true of these cornerstone cases. It is important to  
4 look at what the court actually said and not some  
5 gloss that has been placed on it.

6 The case was about the use of hindsight by  
7 a regulator. In this case, concerning the prudence of  
8 contracts which had been entered in to by the utility,  
9 and I emphasize the past tense in that regard. This  
10 is from the Ontario Court of Appeal judgment at  
11 paragraph 2. That is tab 4, thank you, of B.C.  
12 Hydro's authorities.

13 So paragraph 2 of the Ontario Court of  
14 Appeal judgment:

15 "Enbridge is a gas distributor and seller of  
16 gas to consumers in Ontario. The OEB is  
17 charged with the responsibility of fixing  
18 the rate that Enbridge can charge consumers  
19 for its gas. Enbridge applied for a rate  
20 increase. The OEB refused that request in  
21 part and Enbridge appealed to the Divisional  
22 Court. The Divisional Court unanimously  
23 held that the OEB erred in law in its  
24 application of the legal test to be used  
25 when deciding whether Enbridge was entitled  
26 to a rate increase to reflect higher

1 transportation costs incurred by Enbridge as  
2 a result of certain agreements it had  
3 entered into."

4 And I'd underscore the following:

5 "In reaching its conclusion, the Divisional  
6 Court read a passage from the OEB as  
7 demonstrating, contrary to statements made  
8 earlier and the reasons of the OEB, that the  
9 OEB had improperly used hindsight when  
10 deciding whether the added transportation  
11 costs incurred by Enbridge justified a rate  
12 increase.

13 I would allow the appeal and restore  
14 the order of the OEB. When the impugned  
15 passage is read in the context of the entire  
16 judgment, it can and should be read in a  
17 manner that is consistent with the rest of  
18 the reasons of the OEB."

19 B.C. Hydro's effort to reverse the onus in  
20 establishing its approved prospective operational  
21 costs -- characterizing those as plans or as  
22 forecasts, in my submission, is an interesting  
23 characterization.

24 B.C. Hydro's effort to reverse the onus in  
25 establishing its approved prospective operational  
26 costs would presumptively insert the utility's



1 managers above the judgment of the regulator and strip  
2 much of the substance out of the *Utilities Commission*  
3 *Act* and out of the Commission itself.

4 This general issue was addressed by the  
5 Alberta Utilities Board, in the very recent decision  
6 -- this is the 2008 decision, which my friend Mr.  
7 Christian has brought to everyone's attention.

8 **Proceeding Time 11:16 a.m. T27**

9 Stepping back before I get into that,  
10 Terasen has also brought to everyone's attention in an  
11 e-mail they sent within the last couple of days, the  
12 provisions of the Alberta legislation which stipulates  
13 that the onus rests on the utility to justify rate  
14 increases. In my submission, those provisions are of  
15 no assistance to B.C. Hydro's position, so I  
16 anticipate that Terasen's argument will be, well, you  
17 can't draw any conclusions from the Alberta situation  
18 because there their statute says that the onus rests  
19 with the utility to justify rate increases, which is  
20 not in our statute but as I say is plastered all over  
21 the place including in the participant's guide of this  
22 Commission.

23 Sections 44(3) of the *Gas Utilities Act* and  
24 103(3) of the *Public Utilities Act*, which are the ones  
25 raised by Terasen, both of Alberta, in my submission,  
26 simply codify the well-established regulatory

1 principle. But in any event, they were not relied  
2 upon by the Alberta board in its November 2008 *ATCO*  
3 decision. In that case, *ATCO* did not argue that the  
4 burden rested on the shoulders of intervenors to show  
5 that its proposed future expenditures were  
6 unreasonable. That was expressly precluded by the  
7 statute in any event by regulatory principles, we  
8 would say.

9 In the recent *ATCO* case, the utility tried  
10 to work around the problem. That is, the statute said  
11 that the burden rests on the utility. So the utility  
12 argued that its forecasts attracted a presumption of  
13 correctness. It did not argue the provision cited by  
14 *Terasen* and the 2008 ruling did not rely on them.

15 Now, stepping back a bit, we can see the  
16 distinction between deference to a utility's forecasts  
17 and deference to its proposed rate increases are not  
18 really particularly different subject matters.  
19 Forecasts comprise a very large part of the  
20 contentious ground in any revenue requirement hearing,  
21 and shielding forecasts in a way that *ATCO* tried to do  
22 from the onus of rigorous proof would amount to  
23 shielding a very substantial part of any increase  
24 application. But that's really not what this case was  
25 about.

26 What is useful from the November *ATCO*

1 decision is the reasoning of the Alberta board,  
2 because of the way that it applied regulatory  
3 principle to reject ATCO's argument.

4 In the November ATCO decision, the utility  
5 had made essentially the same argument as B.C. Hydro  
6 does here, but again dealing with market forecasts as  
7 opposed to attempting to shield their projected  
8 operational expenditures with deference. The Alberta  
9 board confirmed its earlier rulings on the issue and  
10 said at page -- this is at page 13 of the November  
11 decision. So I take you to the very first sentence at  
12 the top of page 13. If you look at page 13 -- the  
13 paragraphs aren't numbered. Again, if you look at  
14 page 13 of the text of the decision, that is of the  
15 Alberta Utilities Commission text, first full  
16 sentence:

17 "The base year results. The base year  
18 results represent an amalgam of capital and  
19 operating expense decisions made by the  
20 utility in the base year and other past  
21 years."

22 So this is the looking backward analysis.

23 "Because the utility's rates in the base  
24 year and other past years had been approved  
25 by regulation as just and reasonable, and  
26 because the quality of service of the

1 utility was also regulated, the interests of  
2 customers in receiving acceptable service at  
3 reasonable prices were protected by  
4 regulation."

5 So that's the water under the bridge. The regulator  
6 had already looked at those and they had passed  
7 muster. There was a regulatory protection built in of  
8 the interests of consumers.

9 "In that environment, any decisions made by  
10 the utility within those rate and quality  
11 guidelines can be presumed prudent insofar  
12 as the balance between the monopoly power of  
13 the utility and the interests of its  
14 customers is present."

15 Then take you to the last full paragraph on  
16 that page, just skipping over the balance of that.  
17 You can look at it at leisure, the second paragraph.  
18 But the bottom paragraph says:

19 "Operating expenses."

20 So this is the looking forward analysis.

21 "Operating expenses and capital expenditures  
22 forecast by a utility to be incurred in the  
23 test years cannot be presumed prudent  
24 because the balance between customer and  
25 company interests that would be present in a  
26 competitive market is simply not present,

1           and no regulatory examination has yet  
2           occurred to counterbalance the monopoly  
3           power of the utility. In the case of  
4           forecast expenditures for forward test  
5           years, the scales are clearly not balanced  
6           between a monopoly and its customers. If  
7           they were, legislators would not have  
8           identified and acted on a need for rate and  
9           service quality regulation of monopoly  
10          utility companies."

11                    Again, this is the whole reason the  
12          Commission is here, and it would lose much of its  
13          reason for being here if B.C. Hydro's position were  
14          adopted. And if that sounds excessive, I assure you  
15          that it is not.

16                                    **Proceeding Time 11:21 a.m. T28**

17   MR. QUAIL:    The interpretation of the presumption of  
18                   prudence proffered by AG, the utility, would require  
19                   -- that's ATCO Gas -- would require the Commission to  
20                   presume that all of a utility's forecasts for the test  
21                   year are prudent or reasonable, and must be upheld  
22                   unless an onus to prove otherwise is met by others.  
23                   This is not the case. The provisions of the *GU Act*  
24                   clearly stipulate the onus is on the applicant to  
25                   prove that the proposed rates – in this case the  
26                   revenue requirement for the forward-looking test years

1           – are just and reasonable.

2                       Again, the important thing here is the  
3 application of regulatory principle and, in my  
4 submission, common sense. And both the common sense  
5 and the principle of the line of reasoning here by the  
6 Alberta Board is the one that is confirmatory of the  
7 legislative intent of the *Utilities Commission Act* and  
8 the reason for existence of this Commission.

9                       The Alberta Utilities Board rejected ATCO  
10 Gas's argument that the Supreme Court of Canada  
11 decision in *ATCO v. Alberta* has the effect of shifting  
12 the onus onto intervenors for prospective issues as  
13 well as retrospective questions of prudence.

14                      So in conclusion, we submit that B.C.  
15 Hydro's position, seeking to reverse the onus with  
16 respect to an application for approval of prospective  
17 expenditures, which it seeks to recover in rates,  
18 should be rejected, and the well-established  
19 principles of regulatory law and practice should be  
20 confirmed.

21                      And, subject to your questions, those are  
22 my submissions on those two issues.

23 THE CHAIRPERSON:   Once again, Mr. Quail, I believe the  
24 panel members wish to hear the submissions by other  
25 parties and then we may come back to you as well.

26 MR. QUAIL:        Absolutely. I am at your service.

1 THE CHAIRPERSON: Thank you. Next we have Mr. Wallace.

2 **ARGUMENT BY MR. WALLACE ON ITEM 2:**

3 Thank you, Madam Chair, Commissioners. I  
4 had intended to be brief and as a result of Mr.  
5 Quail's very thorough canvassing of the subject, I  
6 will be briefer yet.

7 Turning to the question, question 2, the  
8 JIESC does not agree with the suggestion by B.C. Hydro  
9 that, unless a forecasted expenditure can be  
10 determined to be demonstrably imprudent, the  
11 Commission has no basis on which to disallow it from  
12 its revenue requirements. Obviously Mr. Quail has  
13 gone into that in great depth, and we support his  
14 submissions to you completely.

15 Most particularly, *Hemlock Valley* is not  
16 authority for that principle. And again, as suggested  
17 by Mr. Quail, *Hemlock Valley* very clearly says that if  
18 you find B.C. Hydro's expenditures to be reasonable  
19 and to be required, then you need to include them in  
20 the rates. It does not say anything whatsoever about  
21 prudence and about what should be included in those  
22 expenditures. And clearly *Hemlock Valley* endorsed  
23 some decisions that were made by -- I don't think they  
24 were argued, but it acknowledged, at least, the  
25 Commission removing some of the expenditures that were  
26 forecast by *Hemlock Valley*. So, in our submission,

1           that is the parallel that you are dealing with.

2                       As has been pointed out by Mr. Quail, it's  
3 very clear that the Commission must set just and  
4 reasonable rates, a question of fact of which the  
5 Commission is the sole arbiter. And in setting those  
6 rates, clearly you look at the reasonableness of the  
7 forecast expenditures.

8                       The ATCO decision, among others referred to  
9 in your question, clearly demonstrate awareness by the  
10 court of the tension that exists between the interests  
11 of the ratepayer and the shareholder. The cases --  
12 the materials, more broad than that, that Mr. Quail  
13 has cited, clearly make reference to the onus being on  
14 the utility. That is the way it has been. It's the  
15 way it has to be, in order for the regulatory system  
16 to work.

17   **Proceeding Time 11:26 a.m. T29**

18 MR. WALLACE:   In our submission, there is no authority to  
19 support the presumption put forward by B.C. Hydro with  
20 respect to the issue, the demonstrably imprudent  
21 issue raised in your question. And as we say, *Hemlock*  
22 *Valley* is clearly not the authority for such a  
23 proposition.

24                       In our submission, if you find that the  
25 revenue requirement put forward by B.C. Hydro is just,  
26 reasonable, that it is not unnecessary, unreasonable



1 or excessive as referred to IN the *B.C. Electric* case  
2 quote contained in *Hemlock Valley*, then obviously you  
3 should do -- or you should allow B.C. Hydro to collect  
4 that revenue requirement in its rates. However, in  
5 our submission, clearly we are of the view that parts  
6 of that revenue requirement are unnecessary,  
7 unreasonable or excessive in the current  
8 circumstances, and in that situation it's our  
9 submission that you have the discretion to disallow  
10 those expenditures and to not permit B.C. Hydro to  
11 recover it in its rates.

12 And that's all I have on question 2.

13 Unless there's anything I'll turn to question 3.

14 THE CHAIRPERSON: Same thing again. Please proceed and  
15 we'll come back to you later if required.

16 MR. WALLACE: Thank you.

17 **ARGUMENT BY MR. WALLACE ON ITEM 3:**

18 And question 3 really deals with looking at  
19 past expenditures versus future expenditures, and in  
20 our submission there is a very practical reason for  
21 treating past expenditures and future expenditures  
22 differently. And Mr. Quail, again, has spoken of it.

23 In JIESC's view, where a utility has  
24 undertaken an expenditure in good faith, believing  
25 that it is in the interest of the ratepayers, we  
26 believe that commissions and courts, and for that

1 matter intervenors, are generally loath to disallow or  
2 oppose an expenditure in the absence of the clearest  
3 imprudence where the expenditures have been  
4 undertaken.

5 However, on the other hand, when one is  
6 looking forward perspectively, the Commission then is  
7 in a much better position to make its own decision as  
8 to what is in the public interest and to determine the  
9 expenditures that are reasonable and should be  
10 included in the revenue requirement. And by  
11 signalling that to the utility, the expenditures can  
12 be avoided and nobody bears that unreasonable burden.

13 It's this very distinction between past and  
14 future expenditures that make the JIESC argue very  
15 strongly and regularly, consistently, for applications  
16 that are filed early and for decisions that are put  
17 forward on an early basis prior to expenditures being  
18 undertaken rather than after-the-fact reviews. It's  
19 just simpler, it's simpler and fairer to stop an  
20 unreasonable or excessive expenditure in advance.

21 And that concludes my submissions on issue  
22 3.

23 THE CHAIRPERSON: Thank you, Mr. Wallace. Next we have  
24 COPE, Mr. Oulton.

25 **ARGUMENT BY MR. OULTON ON ITEMS 2 AND 3:**

26 I don't know if anyone else finds that

1 humming as annoying as I do, but I'm hopeful that it  
2 won't distract me too much in this --

3 THE CHAIRPERSON: Yes, I'm advised that our Hearing  
4 Officer has done his best to shut it down, but has --  
5 normally he delivers just about on everything, but  
6 even he is not perfect.

7 MR. OULTON: There are things, I expect, that may even be  
8 beyond his control. With that, I'm most grateful to  
9 Mr. Quail for his very able and thorough submissions  
10 which I believe will make my task somewhat more brief  
11 here this morning, at least with respect to issue 2  
12 and to a certain extent 3. I didn't intend to make  
13 some submissions but there is one point that I wish to  
14 pick up from what Mr. Quail said that feeds into some  
15 of the things that I will have to say when we get to  
16 issue 6 at the time when we get there.

17 **Proceeding Time 11:31 a.m. T30**

18 Probably the first point that I wish to  
19 make, I agree with B.C. Hydro that the issue raised in  
20 issue number 2 is a different issue than the prudence  
21 question. What I take from issue 2, and I accept that  
22 it comes primarily from our written argument and I  
23 don't intend to repeat what's set out there, I'll just  
24 draw your attention that it's paragraphs 8 to 19 of  
25 our initial written submissions.

26 But what's at issue in question 2 is the

1 proper interpretation, and what is required under  
2 Sections 59 and 60 of the Act, and it's COPE's  
3 position that that's a separate exercise from any  
4 determinations as to the prudence of the revenue  
5 requirements that the utility is advancing to try to  
6 support the rate that it is seeking. What Sections 59  
7 and 60 do is they set out the criteria that the  
8 Commission is obliged to consider and apply in setting  
9 the rate, and in COPE's submission, there's two parts  
10 to the analysis. There's the revenue requirements  
11 that B.C. Hydro is advancing to try to support its  
12 rate, and as part of that it's seeking its fair and  
13 reasonable return, which my friend correctly points  
14 out, we acknowledge that that's one of the factors  
15 that is at play here, and the statute mandates that.

16 But what my friend's position, in my view,  
17 gets wrong is, it says that that is -- I think the  
18 language he said was, "You are to give effect to the  
19 fair and reasonable return without any trade-offs, and  
20 that's what "having due regard" to that means under  
21 the *Hemlock* decision." Respectfully, if that's what  
22 "due regard" means, then you must give effect to  
23 subsection (iii), the efficiency, the cost reductions  
24 and everything else, without trade-offs. And that  
25 would lead to an absurd result because there very well  
26 may be situations where B.C. Hydro is advancing the

1 revenue requirement and saying, "We're entitled to  
2 return X." And, respectfully, COPE is going to say  
3 that this is partly what's happening here. B.C. Hydro  
4 is saying "We are obliged to do A, B and C and it's  
5 going to cost us X, and we want a reasonable rate of  
6 return."

7 In our submission there are situations, and  
8 the Commission is confronted with one here, where part  
9 of that revenue requirement, leaving aside questions  
10 of prudence, which I will make some submissions on,  
11 need to be balanced against the legitimate interests  
12 of the ratepayers, which are embodied in ensuring that  
13 the utility, in its operations, in the decisions it  
14 makes, in its forecast expenditures, and all the other  
15 decisions that it takes, is efficient -- is cost-  
16 effective -- and is -- there's the third thing that, I  
17 apologize, I have lost my place somewhere.

18 THE CHAIRPERSON: Enhances the performance.

19 MR. OULTON: And its performance is enhanced. That needs  
20 to be balanced against the desire of the utility to  
21 get a fair and reasonable return.

22 What that may mean is, they may say a fair  
23 and reasonable return is 10 percent, or 15 percent.  
24 But in some circumstances, it may be 2, because by  
25 reducing the return that the shareholder is going to  
26 get on its revenue and requirements and its assets and

1 everything else, in the circumstances of this  
2 particular test period, a fair and reasonable return  
3 is smaller than it would otherwise be because of these  
4 other concerns that must be balanced against it. And  
5 my friend says, "Well, really, all that refers to is  
6 rate design mechanism." Well, it may be that that may  
7 be a way to achieve that, but it by no means is the  
8 only way. There may be expenses that, in a particular  
9 test period, that are unreasonable or would lead to a  
10 rate that ignores subsection (iii), and that is what  
11 COPE says this Commission must have due regard to in  
12 addition to the other criteria. It's a balancing  
13 exercise.

14 And in that regard, the *ATCO* decision that  
15 is referred to in Exhibit A-26, it provides a very  
16 clear -- and there are multiple instances in the  
17 authorities, but the *ATCO* decision of the Alberta  
18 Court of Appeal that's cited, the 2004 Alberta Court  
19 of Appeal 215 decision, it sets out the balancing that  
20 this Commission and other boards across this country  
21 are engaged in. Because there is a tension that my  
22 friend, Mr. Quail, has noted, and my friend Mr.  
23 Wallace as well, between this fair and reasonable  
24 return and the interests of the ratepayer in  
25 efficiency -- in efficient cost-effective service.

26 **Proceeding Time 11:36 a.m. T31**

1 MR. OULTON: And in that regard, my friend Mr. Quail  
2 noted paragraphs 131 and 132 I believe of the ATCO  
3 decision. I'd like to start with paragraph 53, where  
4 the Court in assessing the standard of review that was  
5 going to be applied simply said when talking about the  
6 expertise of this commissions Alberta equivalent, it  
7 said:

8 "The board is a specialized tribunal with an  
9 acknowledged expertise in regulation of  
10 transmission and distribution utilities in  
11 the electrical industry."

12 And that comment equally applies here.

13 "It possesses considerable technical  
14 expertise, in all aspects of the electric  
15 energy industry including setting rates and  
16 tariffs..."

17 and this is what I wish to emphasize,

18 "...balancing competing interest amongst  
19 utilities and consumers, and assessing the  
20 public interest."

21 It is that expertise that is triggered in a revenue  
22 requirements application such as this where B.C. Hydro  
23 is seeking a rate increase, in my submission.

24 And more to the point, later in the  
25 decision, and this goes to the passage that it is  
26 referred to in Exhibit A26:

1           "The Court directly considered the  
2           relationship between the utility board's  
3           rate setting jurisdiction and its other  
4           regulatory functions."

5           And in our submission, the situation in that case, is  
6           somewhat analogous to what is happening here. In that  
7           case, it was considering the interplay between rate  
8           setting and the role of reviewing and improving  
9           negotiated settlements. Here, what the Commission is  
10          asked by COPE to do, is to consider the interplay  
11          between the rate setting jurisdiction invoked by this  
12          hearing, and its Section 71 jurisdiction in other  
13          matters that deal with the specific issue that we have  
14          raised, which I will come to under issue 6, which is  
15          the F2006 call awards.

16                        But there is a tension in my submission and  
17          what the court had to say in *ATCO* is equally  
18          applicable here, and that is where my friend Mr. Quail  
19          started with sections 131, or paragraphs 131 and 132.  
20          I just wish to draw the commissions attention as well  
21          to paragraph 133, where the board continued on and  
22          said -- or sorry, where the court continued on and  
23          said:

24                        "The board, as the independent regulator of  
25          public utility services, is therefore  
26          required to assess whether the tariffs



1           claimed strike an appropriate balance  
2           between the utility's legitimate interests  
3           and those of the rate paying public."

4           And it is COPE's submission that that is what section  
5           60(1)(b) is all about. You must have due regard, not  
6           only to the utility's desire to have a fair and  
7           reasonable return, but also the ratepayer's interest  
8           in paying, I think it is -- sorry, that the rate is  
9           not unjust or unreasonable. And then also and  
10          respectfully in my submission, this is both in the  
11          utility's interest, I would submit, in the long term,  
12          and the ratepayers', but for utilities to be  
13          efficient, engage in cost reduction, and enhanced  
14          performance.

15                 And my friend continues to rely on *Hemlock*  
16                 and the simple answer was set out in our written  
17                 submissions, and that is quite simply that the statute  
18                 has changed. But the more direct response is what I  
19                 started off with, which is my friend's view of *Hemlock*  
20                 is mistaken insofar as he seems to say that the fair  
21                 and reasonable return ought to be the predominant  
22                 criteria. Respectfully, that is not the case, and  
23                 what is the case is, as set out in paragraph 133 of  
24                 *ATCO*. Following what I just said, the court concludes  
25                 that sentence saying, the board's task, determining  
26                 what is in the public interest in fixing just and

1 reasonable rates, requires a careful weighting and  
2 balancing of these competing interests, and it is  
3 submitted that that is what is required under Section  
4 30, is a careful weighing and balancing of those  
5 interest. It is not: Hey, here is our revenue  
6 requirement, therefore we are automatically entitled  
7 to get our fair and reasonable return *carte blanche*  
8 over and above everything else.

9 To use the language in Exhibit A26, it is  
10 not that the other factors set out in Section 60(1)  
11 are subordinate to the fair and reasonable return,  
12 they all must be given careful consideration and be  
13 weighed and balanced accordingly.

14 **Proceeding Time 11:41 a.m. T32**

15 And the Commission has a broad discretion,  
16 in our submission, to set a rate that properly  
17 reflects not only the return that B.C. Hydro wishes,  
18 but also the other criteria that we've discussed and,  
19 in particular, has a broad discretion to recognize and  
20 to protect the ratepayers' interests.

21 My friend, Mr. Quail, I think, has rather  
22 exhaustively dealt with the proper approach to  
23 statutory interpretation, and I agree with and adopt  
24 his comments in that regard. And just simply say that  
25 B.C. Hydro's position respectfully ignores the clear  
26 language of the statute, particularly when it's read

1 in context. That section is clear. You must have  
2 regard to all of the matters set out in that section.  
3 Nowhere does it say any are subordinate to others.  
4 Rather, as I mentioned in *ATCO* and other decisions,  
5 it's a balancing exercise that is this Commission's  
6 task . Probably not an enviable one.

7 And the rest of my submissions I will save  
8 for issue 6, save and except to say COPE does adopt  
9 the position taken by JIESC and the BCOAPO with  
10 respect to prudence, in that, in our submission, B.C.  
11 Hydro cannot immunize its request for a rate based on  
12 revenue requirement for prospective expenses, in our  
13 submission, for reasons I'll come to, whether or not  
14 those expenses are related to contracts that were  
15 approved to the past. And I'll come to that under  
16 issue 6 in greater detail.

17 But in our submission, the prospective  
18 expenditures that B.C. Hydro is incurring are not  
19 presumptively prudent. The burden is on B.C. Hydro to  
20 establish the prudence of those.

21 And subject to any questions, those are my  
22 submissions.

23 THE CHAIRPERSON: Thank you, Mr. Oulton. Again, we may  
24 come back to you later on, after one of the other  
25 parties.

26 MR. OULTON: Again, as with my friends, I am at your

1 service.

2 THE CHAIRPERSON: Okay, thank you. Next, Mr. Weafer,  
3 representing CEC.

4 **ARGUMENT BY MR. WEAFER ON ITEMS 2 AND 3:**

5 MR. WEAFER: Thank you, Madam Chair.

6 Madam Chair, the CEC on both issues 2 and 3  
7 would support the submissions of BCOAPO, JIESC and  
8 COPE, and the only matter I'd like to address, if I  
9 may, is the CEC's submission on the prudence test  
10 filed in its argument. And the reason I do that is,  
11 in reply, B.C. Hydro indicates that all parties except  
12 two expressly accept B.C. Hydro's submission on the  
13 prudence test. And just to be clear, the CEC did  
14 indicate that the submissions of B.C. Hydro did not  
15 preclude the Commission from dealing with the primary  
16 positions put forward by the CEC, which was a support  
17 of the use of regulatory accounting and deferral  
18 accounts to mitigate rate impact.

19 So, I just wish to be clear. In terms of  
20 the CEC's stated support of B.C. Hydro's position on  
21 the prudence test, it was specific to our submissions  
22 on the utilization of deferral accounts, and the  
23 discretion of the Commission to utilize discretion in  
24 terms of regulatory accounting.

25 So, those are our submissions.

26 THE CHAIRPERSON: Thank you for that clarification as

1 well.

2 MR. WEAVER: Thank you.

3 THE CHAIRPERSON: Thank you. Then we have IPP. All  
4 right.

5 MR. OULTON: I'm not intending to -- I'm simply noting  
6 that one of my pages was left behind.

7 THE CHAIRPERSON: IPP, Mr. Austin.

8 **ARGUMENT BY MR. AUSTIN ON ITEMS 2 AND 3:**

9 Mr. Oulton doesn't look like Mr. IPP. The  
10 same haircut, though.

11 With respect to issues 2 and 3, the IPPBC  
12 is generally going to restrict its comments to the  
13 question of prudence, and it supports the general  
14 proposition that Section 60 allows the BCUC to engage  
15 in trade-offs in relation to the setting of rates. I  
16 think other parties have covered that extensively.

17 **Proceeding Time 11:46 a.m. T33**

18 There doesn't seem to be any jurisprudence  
19 that would indicate otherwise. Clearly the Commission  
20 needs the discretion to be able to set rates, and it  
21 is a tradeoff process.

22 My comments are going to be directed at the  
23 concept of prudence, and the first place I'd like to  
24 start is B.C. Hydro's final argument because I'm  
25 somewhat confused as to what B.C. Hydro's position is  
26 with respect to prudence as stated this morning and as

1       stated in its final argument on page 26. And I  
2       appreciate maybe not everybody in the room has got a  
3       copy of the final argument but I'll just read a short  
4       piece of it into the record. It says:

5               "The authorities cited above make it  
6       apparent that the prudence test applies to  
7       all management decisions and their cost  
8       consequences that flow from management's  
9       obligation to manage the affairs of the  
10       company. Generally this will apply to all  
11       decisions with respect to expenditures,  
12       whether capital or operating."

13       So that's a very, very, very broad net.

14               And the first point I'd like to make is the  
15       concept of it applying to essentially all capital  
16       expenditures. And the IPPBC has a great deal of  
17       difficulty envisaging the situation where it would  
18       apply to all capital expenditures, because of the  
19       provisions of the *Utilities Commission Act* and in  
20       particular Sections 44.2 and 45. 44.2 is new, and  
21       this relates to the concept of a public utility filing  
22       with the Commission an expenditure schedule containing  
23       one or more of the following. So we've got this  
24       concept of an expenditure schedule. And for  
25       simplicity let's call it a capital plan.

26               And then under 45 we've got the concept of

1 certificate of public convenience and necessity. So  
2 that's been around for a long, long time. And the  
3 IPPBC has a great deal of difficulty understanding how  
4 the prudency test would put the onus on intervenors  
5 to, in a sense, pass the two-part test with respect to  
6 capital expenditures under 44.2 of the Act or  
7 certificate of public convenience and necessity  
8 applications under 45(1). Intervenors would not have  
9 that information. There's nothing in this Act to  
10 suggest that the prudency test would apply to that,  
11 and somehow it seems to be caught in B.C. Hydro's  
12 argument. And clearly in the IPPBC's submission, that  
13 can't be the case.

14 In terms of going back to the basics on  
15 this concept of the prudency review, the IPPBC wishes  
16 the Panel to look at the decision of the B.C. Court of  
17 Appeal in *B.C. Hydro and Power Authority v. The*  
18 *Commission*, and this is at tab 3 of B.C. Hydro's  
19 authorities. And this decision was rendered on behalf  
20 of the Court of Appeal by Mr. Justice Goldie, and Mr.  
21 Justice Goldie had obviously extensive experience on  
22 the legal side but he also had very extensive  
23 experience on the regulatory side. So a decision such  
24 as this doesn't come along all that often, but it's  
25 worth revealing in terms of some of the basics. And I  
26 certainly appreciate the issue there was whether

1 integrated resource planning is something that the  
2 B.C. Utilities Commission could direct B.C. Hydro to  
3 do pursuant to the provisions of the *Utilities*  
4 *Commission Act* as it existed then. Obviously the *Act*  
5 has been changed significantly as it exists now, but  
6 that was the general issue.

7 And some of the other parties have  
8 mentioned this, but it's worth looking at this from  
9 the perspective of Mr. Justice Goldie. On page 8 and  
10 it's actually paragraph number 46. It says:

11 **Proceeding Time 11:51 a.m. T34**

12 "In this light, the Utilities Commission is  
13 a current example of means adopted in North  
14 America, firstly in the United States, to  
15 achieve a balance of public interests  
16 between monopoly, where monopoly is accepted  
17 as necessary, and protection to the consumer  
18 provided by competition. The grant of  
19 monopoly through certification of public  
20 convenience and necessity was accomplished  
21 by the correlative burden on the monopoly of  
22 supplying service at approved rates, all  
23 within the area from which competition was  
24 excluded."

25 So, one of the fundamental underpinnings of  
26 the whole concept of regulation is the concept of a



1 certificate of public convenience and necessity. And  
2 the reason I'm bringing up this point is, we've had a  
3 lot of discussion here today about whether the  
4 prudence test applies to retroactive decisions versus  
5 forecast or prospective decisions. In the concept of  
6 regulation of utility, if you look at the *Utilities*  
7 *Commission Act*, and you look at the concept of  
8 certificate of public convenience and necessity, an  
9 awful lot of what a utility should or shouldn't be  
10 doing is subject to the concept of certificate of  
11 public convenience and necessity. But over the years,  
12 just through a pragmatic approach to this, we've  
13 tended to drift away from the exact meaning and the  
14 exact words of the Act with respect to certificates of  
15 public convenience and necessity, and essentially have  
16 transferred some of that over onto the rate  
17 application side.

18 It's just a matter of practicality, because  
19 there have been times where the revenue requirements  
20 hearings and the long-term acquisition plan have been  
21 combined in applications. And as a matter of  
22 practicality, we've moved forward on that basis, or we  
23 separated them, or whatever the case may be. But for  
24 B.C. Hydro to, all of a sudden, talk about the concept  
25 of prudence in relation to all things is just not  
26 going to work, and the intent was never there.

1                   And the other thing, when you look at this  
2                   passage, there's the concept of monopoly. So what  
3                   we're doing through regulation is essentially trying  
4                   to emulate the market. We're poking and prodding, as  
5                   a market would poke and prod a producer of any type of  
6                   service. And B.C. Hydro would have us believe, at  
7                   least in a test of prudence, that the burden really is  
8                   on those poking and prodding, in the first instance,  
9                   to prove or disprove what the utility is trying to do.  
10                  And in today's market, that would be the equivalent of  
11                  somebody who wanted to raise capital, and going off to  
12                  the markets, having the markets have the onus to prove  
13                  that the person who needs the capital doesn't need it,  
14                  or needs it. It just doesn't make sense.

15                  And in relation to the concept of the past  
16                  or prospective nature of the prudence test, the IPPBC  
17                  agrees with B.C. Hydro that, if in the past, there has  
18                  been regulatory oversight of, say, for example, a  
19                  project under a certificate of public convenience and  
20                  necessity, and later on, say, for example, the cost of  
21                  the project is set at 300 million through the CPCN  
22                  process, to shorten it up, and then the project comes  
23                  in at \$350 million, then the prudence test would  
24                  require that the intervenor first establish that there  
25                  was something amiss, and then the applicant would then  
26                  respond. That makes perfectly good sense, because

1       you've already gone through a process in the first  
2       place to determine whether this expense is something  
3       that's desirable, but all you're doing is, on the  
4       prudence side later on, is looking at a particular  
5       component.

6                     But what we have in the regulatory -- in  
7       the rate application is, we've got all kinds of  
8       forecasts and prospective events that may occur and,  
9       according to my notes this morning, B.C. Hydro was  
10      saying, "Well, there's certain cases in terms of  
11      forecasting where prudence applies, and there's  
12      certain cases where it doesn't apply." And then from  
13      a practical point of view, who is going to make that  
14      decision? And my notes, and certainly B.C. Hydro can  
15      correct me if I'm wrong, is we have the concept of an  
16      interest rate forecast. So, the prudence -- let's  
17      call it the "prudence hurdle" for intervenors --  
18      doesn't exist there. But with relation to operating  
19      costs, it does.

20                    Well, the IPPBC is arguing that, when you  
21      look at operating costs, built into a lot of those  
22      operating costs are forecasts that are not subject to  
23      the prudence test, and then you have the results of  
24      those forecasts being embedded on the operating side,  
25      and those are subject to the prudence test.

26   **Proceeding Time 11:56 a.m. T35**

1                   From the IPPBC perspective, none of that  
2 makes any sense because we would never be able to make  
3 the necessary delineations until somebody such as B.C.  
4 Hydro, being the applicant, told us, "Well, you're  
5 wrong on that one," and they may only tell us in  
6 argument. We wouldn't have a hope.

7                   And the IPPBC agrees with the other parties  
8 in terms of the prudence test. The prudence test is  
9 not going to apply to prospective material or  
10 forecasts or whatever in something like the revenue  
11 requirements application. It agrees that it certainly  
12 would apply to decisions that already have been made,  
13 especially those that have been subject to a previous  
14 regulatory review. So I think that's a distinction  
15 that needs to be made. And certainly on the capital  
16 side, it doesn't apply. We've got certificates of  
17 public convenience and necessity or if we're going to  
18 be filing capital budgets, it's not applicable.  
19 They're totally different sections of the Act.

20                   And I would just like to just reiterate  
21 that reading Mr. Justice Goldie's decision as a  
22 valuable exercise, because it does go back to the  
23 basic concepts. It does go back to the concept of  
24 certificate of public convenience and necessity, which  
25 we've tended to pull away from for practical reasons.  
26 But for purposes of regulating the utility, certainly

1 the intervenors ought not to have a hurdle to overcome  
2 in relation to revenue requirements applications and  
3 decisions. The IPPBC agrees that the Utilities  
4 Commission doesn't have the power to manage a utility,  
5 and the Court of Appeal, through Mr. Justice Goldie in  
6 paragraph 58, agrees with that. It says:

7 "Taken as a whole, the *Utilities Act*, viewed  
8 in the purposive sense required, does not  
9 reflect any intention on the part of the  
10 legislature to confer upon the Commission a  
11 jurisdiction so to determine, punishable on  
12 default by sanctions, the manner in which  
13 the directors of a public utility manages  
14 its affairs."

15 Completely agreed. The *Utilities*  
16 *Commission*, by poking and prodding as intervenors do,  
17 or through intervenors' submissions, is not managing  
18 the utility. What it's doing is trying to improve the  
19 efficiency of the utility. 99 or 99.99 percent of the  
20 decisions that the utility makes are not subject to  
21 any review, and that really is the true management of  
22 the company. There are decisions that it makes that  
23 are, on the grand scheme of things, very small  
24 percentage that intervenors and the Utilities  
25 Commission can poke and prod, and through Section 60,  
26 can suggest improvements for efficiency.

1                   And I think that's an important point  
2                   because there's this tendency at this stage for B.C.  
3                   Hydro to think that any time anybody suggests or  
4                   orders an improvement in terms of efficiency, somehow  
5                   it's taking over the control and management of the  
6                   company. That is just simply not true. The people in  
7                   this room do not have the resources to do it. They  
8                   don't have the time. And if you look at the number of  
9                   people that are being employed to manage B.C. Hydro,  
10                  it's a lot greater than the number of people in this  
11                  room.

12                  And those are the IPPBC's submissions.

13 THE CHAIRPERSON: No questions at this point in time.  
14 Thank you very much, Mr. Austin.

15                  It's now 12 o'clock and we have -- on these  
16                  issues 2 and 3, we still have Terasen. Mr. Andrews.  
17                  No, he's -- we have Terasen only left on these two  
18                  issues. How long would you be, Mr. Johnson?

19 MR. JOHNSON: On the two issues I will be less than --  
20 I'll probably be about the same as Mr. Quail, I would  
21 say. Maybe half an hour.

22 THE CHAIRPERSON: I believe it's time then to take our  
23 lunch break and we'll return at 1:30. Thank you.

24 (PROCEEDINGS ADJOURNED AT 12:00 NOON)

25 (PROCEEDINGS RESUMED AT 1:33 P.M.)

**T36 & 37**

26 THE CHAIRPERSON: Please be seated. Mr. Johnson, I take

1           it you are ready to proceed.

2   MR. JOHNSON:   Thank you, and I'll be addressing items 2  
3           and 3 and I'll start by apologizing a bit for the  
4           perhaps somewhat disjointed argument in that I'd  
5           originally tried to combine the two into one topic but  
6           have tried to separate them to some extent at least,  
7           although there will be a bit of overlap.

8   **ARGUMENT BY MR. JOHNSON ON ITEM 2:**

9                       With regard to item 2, the Terasen  
10           Utilities submit that both the *Hemlock Valley* and the  
11           *B.C. Electric Railway* cases, which have both been  
12           cited, make it quite clear that public utility rates  
13           must be set at a level that allows the utility the  
14           opportunity to earn a fair return. And there has been  
15           reference to Section 60 of the *Act* and in particular  
16           60(1)(b)(iii), and it's my submission that that  
17           section and other sections of the *Act* don't vary the  
18           requirement as set out in both *Hemlock Valley* and *B.C.*  
19           *Electric Railway*. And Mr. Quail, I think, was looking  
20           over my shoulder earlier because he indicated I was  
21           going to say I disagreed with him, and I do.

22                       It's my submission that the rates and the  
23           balancing that people have talked about can't impinge  
24           on the right of the utility to have its rates set on a  
25           basis that it's given the opportunity to earn a fair  
26           return. And so to the extent that this was

1 characterized as a hierarchy in some of the  
2 submissions before me, it's my submission that yes,  
3 there is a hierarchy and a fair return is at the top  
4 of that hierarchy.

5 And I'll refer you -- I won't refer you to  
6 the -- I won't discuss the *Hemlock Valley* case in that  
7 I agree with what Mr. Quail had to say, that the  
8 *Hemlock Valley* case is -- the reasoning in it adopts  
9 very much the principles in the *B.C. Electric Railway*  
10 case, and it's sort of an application of those  
11 principles to the specific facts that were in *Hemlock*  
12 *Valley*.

13 But I will refer you to the *B.C. Electric*  
14 *Railway* decision, and that's in tab 1 of the COPE Book  
15 of Authorities. And I'm starting at page 5 of 15 of  
16 that judgment. It's a judgment of the Supreme Court  
17 of Canada. And this is the judgment of Mr. Justice  
18 Locke, who was one of the judges in the majority.  
19 There is a minority, or a dissenting decision earlier,  
20 but Mr. Justice Locke's decision starts at page 4.  
21 And then over on page 5 I'll start, and this is the  
22 paragraph in the middle of the page. It starts out  
23 "As has been pointed out," but I'll just read from the  
24 second part of it.

25 **Proceeding Time 1:36 p.m. T38**

26 "The utility has, so far as we are informed,



1 a monopoly on the sale of electric energy in  
2 the cities of Vancouver and Victoria. And  
3 in my opinion, at common law, the duty thus  
4 cast upon it by statute would have entitled  
5 it to be paid fair and reasonable charges  
6 for the services rendered in the absence of  
7 any statutory provision for such payment."

8 So Mr. Justice Locke, and he goes back in this  
9 judgment and talks about the common law, but he is  
10 saying that, even absent a statutory requirement, a  
11 statutory provision, that at common law a utility is  
12 entitled to a fair return. And he then discusses the  
13 common law about common carriers, and such.

14 And then on page 6, he goes through a bit  
15 of a history of regulation in British Columbia,  
16 starting with the *Water Act Amendment Act* of 1929, and  
17 discusses some U.S. authorities. And at the bottom of  
18 page 6, Mr. Justice Locke says:

19 "As I have said, the *Public Utilities Act*  
20 does not contain any provision which in  
21 terms declares the right of a utility to a  
22 fair return on the value of its property.  
23 It does, however, by definition of the terms  
24 'unjust' and 'unreasonable', adopted from  
25 the *Water Act Amendment Act*, declare that  
26 these expressions include rates that are

1           insufficient to earn fair compensation for  
2           the service rendered, and the Public  
3           Utilities Commission in the present matter  
4           have interpreted this in its context as  
5           indicating the yardstick to be used in  
6           determining the fair and reasonable returns  
7           to which the appellant is entitled."

8           And then skipping over to page 8, and this is the  
9           third paragraph on that page:

10           "I can find nothing in this legislation  
11           indicating an intention on the part of the  
12           legislature to empower the Commission to  
13           deprive the utility of its common-law right  
14           to be paid fair compensation for the varying  
15           services rendered, or to depart from the  
16           declared intention of the legislature in the  
17           *Water Act Amendment Act*, that such  
18           companies, upon whom these obligations are  
19           imposed, are entitled to have the quantum of  
20           such fair compensation determined as a fair  
21           return upon the appraised value of the  
22           properties required."

23           And then finally, my last passage from Mr. Justice  
24           Locke is at the bottom of that page, the bottom of  
25           page 8, where he refers back to the questions that  
26           have been posed, and goes on to say:

1           "The obligation to approve rates which will  
2           produce the fair return to which the utility  
3           has been found entitled is, in my opinion,  
4           absolute."

5   **Proceeding Time 1:39 p.m. T39**

6                   And I stress that. It's not a balancing of  
7           interests, it is absolute. Mr. Justice Locke is  
8           saying the obligation to allow the utility the  
9           opportunity to earn a fair return is, in his opinion,  
10          absolute. Which does not mean that the obligation of  
11          the Commission to have due regard to the public, to  
12          the protection of the public as required by Section  
13          16(1)(b), is not to be discharged. So, it's not  
14          something you don't look at the public, but there is  
15          this, in my submission, absolute obligation to ensure  
16          the opportunity to earn a fair return.

17                   Mr. Quail also referred to the judgment of  
18          Mr. Justice Martland, and I'll only refer you to one  
19          passage from that, and that's at page 14 of 15 in the  
20          judgment from the COPE book of authorities. The  
21          second full paragraph on that page refers to the two  
22          sections of the then *Public Utilities Act*, and then  
23          Mr. Justice Martland goes on to say:

24                   "As I read them, the combined effect of the  
25           two clauses is that the Commission, when  
26           dealing with a rate case, has unlimited

1           discretion as to the matters which it may  
2           consider in effect as affecting the rate,  
3           but that it must..."

4           and I stress the word "must",

5           "...that it must, when actually setting the  
6           rate, meet the two requirements specifically  
7           mentioned in clause (b)."

8           And the two requirements there are to give the public  
9           utility a fair and reasonable return, on the appraised  
10          value of its property, used or prudently required to  
11          enable the public utility to furnish the service.

12                 So in my submission, there is this -- as  
13          Mr. Justice Locke put it -- this absolute obligation.

14                 But I go on to say that, even without this  
15          hierarchy -- in my submission, there is this  
16          hierarchy, but even if we assume for a moment that  
17          this hierarchy didn't exist, in my submission the  
18          circumstances in this proceeding do not allow this  
19          Commission panel to reduce the fair return to B.C.  
20          Hydro. B.C. Hydro's return on equity is -- there's a  
21          Special Direction which directs the Commission on how  
22          to set the return on equity for B.C. Hydro, and that  
23          Special Direction in effect says that B.C. Hydro  
24          should be allowed a return on equity which is the same  
25          as the most comparable investor-owned utility. And  
26          that happens to be Terasen Gas, for practical

1 purposes.

2 The return for investor-owned utilities,  
3 including Terasen Gas, is set pursuant to a procedure  
4 that the Commission has established. They have  
5 established a generic return on equity process, and  
6 have determined through a separate process, separate  
7 from this revenue requirement proceeding, what the  
8 appropriate return on equity is for the investor-owned  
9 utilities, and therefore the return for B.C. Hydro.

10 **Proceeding Time 1:43 p.m. T40**

11 The effect of that, in my submission, is  
12 that return on equity is not a question in this  
13 proceeding. There is no question about return on  
14 equity. And arguments that in any way suggest that  
15 somehow the Commission in looking at what is within  
16 its purview in this proceeding could cause or might  
17 cause B.C. Hydro to earn less than its return on  
18 equity, I think are just outside the bounds of this  
19 proceeding. It is my submission that this Panel must  
20 accept the return on equity as has been separately  
21 determined in a separate process, and can't impinge on  
22 that return on equity.

23 So even without the legal hierarchy, I say  
24 this Panel must accept the return on equity.

25 Then I have one sort of further submission  
26 in that general topic, and that's really to quote from

1        what Mr. Quail said, and I'm quoting here, I think, at  
2        least from his written document and I think he spoke  
3        very much the same words. He said:

4                "In my view, however, if a public utility is  
5                providing an adequate and efficient service,  
6                without incurring unnecessary, unreasonable  
7                or excessive costs in doing so, I cannot see  
8                how a schedule of rates which overall yields  
9                less revenue than would be required to  
10               provide that rate of return on its rate  
11               base, which the Commission has determined to  
12               be fair and reasonable, can be considered  
13               overall as being excessive."

14        And I agree with that.

15                And the practical effect of that is that in  
16        almost all circumstances, there really will be no  
17        issue before the Commission in which, even if you  
18        adopted the arguments of Mr. Quail, there will be  
19        almost no circumstances where the Commission would  
20        impinge on the fair return. Because as Mr. Quail said  
21        and he made this point in argument, that there really  
22        aren't many circumstances, if -- perhaps there could  
23        be some, but almost no circumstances, where this issue  
24        we've been debating is a practical matter.

25                I'll then turn to item 3, but I will say  
26        that --

1 THE CHAIRPERSON: Mr. Johnson.  
2 MR. JOHNSON: Yes.  
3 THE CHAIRPERSON: Commissioner Milbourne has a question.  
4 COMMISSIONER MILBOURNE: One question of -- maybe you  
5 could help me understanding something. You were  
6 talking about the *B.C. Electric Railway* case and you  
7 referred to page 14-15 of, I believe, it was Justice  
8 Martland's comment?  
9 MR. JOHNSON: Yes.  
10 COMMISSIONER MILBOURNE: You finished up by saying -- it  
11 was kind of a corollary there, a corollary statement,  
12 something about nothing had the effect of fettering  
13 the jurisdiction of the Commission with respect to the  
14 matters setting the rate? The language there is --  
15 MR. JOHNSON: I read from Mr. Justice Martland on page 14  
16 where he refers to sub-clauses (1) and (2) of clause  
17 (b) immediately above that, and then went on to say  
18 that the Commission must, when setting the rate, meet  
19 the two requirements specifically mentioned in clause  
20 (b). And one of those two requirements is the concept  
21 of a fair return to the utility.  
22 COMMISSIONER MILBOURNE: Right, then you went on to say  
23 something else in that same paragraph, something about  
24 the --  
25 MR. JOHNSON: I'll have to see with my -- it's just -- I  
26 just have handwritten notes on that point,

1 Commissioner Milbourne, so --.

2 COMMISSIONER MILBOURNE: If I could read my own writing I  
3 could be more specific as it usually takes me time to  
4 sort it out.

5 MR. JOHNSON: Well, both of may have to go back to read  
6 the transcript.

7 COMMISSIONER MILBOURNE: The unfettered jurisdiction of  
8 the Commission with respect to the matters setting the  
9 rate.

10 MR. JOHNSON: What I was attempting to, I think, was  
11 really just paraphrase what Mr. Justice Martland was  
12 saying and putting it in my words, that the Commission  
13 must, in setting the rates, set rates that do allow  
14 the utility the opportunity to earn a fair return.

15 **Proceeding Time 1:48 p.m. T41**

16 THE CHAIRPERSON: I wonder if Mr. Bemister can go back  
17 and look at the transcript there. Not right now.

18 COMMISSIONER MILBOURNE: That's not what I heard.

19 COMMISSIONER RHODES: I'll look that up.

20 THE CHAIRPERSON: Okay, all right. We have another  
21 attempt by Commissioner Rhodes.

22 MR. JOHNSON: Okay.

23 COMMISSIONER RHODES: It was right after you said you  
24 were going to refer to Mr. Martin's decision at page  
25 14, I believe.

26 MR. JOHNSON: Yes.



1 COMMISSIONER RHODES: And then you started your quote,  
2 talking about -- I think it said while the Commission  
3 has unfettered or unlimited discretion in matters  
4 affecting rate, it still has to do something. It was  
5 the beginning of your --

6 MR. JOHNSON: Oh, I was reading there -- that -- I was  
7 reading from Mr. Justice Martland's judgment, yes.

8 COMMISSIONER MILBOURNE: You were.

9 MR. JOHNSON: And the paragraph reads this -- I'll just  
10 read it a bit slower, then. He refers to the two sub-  
11 clauses, just immediately prior to this quotation, and  
12 those are from the then *Public Utilities Act*. And he  
13 then says, and I'm quoting here:

14 "As I read them...",  
15 referring to the two sub-clauses:

16 "...the combined effect of the two clauses is  
17 that the Commission, when dealing with a  
18 rate case, has unlimited discretion as to  
19 the matters it may consider in affecting the  
20 rate."

21 COMMISSIONER MILBOURNE: The matters it may consider  
22 affecting the rate. That's what I was looking for.

23 MR. JOHNSON: Yes.

24 COMMISSIONER MILBOURNE: Now, my question is, are the  
25 operating costs in your view a matter affecting the  
26 rate?

1 MR. JOHNSON: Yes.

2 COMMISSIONER MILBOURNE: Thank you very much. That's  
3 what I wanted to clarify.

4 **ARGUMENT BY MR. JOHNSON ON ITEM 3:**

5 MR. JOHNSON: Turning, then, to item 3, I'll just start  
6 by referring to the *Hemlock* case to say that, in my  
7 submission, it has nothing to do with the prudence  
8 test. And I think Mr. Christian also said that, but  
9 -- if he did, I'm agreeing with him.

10 In looking at this issue, if I can sort of  
11 refer to it as the "prudence" issue, or -- I started  
12 by going back to see what B.C. Hydro had said about  
13 it, and Mr. Christian did raise this first back in one  
14 of the procedural conferences, I believe, at pages 208  
15 and 209 of the transcript, when he said that the cost  
16 of service is a reflection of the consequence of  
17 decisions that are the obligation and prerogative of  
18 management to make, and when also went and said:

19 "The utility management decisions are  
20 presumed to be prudent. It's a rebuttable  
21 presumption, but they are presumed to be  
22 prudent at the outset."

23 And in its final decision at page 20, B.C.  
24 Hydro discusses the prudence test, or commences a  
25 discussion, and at page 25 says:

26 "The courts recognize a presumption of

1           prudence with respect to decisions by  
2           utility management, because it is the  
3           directors and their management delegates  
4           that are obliged under the constituting  
5           documents of the utility to manage its  
6           affairs, and under the regulatory scheme, to  
7           provide the public utility service. The  
8           Commission is not charged with the  
9           management of the utility or the provision  
10          of service, and the decisions of those who  
11          are charged with management and service  
12          obligations should be presumed to have been  
13          made in the exercise of reasonable  
14          judgment."

15                 The Terasen utilities agree with those  
16          statements, and submit that they correctly  
17          characterize the general law regarding decisions of  
18          the management of utilities.

19                 And then at page 26 of its submission, B.C.  
20          Hydro talked about the applicability of the prudence  
21          test to its revenue requirement applications. And Mr.  
22          Austin quoted a paragraph from that, which starts out:

23                         "The authorities cited above make it  
24                         apparent that the prudency test applies to  
25                         all management decisions."

26          et cetera.

1                   And then at page 38 of its submission, B.C.  
2 Hydro said that there are very few elements of B.C.  
3 Hydro's cost structure that, on the evidence, could be  
4 found to be imprudent, or that are subject to a  
5 contrary view by the Commission.

6   **Proceeding Time 1:52 p.m. T42**

7                   And in the balance of its submissions, B.C.  
8 Hydro frequently argues that there's no evidence to  
9 support a finding of imprudence. Now, the words at  
10 page 38 of the Hydro submission where Hydro says, "...or  
11 that are subject to a contrary view by the  
12 Commission," appears to suggest a recognition by B.C.  
13 Hydro that the Commission can conclude that certain  
14 forecast expenditures are subject to a contrary review  
15 by the Commission and cannot or could not, should not  
16 be recovered in rates. However, in its reply  
17 submission I think B.C. Hydro made it quite clear that  
18 it's taking the position that the Commission must  
19 allow all forecast expenditures in its budgets to be  
20 recovered in rates. And then Mr. Christian made it  
21 clear today that that doesn't apply to all forecast  
22 expenditures but apparently to expenditures such as  
23 operating expenses, where these are sort of planned by  
24 management.

25   Mr. Quail distributed a November 2008  
26 decision of the Alberta Utilities Commission -- I

1 think maybe both Mr. Christian and Mr. Quail did,  
2 perhaps -- and in that decision the Alberta Utilities  
3 Commission came to a different view than that  
4 advocated by B.C. Hydro. And I would like to refer to  
5 that fairly briefly. Page 11 of the AUC decision, the  
6 November 2008 decision to do with ATCO Gas, on page 11  
7 the Commission refers to an earlier decision of the  
8 Alberta Energy and Utility Board, a 2006 decision, and  
9 you can see that under the heading "Presumption of  
10 Prudence Forecasts":

11 "The Commission has considered the  
12 observations and findings of the board in  
13 decision 2006-004."

14 And they then go on to quote from that earlier 2006  
15 decision. And about halfway down the page, just after  
16 the word "and", the 2006 decision said:

17 "The board also agrees with intervenors and  
18 in particular with the views of the CIFB as  
19 summarized above, that forecasts cannot be  
20 presumed to be prudent, correct or  
21 reasonable. The statutory burden of proof  
22 to show that applied-for rates, tolls and  
23 charges are just and reasonable rests with  
24 the utility."

25 And then the footnote, footnote 216, cites  
26 a section of the *Gas Utilities Act* and a section of

1       the *Public Utilities Board Act*, and those were  
2       distributed earlier this week by the Terasen  
3       Utilities, and Mr. Quail made reference to them. Both  
4       of those Acts contain a statutory section, or a  
5       section of the statute, which clearly says that the  
6       burden of proof to show that the increases or  
7       decreases or alterations are just and reasonable is on  
8       the owner of the utility.

9               Mr. Quail said that the Alberta Commission  
10       didn't really rely on that statutory authority, and I have  
11       to take issue with him on that point. I think it's  
12       quite clear from the passage I just quoted that in  
13       2006, the AEUB certainly relied on that section. They  
14       said it right after their statement on the presumption  
15       on -- whether you could apply a presumption to  
16       forecasts. And in the passage that Mr. Quail read  
17       from page 13 of the 2008 decision, he read to you two  
18       or three -- two passages from that decision -- the  
19       second last paragraph on page 13, the last sentence  
20       says:

21               "The provisions of the *Gas Utility Act*  
22       clearly stipulate that the onus is on the  
23       applicant to prove that the proposed rates  
24       for the forward test year are just and  
25       reasonable."

26       And that's after they've found that this presumption

1 doesn't apply.

2 So in my submission, it's quite clear when  
3 you read the Alberta Utilities Commission decision,  
4 which in effect adopted the 2006 decision, that both  
5 the AEUB and the AUC were relying on this statutory  
6 provision to establish the onus, and that in part  
7 caused them to conclude that the presumption didn't  
8 apply. It didn't apply to forecasts.

9 **Proceeding Time 1:58 p.m. T43**

10 Now, there is no similar statutory burden  
11 in the *Utilities Commission Act*. There is no sections  
12 equivalent to the *Gas Utility Act* or the *Public*  
13 *Utility Act* in Alberta. So, in my submission, the  
14 Alberta decision can be distinguished, due to a  
15 different statutory regime. The *Utilities Commission*  
16 *Act* of this province requires the Commission to  
17 establish just and reasonable rates, or it puts it in  
18 the negative -- they can't be unjust and unreasonable.  
19 In my submission, there is no burden on either the  
20 applicant or the intervenors in the process to set  
21 rates. Mr. Quail did refer you to, I think, a  
22 participant's guide, but in my submission what might  
23 be in a participant's guide doesn't establish a  
24 burden.

25 In my submission, there is no burden on  
26 either the applicant or the intervenor, or

1        intervenors. And that's because there is a statutory  
2        obligation on the Commission to set the rates that are  
3        just and reasonable, or fair and reasonable, whatever  
4        words you wish to use. You have a statutory  
5        obligation to listen to all of the evidence, to apply  
6        your judgment to that evidence, and to establish the  
7        rates. It's not like the lawsuit in court where I sue  
8        you, and I have to establish that I'm right. This is,  
9        rather, a process where the Commission is given the  
10       obligation to set the fair rates, the just and  
11       reasonable rates, and that, in my submission, doesn't  
12       involve an onus on one party or the other. It  
13       involves a fulfillment of a statutory obligation. You  
14       have to look at all the evidence before you and, on  
15       the basis of all that evidence, decide which rates are  
16       going to be just and reasonable.

17                    And I want to emphasize, and I was careful  
18       to say, in the last point, that the determination of  
19       the rates must be based on the evidence before the  
20       Commission. Rates should not be established at a  
21       level different than that sought by the utility,  
22       simply because one or more of the parties has  
23       indicated a preference that the rates be lower, or be  
24       different. The Commission's evidence has to be -- the  
25       Commission's determinations have to be founded on the  
26       evidence.



1                   Now, having said that I -- in my  
2                   submission, the November, 2008 Alberta decision can be  
3                   distinguished due to a different statutory regime, I  
4                   return to B.C. Hydro's argument that is, in essence,  
5                   that without a finding of imprudence on forecast  
6                   expenditures, those expenditures must be allowed in  
7                   the rates set by the Commission. It's the submission  
8                   of the Terasen utilities that there are really two  
9                   concepts or legal principles at play here. And the  
10                  two of them must be considered in your consideration  
11                  of items 2 and 3 on the list. There are also factual  
12                  and timing matters that I submit should be considered.

13                  With regard to the two concepts or legal  
14                  principles, the Terasen utilities agree with B.C.  
15                  Hydro that it's the responsibility of management to  
16                  manage the utility, and to establish budgets. So  
17                  that's one legal concept, and I don't know that that's  
18                  in question here at all.

19                  The second principle that I say is  
20                  applicable is that the Commission has this statutory  
21                  obligation, statutory responsibility, to establish  
22                  just and reasonable rates. And that's set out in  
23                  primarily Sections 59 and 60 of the Act. In setting  
24                  the rates, the Commission has a broad discretion to  
25                  consider all relevant and proper matters, as long as  
26                  they are founded in the evidence.

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**Proceeding Time 2:03 p.m. T44**

And this was recognized, I submit, in the case of *The City of Calgary v. ATCO Gas*, and I'd like to refer you to that. That's a 2006 judgment of the Supreme Court of Canada which was distributed by the Terasen Utilities. And I will start at page 38 of that judgment, and this is under the heading "Historical Background and Broader Context". And I perhaps should just preface this case to say that this case was dealing with -- came out of Alberta obviously and was dealing with the sale of some property owned by Alta Gas, ATCO Gas, and the issue was whether the Commission in Alberta or the Board in Alberta had authority to impose a condition which said that part of the capital gain had to go back to the customers. That was the issue that was under appeal. And the portion of the judgment I'm going to read for you really is background to the broader discussion.

So at page 38, and this is from the majority judgment, under the heading "Historical Background and Broader Context", the court talks about the history of public utilities regulation in Alberta. So I won't -- that's just the sort of lead-in. And then if I can just turn you -- ask you to turn to page 40, paragraph 60:

"Although the board may seem to possess a

1           variety of powers and functions, it is  
2           manifest from a reading of the..."  
3           and they refer to three Alberta pieces of legislation,  
4           "...that the principal functions of the board  
5           in respect of public utilities is the  
6           determination of rates. Its power to  
7           supervise the finances of these companies  
8           and their operations, although wide, is in  
9           practice incidental to fixing rates."  
10          The court is recognizing that really the primary  
11          function of a commission such as this is the rate  
12          fixing function, rate determination function. And  
13          then on paragraph 61 over the page:  
14                 "The process by which the board sets the  
15                 rates is therefore central and deserves some  
16                 attention in order to ascertain the validity  
17                 of the city's first argument."  
18          And that's the City of Calgary which was the appellant  
19          in this case. And then there is a heading "Rate  
20          Setting":  
21                 "Rate regulation serves several aims:  
22                 sustainability, equity and efficiency, which  
23                 underline the reasoning as to how rates are  
24                 fixed."  
25          And then the court quotes from a text:  
26                 "The regulated company must be able to

1 finance its operations and any required  
2 investment so that it can continue to  
3 operate in the future. Equity is related to  
4 the distribution of welfare among members of  
5 society. The objective of sustainability  
6 already implies that shareholders should not  
7 receive too low a return, and defines this  
8 in terms of the reward necessary to ensure  
9 continued investment in the utility, while  
10 equity implies that the returns should not  
11 be too high."

12 Then going back to the judgment:

13 "These goals have resulted in an economic  
14 and social arrangement dubbed 'the  
15 regulatory compact', which ensures that all  
16 customers have access to the utility at a  
17 fair price, nothing more."

18 As I will explain further, it also  
19 transfers onto the customers -- it does not transfer  
20 onto the customers any property right.

21 "Under the regulatory compact, the regulated  
22 utilities are given exclusive right to sell  
23 their services within a specific area at  
24 rates that will provide companies the  
25 opportunity to earn a fair return for their  
26 investors. In return for this right of

1           exclusivity, utilities assume a duty to  
2           adequately and reliably serve all customers  
3           in their determined territories, and are  
4           required to have their rates and certain  
5           operations regulated. Therefore, when  
6           interpreting the broad powers of the board,  
7           one cannot ignore this well-balanced  
8           regulatory arrangement, which serves as a  
9           backdrop for contextual interpretation. The  
10          object of the statutes is to protect both  
11          the customer and the investor. The  
12          arrangement does not, however, cancel the  
13          private nature of the utility. In essence,  
14          the board is responsible for maintaining a  
15          tariff that enhances the economic benefits  
16          to consumers and investors of the utility."

17                   And then the board goes on, or the court  
18          goes on to refer to an earlier Supreme Court of Canada  
19          decision of *Northwestern Utilities*, a 1979 decision.  
20          There's a number of northwestern utility decisions,  
21          but this is the '79 decision.

22   **Proceeding Time 2:0j8 p.m. T45**

23                   And they quote there: "The PUB...", and this  
24          is the Alberta context, so it's slightly different in  
25          British Columbia, only in terms of process, but  
26          they're quoting here, they say:

1 "The PUB approves or fixes utility rates  
2 which are estimated to cover expenses plus  
3 yield the utility a fair return or profit.  
4 This function is generally performed in two  
5 phases. In phase one, the PUB determines a  
6 rate base. This is the amount of money  
7 which has been invested by the company in  
8 the property, plant and equipment, plus an  
9 allowance for necessary working capital, all  
10 of which must be determined as being  
11 necessary to provide the utility's service.  
12 The revenue required to pay all reasonable  
13 operating expenses, plus provide a fair  
14 return to the utility on its rate base, is  
15 also determined in phase one. The total of  
16 the operating expenses plus the return is  
17 called the revenue requirement."

18 And then it goes on to say, "In phase two," which we  
19 don't follow this practice in B.C.:

20 "In phase two, rates are set which under  
21 normal temperatures..."

22 et cetera,

23 "...will produce the forecast revenue  
24 requirement. These rates will remain in  
25 effect until changed as the result of  
26 further application or complaint, or the

1 board's initiative. Also in phase two,  
2 existing interim rates may be confirmed or  
3 reduced. If reduced, a refund is ordered."  
4 So that's a broad description, and I'd just like to  
5 take you back to what's in the middle of that  
6 paragraph, where it says:

7 "The revenue required to pay all reasonable  
8 operating expenses plus provide a fair  
9 return to the utility."

10 And what I would submit is that, where we've heard Mr.  
11 Quail and Mr. Wallace and others talk about varying  
12 the amounts sought in the application, what that's  
13 really dealing with is the board coming to a  
14 determination of what the reasonable operating  
15 expenses are. And that, I submit, is part of your  
16 function and within your jurisdiction. You are, in  
17 carrying out your rate-setting function, are to look  
18 and determine what are the reasonable operating  
19 expenses.

20 And I note here that they've broken this --  
21 in this judgment, it's broken into two parts. There's  
22 the reasonable operating expenses plus the fair  
23 return. And this goes back to the point I made  
24 earlier, that I submit that there is this obligation  
25 to provide a fair return. And when you're looking at  
26 the level of reasonable operating expenses, that's

1 different than looking at the fair return. Those are  
2 two separate components that go into the revenue  
3 requirement.

4 And so this concept of -- we discussed  
5 earlier about trade-offs, that there be trade-offs.  
6 Those trade-offs can very well be between the level of  
7 operating expenses and the level of service. The  
8 utility may have put forward a proposal that it should  
9 have a level of service here, and for whatever reason,  
10 the Commission decides, with an associated revenue  
11 requirement, and for whatever reason, the Commission,  
12 on the basis of submissions from intervenors or  
13 others, decides that, no, the reasonable service is  
14 somewhat lower and that carries with it lower  
15 expenditures. And I say that's quite appropriate, and  
16 that's part of the determination of the reasonable  
17 operating expenses. But that's separate than trading  
18 off on the fair return. The fair return is set in  
19 British Columbia pursuant to the generic formula, but  
20 in other jurisdictions, and more broadly, there are  
21 Supreme Court of Canada cases on *Northwestern*  
22 *Utilities*, another *Northwestern Utilities* case from  
23 1929, which say, "Here is sort of the parameters to  
24 set the fair return." And it's not a trade-off  
25 between fair return and reasonable operating expenses.  
26 It may be a trade-off between expenses and service, or



1 other items, but not, I say, between fair return and  
2 expenses.

3 B.C. Hydro, in effect, is saying that the  
4 rates it has sought in its application, and in  
5 particular the operating expenses it has sought in its  
6 application must be accepted by the Commission unless  
7 the Commission rules that its forecasts involve  
8 expenditures that the Commission determines are  
9 imprudent. That's sort of the nub of this issue  
10 number 3. The Terasen utilities do not agree with  
11 B.C. Hydro's position. Rates as established by the  
12 Commission are to be just and reasonable, or as I say,  
13 at least not unjust nor unreasonable.

14 **Proceeding Time 2:13 p.m. T46**

15 I searched through the *Utilities Commission*  
16 *Act* and I couldn't find the word "prudent" anywhere in  
17 the *Act*, and I couldn't find the word "imprudent"  
18 anywhere in the *Act*. In my submission, the *Utilities*  
19 *Commission Act* does not establish a test of imprudency  
20 in determining rates in a revenue requirement  
21 proceeding. The *Utilities Commission Act* adopts a  
22 standard of reasonableness and justness as a test of  
23 rates.

24 In his submissions today and in his opening  
25 statement back on pages 207 and 208 of the transcript,  
26 Mr. Christian drew a distinction between a rate design

1 proceeding and a revenue requirement proceeding and  
2 said there were different discretion or different  
3 scope of discretion for the Commission. In my  
4 submission, the Act doesn't draw such a distinction in  
5 terms of what a rate must be. The Act says rates are  
6 to be just and reasonable. That's in a context of  
7 rate design and in the context of revenue requirement  
8 proceedings. Simply put, the *Utilities Commission Act*  
9 does not say that rates charged to customers are to  
10 include all expenditures included in the utilities  
11 budgets, unless those expenditures are determined to  
12 be imprudent.

13 This submission I've just made might be  
14 considered by some in the room to be a bit surprising,  
15 being made on behalf of three regulated public  
16 utilities, but my clients do not consider it to be in  
17 their interests or in the interests of the Commission  
18 or customers of the Commission to create legalistic  
19 hurdles for the Commission that don't appear in the  
20 Act. My clients accept the arrangement referred to as  
21 the regulatory compact in the *ATCO* case.

22 Rates should be determined by the  
23 Commission on the basis of the evidence in a  
24 proceeding such as this. Forecast expenditures should  
25 not be disallowed capriciously. And the Commission  
26 should not substitute its view on how the utilities

1           should be operated for those of the management of the  
2           company. But my clients recognize that in the rate  
3           setting process, it can and should normally be  
4           undertaken, such a process should normally be  
5           undertaken without imposition of a prudence test as  
6           part of the rate setting process.

7                         Now, as I said earlier, my clients, and  
8           it's my submission that the Act doesn't set a burden,  
9           they don't have the onus of establishing that the  
10          rates they seek are correct. In practical terms, you  
11          know, this is probably an issue of much ado about  
12          nothing in that at the end of the day you're going to  
13          hear all of the evidence, and I have yet to see a  
14          decision of this Commission, and I'm not sure of any  
15          decision, where the Commission has said, "We refuse to  
16          allow the rates because the onus wasn't met." I mean,  
17          if the rates aren't -- if what's sought is varied or  
18          if the -- accepted or not, it doesn't appear in  
19          decisions, "Yes, you met the onus, therefore you get  
20          everything you asked for."

21                         In terms of the prudence issue, speaking  
22          quite frankly, my clients are concerned about the  
23          creation of a prudence test in the context of revenue  
24          requirements. Mr. Christian referred to the *Nova*  
25          *Scotia* cases and I won't take you to the case, but in  
26          the 2005 *Nova Scotia* decision that the Commission

1 referenced, at page 87 the board there talked about  
2 prudence reviews and said:

3 "In prudence reviews the utility should  
4 provide evidence of what the decision was  
5 based on, including..."

6 and I quote here,

7 "...decision inputs, assumptions, forecasts  
8 and studies which might have affected the  
9 decision by management."

10 The practical effect of that is, if  
11 utilities -- if the test were a prudence test and  
12 therefore the utility, B.C. Hydro is creating this  
13 situation where they're in effect saying all of these  
14 expenditures we're talking about, all of our forecasts  
15 are subject to a prudence test, a determination on  
16 prudence. What that *Nova Scotia* case is saying is  
17 that they're supposed to put in evidence every scrap  
18 of material.

19 **Proceeding Time 2:18 p.m. T47**

20 MR. JOHNSON: that was available to management at the  
21 time each of those thousands of decisions was made.  
22 My clients don't want to see revenue requirement  
23 applications this high. And it's not in anyone's  
24 interest for masses of paper. And we're concerned, my  
25 clients are concerned that that imposition of prudence  
26 tests leads to that sort of a review.

1                   The Terasen utilities do agree with the  
2                   statement, as found at page 11 of the November, 2008  
3                   Alberta decision, where the Commission there quoting  
4                   says:

5                   "The Board considers that management  
6                   prudence is a concept more appropriate to a  
7                   consideration of prior actions taken by  
8                   utility management that become the subject  
9                   of a retrospective review by the Board,  
10                  rather than to a review by the Board of  
11                  prospective forecasts."

12                 In my submission, that's the correct way in which the  
13                 prudency test should be used. It's a retrospective  
14                 review of an expenditure that has been made.

15                 It appears to me that B.C. Hydro has taken  
16                 a test that's primarily, if not exclusively, used in  
17                 after-the-fact examinations and attempted to apply it  
18                 to a prospective determination.

19                 Now, earlier I said there were factual and  
20                 timing matters that might also be considered in this  
21                 debate over the prudency test. And in terms of  
22                 timing, I have this to say, or on factual and timing  
23                 matters. The prudency test, as everyone appears to  
24                 accept, involves an examination of the facts that were  
25                 known or should have been known at the time the  
26                 utility management made the decision. So, everybody,

1 I think, agrees it's not hindsight. You have to look  
2 at what was known or should have been known at the  
3 point in time.

4 B.C. Hydro's budgets, or forecasts in this  
5 revenue requirement proceeding, contain forecasts of  
6 utility expenditures. And forecasts are just that,  
7 they're forecasts. Budgets and forecasts are not  
8 final determinations of what particular expenditures  
9 will be made no matter what happens in the future.  
10 Rather, they are management's best estimate of what is  
11 expected to occur, based on the knowledge available at  
12 the time the budgets were compiled. Mr. Christian  
13 drew a distinction between some types of forecasts,  
14 which he said, "Well, those are sort of beyond the  
15 control of management, so they don't fall in the  
16 prudence review, but other forecasts do fall within  
17 this prudence test." And in particular, he talked  
18 about operating and -- or operating expenses as being  
19 something that does come within the prudence test.

20 B.C. Hydro has filed some evidentiary  
21 updates in this proceeding. I think one in July, and  
22 then another in October, first of October, and another  
23 October 17<sup>th</sup>. I went back and looked at the one filed  
24 in October, October 1<sup>st</sup>, and it does contain some  
25 changes in operating expenses. They're not major, but  
26 there are some changes in operating expenses, so B.C.

1 Hydro's budgets had changed a little bit, or its  
2 forecasts of operating expenses, which seems to  
3 counter what, to a small extent, what Mr. Christian  
4 said.

5 And then there was an October 17<sup>th</sup>  
6 undertaking -- a response to an undertaking which I am  
7 told was treated as an evidentiary update, Exhibit B-  
8 64. And one of the items in that update is an \$80  
9 million change -- let me just find it. This is B-64,  
10 it's page 3.

11 "Increase in non-current post-employment  
12 benefit costs of \$80 million for the fiscal  
13 2010."

14 And I'm told that that item, which is included in  
15 operating expenses, that's an operating expense item,  
16 and so although Mr. Christian has distinguished  
17 between operating expenses and some other category,  
18 this seems to be a sub-set of operating expenses which  
19 I assume Mr. Christian would say, "Well, that falls  
20 outside the prudence test too, because it was due to  
21 sort of what happened out there in the market, and  
22 pension expenses."

23 **Proceeding Time 2:23 p.m. T48**

24 Well, that may be so. It happened for  
25 external reasons. But it is an operating expense. So  
26 we're left with the situation -- well, you can't just

1 say all operating expenses fall sort of inside the  
2 prudence test, because some of them don't. And what  
3 are those? It's sort of the point that Mr. Austin was  
4 making earlier, that it's very impractical to try and  
5 distinguish which would and which wouldn't fall in  
6 there, into this test.

7 Another example I thought of was because of  
8 the weather around us was, we've had a lot of snow and  
9 I know the B.C. Hydro people were out fixing my power  
10 lines, because they didn't work for a day, and I  
11 thanked them for being out on Christmas Day fixing the  
12 power. It was very, very good of them. I wish they'd  
13 ploughed my road, the municipal people had ploughed  
14 the road, but that's a different story. But I assume  
15 that the B.C. Hydro line personnel were being paid  
16 double or triple time for working on Christmas Day to  
17 fix my power line and restore power to me, and you  
18 know, things like weather -- snow, bad weather, wind,  
19 whatever -- is going to have an effect on B.C. Hydro's  
20 costs, on its operating expenses. And I assume that  
21 B.C. Hydro, when it assumed -- it projects its  
22 expenses relating to that type of expenditure, it  
23 makes an assumption of normal weather, some sort of  
24 normal weather or normalized weather -- to come up  
25 with its budget. Now, I'm told that there is a  
26 deferral account that covers storm costs. So, some of



1       these types of costs may very well go into that  
2       deferral account, but they are operating expenses.

3               So, we've now created another sort of sub-  
4       category that doesn't fit in the test, because we --  
5       maybe it's a sub-category that's -- well, if it's an  
6       operating expense, it's got a deferral account  
7       associated with it, then it's not a prudence review,  
8       because those sorts of thing are beyond our control  
9       too.

10              B.C. Hydro says that capital expenditures,  
11       or sort of normal capital expenditures, should be -- I  
12       think they're saying -- should be subject to this  
13       prudence test. They can't be disallowed unless  
14       they're ruled imprudent. You know, we've -- as noted  
15       by B.C. Hydro in Exhibit B-64, their update, there has  
16       been very major changes in economic conditions  
17       recently. This affects housing starts. It must  
18       affect the number of customers B.C. Hydro will  
19       connect, and presumably affects the amount that they  
20       will spend in terms of capital on connecting  
21       customers.

22              B.C. Hydro, as I said a moment ago, you  
23       know, B.C. Hydro's forecasts here are based on  
24       budgets, those -- this application was filed in  
25       February. Those budgets must have been prepared some  
26       time towards the end of 2007. So we're -- it's over a

1        year ago. Now, when B.C. Hydro was making those  
2        capital forecasts, and coming up with, you know, a  
3        good estimate, the best estimate of how many customers  
4        they were going to connect, that would be made on the  
5        basis of the evidence available to them at that time.  
6        Conditions have changed very dramatically. That's not  
7        to say that the decision made last -- you know, a year  
8        ago, or more than a year ago, the management decision,  
9        was imprudent. It might have been very prudent, the  
10       best decision. But circumstances change. And B.C.  
11       Hydro's position essentially would be that the  
12       Commission -- if B.C. Hydro didn't change its capital  
13       forecast due to these changes in housing starts, then  
14       B.C. -- then the Commission could only disallow those  
15       costs for extra housing connections if it determined  
16       management's decision was imprudent. But imprudent --  
17       imprudency tests aren't supposed to use hindsight.  
18       You have to look at the decision when it was made.  
19       That decision would have been made over a year ago.  
20       Let's assume it was prudent at that point. But it's  
21       just out of date.

22                    But the position being advanced is that you  
23       couldn't disallow the costs associated with that  
24       decision without ruling it imprudent. And you can't  
25       use hindsight to determine if it's imprudent.

26                    You know, I really think this debate about

1 prudency is, at the end of it, much to-do about  
2 nothing.

3 **Proceeding Time 2:28 p.m. T49**

4 The Commission must determine the just and  
5 reasonable rates and it must determine those rates in  
6 light of all of the information that's now before it.  
7 If there's information before it that the housing  
8 starts have changed so the level of capital  
9 expenditures should be down and there should be less  
10 expenditures, then that's something the Commission  
11 should take into account. If information before the  
12 Commission is that some operating expenses have  
13 changed or should change, that's something the  
14 Commission can take into account in coming out with  
15 its decisions.

16 In my submission, a presumption that  
17 management decisions made on budgets over a year ago  
18 doesn't really provide the Commission with any  
19 meaningful assistance on the exercise of its statutory  
20 responsibility to establish just and reasonable rates.

21 And that concludes my submissions on points  
22 2 and 3, unless there's any questions.

23 COMMISSIONER RHODES: I think Mr. Quail suggested that  
24 the Alberta Act codified the common law?

25 MR. JOHNSON: I think he said that.

26 COMMISSIONER RHODES: And I'm wondering -- and certainly

1           the B.C. Act, I think you mentioned in your argument,  
2           doesn't say anything about it.

3 MR. JOHNSON:    It's silent.  And Mr. Quail said the same  
4           thing, yes, that it's silent.

5 COMMISSIONER RHODES:  What is your view on the common  
6           law?

7 MR. JOHNSON:  I'm not aware of any common law that  
8           relates to that particular position.  Mr. Quail made  
9           the statement.  He didn't cite anything that supported  
10          it.  My view is, as I said earlier, that because this  
11          is a statutory responsibility on the Commission, it's  
12          not an issue of onus.  I really don't have anything  
13          else to say on that.

14 COMMISSIONER RHODES:  Okay, thank you.

15 COMMISSIONER MILBOURNE:  I guess I'd ask you, Mr.  
16          Johnson, that also direct this to other intervenors  
17          who we didn't ask questions of but we put on notice  
18          that we might want to hear from on odds and ends, and  
19          if the people who did kind of rely on the stuff or  
20          drew our attention to the stuff on page 13 of this  
21          2008 ATCO decision, the November 13 decision, a number  
22          of paragraphs on this page 13 have been cited by  
23          people.  And what kind of interested me is that the  
24          books at either end of the bookcase have been touched  
25          on, but there's kind of one piece buried in the middle  
26          of this shelf that seems to have some relationship to

1 the point you're making, I think you're making, that  
2 there may be much ado about nothing here. And it's  
3 the last sentence of the -- pardon me, it's the last  
4 paragraph on page 13:

5 "While then Commission does not accept the  
6 interpretation of presumption of prudence,  
7 it does acknowledge that it is necessary for  
8 the Commission and intervenors to test a  
9 utility's forecasts, and for the Commission,  
10 if it chooses to apply different forecasts,  
11 to do so based on the application of its own  
12 expertise to the evidence and arguments in  
13 evidence in the proceeding."

14 Is that -- I guess what I'm asking is, is that a kind  
15 of nutshell way of putting the notion of maybe much  
16 ado about nothing into more of a plain language  
17 perspective?

18 MR. JOHNSON: I said I think it's much ado about nothing  
19 because at the end of the day I see that the  
20 Commission's jurisdiction is to set the just and  
21 reasonable rates, and it can't get -- you know. I  
22 suppose I'm saying at the end of the day that's what  
23 you're going to do and whether it is done through some  
24 application of a prudence test, which I don't agree  
25 with but if it was done that way or done some other  
26 way, you have to find that. And so the end result is

1           probably going to be the same or very similar. So I  
2           think this is much to-do about nothing.

3                         Now, with regard to this paragraph, I agree  
4           with what it's saying there that, you know, as a  
5           practical -- this is really saying as I see it. As a  
6           practical matter, the Commission is going to have to  
7           rely on the forecasts of the utility, and that's --  
8           most of the evidence before you is going to be the  
9           forecasts of the utility in one way or another. And  
10          so you're going to have to rely on that. And I think  
11          it was Mr. Austin that said, you know, at the end of  
12          the day, most of what B.C. Hydro has put in front of  
13          you is going to be accepted because in most cases,  
14          there isn't any evidence other than what B.C. Hydro  
15          says on a particular point. And there's maybe some  
16          specific issues where there is a real debate on the  
17          expenditure, but most of B.C. Hydro's expenditures  
18          probably aren't even going to be examined in any way  
19          in this proceeding. And what the Commission is saying  
20          here is, yes, it recognizes it's going to have to --  
21          whether you call it a prudence test or don't apply it,  
22          you're going to have to rely on B.C. Hydro's  
23          forecasts. And if, as it says, if the Commission  
24          chooses to apply other forecasts, it really has to do  
25          so on the basis of both the application of its  
26          judgment and evidence. You can't just pick other

1 numbers out of the air. There's got to be some  
2 evidence, evidentiary basis to support something  
3 different.

4 **Proceeding Time 2:34 p.m. T50**

5 COMMISSIONER MILBOURNE: Thank you.

6 MR. JOHNSON: Thank you.

7 THE CHAIRPERSON: I still have a follow-up question also,  
8 Mr. Johnson.

9 MR. JOHNSON: Yes.

10 THE CHAIRPERSON: I'm coming back to this -- well, this  
11 is still very much of a general question of  
12 clarification as well. To the *City of Calgary v ATCO*  
13 case you were quoting just to bring us all back to the  
14 basics. And how, on page 43, you were quoting from  
15 the paragraph 65, you know, how -- and basically when  
16 we are setting reasonable rates in the revenue  
17 requirement, there has to be revenue required to pay  
18 all reasonable operating expenses plus provide a fair  
19 return to the utility on its rate base. And that's  
20 sort of required --

21 MR. JOHNSON: Yes.

22 THE CHAIRPERSON: -- and determined in this proceeding.  
23 And you made the distinction that first we are looking  
24 at the operating expenses of B.C. Hydro, what are the  
25 reasonable operating expenses, and then we also have  
26 to look at what is the fair return B.C. Hydro is

1 allowed to earn, and there is a special direction for  
2 that. But with that background, then, if we go back  
3 to the paragraph 62, you were also quoting from, it  
4 says:

5 "Rate regulation serves several aims:  
6 sustainability, equity, and efficiency."

7 MR. JOHNSON: Mm-hmm.

8 THE CHAIRPERSON: That quote there did not further  
9 clarify what the efficiency meant in that context.  
10 So, I'm asking you, Mr. Johnson, based on this legal  
11 review you have given us on these issues, when the  
12 Commission is looking at B.C. Hydro's forecast  
13 operating expenses, is it totally acceptable to bring  
14 in the efficiency issue in there as well?

15 MR. JOHNSON: In my submission, it's a valid issue for  
16 the Commission to consider the efficiency of the  
17 utility. It's in the interests of society of a whole  
18 to have efficient utility operations.

19 THE CHAIRPERSON: Thank you, Mr. Johnson.

20 **ARGUMENT BY MR. QUAIL ON ISSUE 3:**

21 I understood from Commissioner Milbourne  
22 that other parties would have an opportunity to  
23 respond to the question that he posed. If I  
24 understand that correctly, I'd just like to respond  
25 briefly.

26 And as I said earlier, I was actually kind



1 of surprised that B.C. Hydro raised this issue in  
2 their argument, claiming the presumption of prudence  
3 for prospective decisions, and I think I said I'm not  
4 sure whether the actual bottom line in this  
5 application is affected. But I am concerned that the  
6 regulatory regime could go off on some kind of  
7 incorrect footing if this issue were not dealt with  
8 properly.

9 In my submission, in terms of sort of  
10 rubber hitting the road and putting this in a context  
11 where it becomes much more concrete, I think that a  
12 useful way to look at it is as follows: This  
13 Commission has determined -- actually it was in a  
14 negotiated settlement, but it was confirmed by the  
15 Commission by way of an Order, that B.C. Hydro's rates  
16 up till the date when they filed their application  
17 were just and reasonable.

18 Now, B.C. Hydro files an application that  
19 essentially says they're no longer just and  
20 reasonable. And in fact, that was expressly the basis  
21 of their application, and of the interim Order being  
22 made. And in my submission, it's sort of trite that  
23 if they're asserting that the rates aren't just and  
24 reasonable, they're the ones that bear the burden of  
25 demonstrating that fact. There's no great mystery  
26 about it.

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**Proceeding Time 2:39 p.m. T51**

Translating that into a circumstance, the circumstances that are addressed in the final paragraph on the page that Commissioner Milbourne referred to, suppose that there is an issue in the application where the only evidence on the record is the evidence of the utility. If that evidence is accepted by the Commission as being credible evidence and reasonable evidence, and there's no evidence to the contrary, well then, just in terms of the normal operation of the way evidence is weighed, B.C. Hydro has clearly met the onus and that no conclusion can be reached other than the one that's supported by evidence, again assuming the evidence has been accepted.

So I don't know if that assists or not, but I think it is helpful to bring this down to the ground in terms of how these proceedings actually work, and that could help avoid us getting into some kind of Byzantine constructions as I think my friend Mr. Johnson, I heard him cautioning the Commission about. So I hope that's about it.

THE CHAIRPERSON: Anybody else? All right then, Mr. Christian.

**REPLY BY MR. CHRISTIAN ON ISSUE 3:**

MR. CHRISTIAN: Back to me. So I'm going to deal with

1 issues 2 and 3 in that order, but first I want to give  
2 a high-level response to Mr. Johnson's comments and in  
3 particular his submissions with respect to issue 3,  
4 which while I was listening to him I was a little  
5 surprised because it struck me that fundamentally his  
6 view on issue 3, at least some of his submissions,  
7 ring consistent with some of the things he'd said  
8 under issue 2. Insofar as I understood him to say  
9 that the right of a utility to have a rate level  
10 sufficiently high that it has an opportunity to earn a  
11 fair return on its investment was a paramount  
12 consideration. I understood him to say that the  
13 expenses that a utility plans to incur, whether they  
14 were forecasting expenses, except for this purpose  
15 right now, that the distinction doesn't matter, he  
16 agreed that the management's obligation is to decide  
17 what those expenses should be and that they may not be  
18 simply substituted for by a different number by the  
19 Commission to achieve other objectives because that  
20 would then undermine the ability of the utility to  
21 earn its return on its investment.

22 And so then, having heard that, it wasn't  
23 clear to me whether really there was, in substance,  
24 much difference between his point on the prudence test  
25 or not. Because at the end of the day his final  
26 words, I think, were the ones that really are germane

1 here, which is that there is a lot of evidence on this  
2 record of this proceeding, and virtually all from B.C.  
3 Hydro and unless the Commission finds that evidence  
4 wanting in the sense that it cannot accept it, most of  
5 what B.C. Hydro's revenue requirement is before this  
6 Commission is likely to be accepted. And the issue  
7 really is around the edges.

8 One of the edges, for example, is the G.M.  
9 Shrum incident. The failure of that piece of  
10 equipment is causing cost consequences today that B.C.  
11 Hydro has planned for and expects to incur in the test  
12 period. But the decisions that were made that may  
13 have resulted in that failure, of course, were done  
14 years ago. Now, the relevance of that is that  
15 resumption of prudence doesn't mean that Hydro has a  
16 free pass on that. It simply means that the decisions  
17 that B.C. Hydro management made, whether they're the  
18 decisions on how to maintain that plan five years ago,  
19 or the decisions on establishing operating budgets 14  
20 months ago, are, in the absence of some reason, to  
21 rebut the presumption, prudent. It doesn't mean that  
22 they can't be set aside. Doesn't mean that the onus  
23 has shifted. The fact that B.C. Hydro enjoys the  
24 benefit of the rebuttable presumptions simply does not  
25 mean that the evidentiary burden has shifted. And in  
26 fact, the Ontario case referred to, the Ontario Court

1 of Appeal case referred to in B.C. Hydro's argument,  
2 makes it clear that hindsight can be used to rebut the  
3 presumption.

4 So in other words, when a utility goes in  
5 and says, "I expect to spend X dollars on this  
6 project," and it turns out after the fact that the  
7 project costs more than X dollars, the utility -- the  
8 Court of Appeal's decision from Ontario would suggest  
9 that the mere fact that the thing costs more than it  
10 was expected to is sufficient to rebut the  
11 presumption. And then the utility has the obligation  
12 to put forward evidence in support of it.

13 And I say all that because I think it's  
14 relevant to -- and I think ultimately probably  
15 supportive and consistent with what Mr. Johnson is  
16 saying, that this at the end of the day isn't perhaps  
17 as big a deal as it's being made out to be. There's  
18 nothing in B.C. Hydro's position that suggests that a  
19 line-by-line review, or line-by-line listing of every  
20 activity that B.C. Hydro intends to undertake and the  
21 costs associated with it is something that Hydro  
22 expects to file or would need to file. Rather the  
23 issue is having filed its application, what are the  
24 questions raised by intervenors in response to that  
25 application? What are the questions raised by the  
26 Commission Panel and Commission Staff that perhaps

1           rebut the presumption?

2                         And so, as I say, I don't think it's a  
3           wholesale change in the way things have been done. I  
4           don't think that fundamentally it is likely to affect  
5           the substance of the Commission's decision except for  
6           here and there on a few particular cost issues, and  
7           that includes whether or not the Commission accepts  
8           that the presumption of prudence applies to decisions  
9           that have been made in the past, or have cost  
10          consequences yet to be incurred. And in that I'm  
11          referring specifically to F10 operating which is, you  
12          know, one of the issues in this case.

13   **Proceeding Time 2:44 p.m. T52**

14                         Well, let me go back, then. Well, those  
15          are the kind of overarching comments really in  
16          response to what I heard from Mr. Johnson, but I want  
17          to go back and now deal specifically with issue 2, and  
18          I've got a few reply submissions to make on issue 2.

19          **REPLY BY MR. CHRISTIAN RE ITEM 2:**

20                         And the first thing is that we heard a lot  
21          from the intervenors, particularly the customer  
22          intervenors, about the need and the obligation for the  
23          Commission to balance the interests of the utility and  
24          the ratepayers. And that it should do that in the  
25          course of the rate-setting exercise -- in particular,  
26          the revenue requirement setting exercise. And

1 further, as I understand it, in gist, the intervenors'  
2 arguments, except for Mr. Johnson, that in that  
3 balancing exercise, it's open for the Commission to  
4 reduce and make lower than it otherwise would be the  
5 return on equity that the utility would otherwise be  
6 entitled to.

7 Mr. Johnson says, "No, there's no balancing  
8 at all with respect to the return on equity." That is  
9 a paramount consideration that the utility must have  
10 an opportunity to earn. And I say that the answer to  
11 those disparate views lies clearly and specifically  
12 within the *Utilities Commission Act*. And if I can  
13 refer to, again, Section 59(5). Again, I've read  
14 these words before. Section (5):

15 "In this section, a rate is unjust or  
16 unreasonable if the rate is (a) more than a  
17 fair and reasonable charge for a service of  
18 the nature and quality provided by the  
19 utility, or (b) insufficient to yield the  
20 fair and reasonable compensation for the  
21 service provided by the utility, or a fair  
22 and reasonable return on the appraised value  
23 of its property."

24 So B.C. Hydro's position, with respect to the  
25 balancing of interests that might weigh on the allowed  
26 return for the utility, in my submission, occurs right

1 here, in Section 59(5). That is, the Commission is  
2 entitled to weigh interests in assessing what's a fair  
3 return on the invested capital of the utility, but  
4 where it does that is right here in 59(5), when it  
5 trades off with the quality of the service -- or,  
6 sorry, where it may trade off the quality of service  
7 with the fair return to be accorded to the utility.

8 And then if you move to 60(1)(b)(i), there  
9 we have:

10 "The Commission must have due regard to  
11 setting a rate that is not unjust or  
12 unreasonable within the meaning of Section  
13 59."

14 So what I say is, the balancing that my  
15 customer intervenor friends referred to can happen, in  
16 the usual course. And it happens in 59(5). Once that  
17 balance is achieved, once the return on equity is  
18 determined, then it's something the Commission must  
19 have due regard for. And relying on the words of  
20 *Hemlock* again, "having due regard for" means "giving  
21 effect to without placing one above the other". In  
22 other words, each of the elements in 60(1)(b)(i), (ii)  
23 and (iii) must be given effect.

24 Now, the only reason this is a little  
25 unusual in this case is, as Mr. Johnson alluded, it's  
26 somewhat unique for B.C. Hydro, and at least two other



1 utilities that I can think of in B.C. that are subject  
2 to Special Direction, the balancing with respect to  
3 what is a fair return on equity is actually done  
4 already by the legislature through the issuance of  
5 Special Direction No. 2 which, in the case of B.C.  
6 Hydro, requires the Commission to include in their  
7 revenue requirement an amount of deemed equity, a  
8 return on deemed equity. And so the balancing that  
9 would normally exist doesn't happen for Hydro for  
10 exactly the reason that Mr. Johnson said.

11 But I just wanted to make it clear that I  
12 do think that balancing is possible, and it's  
13 permissible. It just doesn't apply to Hydro, and it  
14 doesn't happen in Section 60(1)(b), it happens in the  
15 previous section.

16 Now, I was listening carefully to my  
17 friends this morning. And again, except Mr. Johnson,  
18 who didn't really touch on this point, most of the  
19 intervenor customers, I think, supported what really  
20 is Mr. Oulton's argument about the import of Section  
21 60(1)(b)(iii). As I understood Mr. Oulton's argument,  
22 as I mentioned earlier, it was a little unclear, but  
23 he seemed to be saying that even if an expenditure is  
24 not found imprudent, or found to be reasonable by the  
25 Commission, or whatever formulation this Commission  
26 decides, in other words, it's a good expense,

1 nevertheless, to achieve the objective of  
2 60(1)(b)(iii), should nevertheless just allow that  
3 expense.

4 **Proceeding Time 2:49 p.m. T53**

5 And, only Mr. Oulton, of all counsel who  
6 has addressed that provision, actually has relied on  
7 it, for the purpose of saying what expenses the  
8 commission should disallow. Mr. Oulton's argument  
9 refers to some costs that B.C. Hydro is incurring  
10 under the procurement enhancement initiative, and some  
11 cost that B.C. Hydro is incurring under the Accenture  
12 arrangements. So there is nothing else before this  
13 Commission in which a party has said, this is a dollar  
14 that B.C. Hydro is planning on spending or has spent  
15 in fiscal 2009 already, that you should take away from  
16 them, take it out of their revenue requirement, to  
17 achieve any objectives in 60(b)(iii).

18 So, and I guess the bottom line I think is  
19 that, like a few other things we've actually spent a  
20 fair bit of time talking about today, at the end of  
21 the day, the legal point here, what effect the  
22 provision relied on by Mr. Oulton has, seems to be  
23 very small, and there isn't much that, in my  
24 respectful submission, the commission can hang on it,  
25 which ever way it decides the issue.

26 **REPLY BY MR. CHRISTIAN ON ITEM 3 (Continued):**

1                   Now, I am going to go back to point 3  
2                   again. I made some high level comments on that, in  
3                   response to Mr. Johnson. I've got just a few other  
4                   things to say on it. Again, the essence of B.C.  
5                   Hydro's position on the benefit of the rebuttable  
6                   presumption is that it arises from the decisions made  
7                   by management, and of course, all decisions that are  
8                   here in front of this Commission have, are decisions  
9                   that have been made already, they are in the past.  
10                  The past decisions are the ones that the Commission is  
11                  considering here today, and those are the ones, that  
12                  is the decisions that follow from the statutory  
13                  obligation to provide service, the ones that  
14                  management is required to make under the law, those  
15                  are the ones that get the benefit of the presumption,  
16                  and no others. And again, the fact that there is a  
17                  rebuttable presumption doesn't say anything about how  
18                  that presumption is in fact rebutted, how it can be  
19                  rebutted. There haven't been any submissions made to  
20                  it, and in my submission, there is a little bit of too  
21                  much concern raised about this position that Hydro is  
22                  articulating in its favour, or on its benefit here,  
23                  because it doesn't strike me that the fact that  
24                  there's a rebuttable presumption means that the onus  
25                  has shifted. I think I am beginning to repeat myself  
26                  on this point, so I will end it there.

1                   But it is important to understand that the  
2                   presumption doesn't require -- it doesn't cause an  
3                   evidentiary shift of the type that my friends are  
4                   suggesting, would make it impossible for them to argue  
5                   their case or for this Commission to set just and  
6                   reasonable rates.

7                   Now, Mr. Austin made some reference to the  
8                   fact that the presumption of prudence couldn't apply  
9                   to capital, or shouldn't apply to capital, where  
10                  capital projects are subject to review processes that  
11                  are separate from revenue requirements proceedings,  
12                  and I just want to point out of course that in this  
13                  application we don't have any section 44.2, or 44.5,  
14                  forecasts of expenditures. The capital expenditure  
15                  decisions that are relevant in a revenue requirements  
16                  proceedings are always the past capital decisions,  
17                  where the capital projects have come into service and  
18                  therefore are reflected in incremental finance charges  
19                  incremental depreciation charges.

20                  B.C. Hydro simply doesn't have, at this  
21                  time, any views on whether or not, in a CPCN  
22                  application, or in a capital plan review process, it  
23                  has the benefit of the presumption. That issue hasn't  
24                  been tested, it is not one that Hydro is advancing  
25                  today, and the Commission need not make a  
26                  determination on that point.

1 I am going to turn to the recent, November  
2 2008 ATCO decision that has been the subject of some  
3 submissions already. Having heard the submissions my  
4 friends and watched the Commission panel follow along,  
5 I'm afraid that the version I have may not line up in  
6 terms of page numbers with a version that my friends  
7 have, so we are going to have to bear with me a little  
8 bit here. And my submissions with respect to ATCO are  
9 simply that the ATCO decision should not be followed  
10 by this Commission for two fundamental reasons: There  
11 is a difference in the statutory regime, and the  
12 decision making of the AUC was incorrect. And it was  
13 incorrect in part because of the position that ATCO  
14 took with respect to it, and I will go through each of  
15 those in turn.

16 **Proceeding Time 2:54 p.m. T54**

17 And my first point is really the last one I  
18 just mentioned, which is that I think ATCO, I think  
19 clearly ATCO and B.C. Hydro have a different view on  
20 the application of the prudence test, that is, the  
21 presumption of prudence and where it applies. And on  
22 paragraph 25 of my version of this case, that's the  
23 second full paragraph under the heading called  
24 "Presumption of Prudent Management". It's on page 5  
25 of my version. I've got the Carswell version of the  
26 case here. Anyway the sentence begins, "AG submitted

1       that a presumption of prudent management applies..." I  
2       think it might be page 2 of the decision.

3               Page 6. Mr. Fulton has kindly lent me his  
4       copy of this so hopefully you can avoid having to do  
5       any more of this searching around.

6               In any event, the first sentence of what is  
7       paragraph 25 on my copy begins with the words:

8               "AG submitted that a presumption of prudent  
9       management applies to all of its managerial  
10       decisions including forecast prepared for  
11       the purposes of GRA proceeding."

12       And as I've noted already and it's been the subject of  
13       some submissions, B.C. Hydro's view is not that  
14       everything that is in the revenue requirement gets the  
15       benefit of the presumption of prudence. It's those  
16       decisions of management that it must make.

17               And if you -- I'm not going to refer to the  
18       paragraph because I don't think it's terribly  
19       important, but later on in his decision it's clear  
20       that what was in issue, at least in part in this *ATCO*  
21       case, were actual -- the type of forecasts that I  
22       would say are not -- did not get the benefit of the  
23       presumption of prudence.

24               Just after the heading "Commission  
25       Findings, Presumption of Prudence Generally", there is  
26       an extract there that makes it clear that it's the

1 debenture rate forecasts that at least in part were  
2 the subject of some debate in that case. And as I've  
3 said here, interest rate forecasts in our case, or  
4 forecasts of wholesale market prices, that's evidence  
5 that Hydro puts before the Commission and it doesn't  
6 get the benefit of presumption in respect to that type  
7 of evidence.

8 All right, so the next submission I have to  
9 make, then, arises on what appears to be page 12 of  
10 the document that everybody else is working with, and  
11 it's the very top of page 12 beginning -- the words  
12 are:

13 "The Commission has also considered the  
14 legislation which sets out its rate setting  
15 function."

16 And I'll read the paragraph here, picking it up from  
17 the second line: Including subsection 40(a) of the  
18 *Gas Utilities Act* noted above under "Legislative  
19 Framework" in which the Commission's role is to  
20 expressly – and I'm saying "expressly", that's my  
21 paraphrase of course – consider all revenues and costs  
22 when fixing just and reasonable rates as set out.  
23 Similarly, subsection 4(3) of AR, and there's a  
24 reference to a regulation, requires that the  
25 Commission make a determination as to the prudent  
26 costs incurred by a gas distributor. And the extract

1 from the regulation is set out there. And underlined  
2 words that were emphasized by the Alberta Utilities  
3 Commission and relied on it, in part on its conclusion  
4 on this point is "as determined by the Commission".

5 So a submission I make here is that the  
6 Commission in Alberta is specifically directed to look  
7 at the costs of the utility in a way that I say is not  
8 the case with respect to B.C. Hydro's revenue  
9 requirement in this commission. And on that point I  
10 refer to Heritage Special Direction No. 2 again. I  
11 don't know that it's necessary to turn to it. I think  
12 everybody is reasonably familiar with it. There's a  
13 copy of it in B.C. Hydro's application and I'll just  
14 refer to paragraph 4 of Heritage Special Direction No.  
15 2, which is the operative provision in that Special  
16 Direction with respect to the setting of the revenue  
17 requirement by the Commission for B.C. Hydro. And it  
18 says:

19 "Subject to Section 7, in regulating and  
20 setting rates for the authority, the  
21 Commission must ensure that those rates  
22 allow the authority to collect sufficient  
23 revenue in each fiscal year to enable the  
24 authority to:

- 25 (a) provide reliable electricity service;  
26 (b) meet all of its debt service, tax and



1 other financial obligations despite the  
2 inclusion of debt and deemed equity."

3 Paragraph (c) refers to government policy directives,  
4 none of which are in issue in this case.

5 **Proceeding Time 3:00 p.m. T55**

6 MR. CHRISTIAN: And in (d),

7 "achieve an annual rate of return on deemed  
8 equity equal to the pre-income tax annual  
9 rate of return allowed by the Commission to  
10 the most comparable investor-owned energy  
11 utility regulated under the Act."

12 And in my submission, the reliance of the Alberta  
13 Utilities Commission on the specific direction to  
14 consider and determine the costs is different, and  
15 materially different, than the obligation on this  
16 Commission here, when it sets B.C. Hydro's revenue  
17 requirement, under paragraph (4) of Heritage Special  
18 Direction 2.

19 In the very following paragraph -- I'm back  
20 in the case. But I'm waiting for Madam Chair to --

21 THE CHAIRPERSON: Okay.

22 MR. CHRISTIAN: It's okay. I didn't want to -- I was --  
23 if there was another follow-up question I wanted to  
24 wait for it.

25 THE CHAIRPERSON: My apologies.

26 MR. CHRISTIAN: Not at all.

1 MR. CHRISTIAN: So, I still am on the case. Still on  
2 page 12 of the case, and immediately following that  
3 extract from the regulation, the paragraph begins:

4 "Within this legislative framework, in a  
5 prospective rate-setting context, to apply a  
6 presumption of prudence to forecasts would  
7 be to essentially fetter the Commission's  
8 ability to consider all revenues and costs  
9 and determine whether those costs were to be  
10 prudently incurred."

11 And in my submission, where the Commission relies on  
12 this statement here, it's simply wrong. There is  
13 nothing, for example, in this case before the  
14 Commission right now that fetters its ability to look  
15 at every single element of B.C. Hydro's cost  
16 structure. The only limit really practically speaking  
17 is the time involved to do such an exercise. The  
18 presumption of prudence that applies to those  
19 management decisions to which I've been referring does  
20 not fetter the Commission's discretion, or ability to  
21 consider the revenues and costs, and determine whether  
22 those costs are to be prudently incurred. And the  
23 statement by the Alberta Utilities Commission that  
24 I've just referred to you is, in my submission, simply  
25 wrong.

26 The Commission goes on in that paragraph to

1 say it would also -- and again, "also" being --  
2 applying the presumption of prudence in a prospective  
3 context,

4 "It would also, in the Commission's view,  
5 prevent the Commission and intervenors from  
6 properly testing those forecasts, and would  
7 effectively and improperly shift the burden  
8 of proof which is squarely placed on AG by  
9 Section 44(3) of the *Gas Utilities Act*."

10 So, dealing with the first element of that statement  
11 there, the fact of the presumption of prudence, in my  
12 submission, simply does not prevent anybody from  
13 properly testing those forecasts. Indeed, I think, if  
14 we all think about how the evidence came forward in  
15 this proceeding, there wasn't a substantial difference  
16 in the way the witnesses addressed questions about  
17 fiscal 2009 budgets and fiscal 2010 budgets. The only  
18 difference between the way that those issues were  
19 addressed was an acknowledgement that some of the  
20 fiscal 2009 dollars had been spent already, and so if  
21 legitimate and fair questions were asked of the  
22 witnesses, "Well, are you actually on budget with  
23 respect to the dollars in fiscal 2009?" But the  
24 rationale, the trade-offs, the reasons, the  
25 overarching perspective that Hydro brings to its  
26 budgeting process is exactly the same for each of

1       those two fiscal periods. And it wasn't just any  
2       material difference in the evidence with respect to  
3       those periods. And so this submission again, I say is  
4       simply inaccurate. It doesn't characterize well and  
5       fairly what actually happens in the hearing or in this  
6       particular hearing.

7               And finally, that paragraph also concludes  
8       with a proposition that prospective -- that granting a  
9       utility the benefit of the presumption of prudence in  
10      a prospective -- with respect to a prospective  
11      expenditure effectively and improperly shifts the  
12      burden of proof, which is squarely placed on the AG by  
13      Section 44(3) of the *Gas Utilities Act*. And I've said  
14      this before, so I'm not going to belabour it, but in  
15      my view, the fact that B.C. Hydro gets the benefit of  
16      a presumption of prudence with respect to certain of  
17      its decisions does not in any way shift the burden  
18      overall of proof. And in this respect, I disagree  
19      with Mr. Johnson. I think Hydro does bear a burden of  
20      persuasion with respect to its case generally. But  
21      with respect to certain of its decisions, for the  
22      reasons that I've articulated in the argument, but  
23      which primarily relate to the legal obligations of  
24      management, it gets a presumption of prudence. It's a  
25      rebuttable presumption, and that's all it gets. And  
26      that doesn't shift the burden in the way that the

1 Commission here seems to assume it does.

2 And that concludes my submissions on item  
3 3, and 2, I believe, subject to any questions from the  
4 Commission panel.

5 Well, I have some comments to make on the  
6 next two items, but maybe I'll wait till there's  
7 questions on 2 and 3.

8 THE CHAIRPERSON: Well, I believe we would take a 15-  
9 minute break first, and when the panel returns, we may  
10 have some questions.

11 MR. CHRISTIAN: Thank you.

12 THE CHAIRPERSON: Thank you.

13 (PROCEEDINGS ADJOURNED AT 3:05 P.M.)

14 (PROCEEDINGS RESUMED AT 3:26 P.M.) **T56 and T57**

15 THE CHAIRPERSON: Mr. Christian, I still have just a  
16 couple of follow-up questions. We heard from Mr.  
17 Johnson loud and clear that prudence is really --  
18 should not really matter that much here, and we should  
19 not lose sight of things, but for the purpose, let's  
20 presume now that the panel accepts B.C. Hydro position  
21 there on the prudency test. And going back also to  
22 your position, Mr. Christian, that the part of the Act  
23 that really we should start with, and where we should  
24 do the trade-offs and balancing, is the Section 59(5),  
25 which is looking at the three items there that the (a)  
26 is more than the fair and reasonable charge for

1 service of the nature and quality provided by the  
2 utility --

3 MR. CHRISTIAN: Right.

4 THE CHAIRPERSON: -- and (b), the fair return and (c) is  
5 unjust and unreasonable for any other reason.

6 Coming back to this prudence test, because  
7 it is a high test, it is a high standard, I'm still  
8 wondering if, from B.C. Hydro's point of view, is it  
9 possible that the utility can act prudently while not  
10 being sufficiently efficient?

11 MR. CHRISTIAN: Well, I guess the question begs what  
12 "sufficiently efficient" means. But your question, I  
13 think, raises a concern that's been nagging in the  
14 back of my head, and I'm going to put it on the table,  
15 and maybe this is going to go to where you're going.  
16 And that is, the suggestion from intervenors that  
17 costs that are otherwise not found to be unreasonable  
18 or imprudent should be disallowed as an incentive to  
19 being efficient is one that always struck me as  
20 problematic. It doesn't make any sense to me how  
21 taking costs out of a company's budget enforces it to  
22 be efficient. It may incent efficiency, but it may  
23 simply result in things not being done that otherwise  
24 should have been done. And there's no way for the  
25 Utility Commission, or any administrative tribunal, to  
26 look in and sit in the seats of management and

1           actually do the things differently. So the cost-  
2           cutting that would follow from the idea that  
3           efficiency is the goal to be pursued through  
4           disallowances of operating costs -- those ideas have  
5           never been, in my mind, sufficiently married and the  
6           logic that one would drive the other, I don't  
7           understand.

8   **Proceeding Time 3:29 p.m. T58**

9                               So the question is, can you be prudent if  
10           you're insufficiently -- or can you be imprudent if  
11           you're not sufficiently efficient? I guess --

12   THE CHAIRPERSON:     Or being inefficient.

13   MR. CHRISTIAN:        Right.

14   THE CHAIRPERSON:     Whichever you're playing the words.

15   MR. CHRISTIAN:        However you want to put it. The problem  
16           is what is the standard of efficiency? I don't know  
17           that you can address the question of prudence in that  
18           way because I don't think that there is a reasonable  
19           way to look at it.

20                               And I'm saying that in the abstract. When  
21           Hydro has particular line items in its operating  
22           budget, for example, and propositions may be put to  
23           witnesses about how a particular project is going to  
24           be done and how the money is going to be spent in  
25           respect of that project, certainly it's available for  
26           cross-examiners to put to witnesses, "Well, here's

1 another alternative way of doing the project that  
2 you're saying you're doing. Wouldn't that be more  
3 efficient?" If the witness says, "Yes, that would be  
4 more efficient," well, I think then what's been  
5 established on the record is that there is an  
6 imprudency that relates to the relative efficiency of  
7 the way that the utility wants to do something.

8 So there's no doubt that the two ideas can  
9 relate and can arise on the evidence in the normal  
10 course of a hearing, regardless of the prudence test  
11 that the Commission applies or doesn't apply. So  
12 those things can arise in that way.

13 Similarly, you know, in the course of the  
14 written phase of the hearing, the utility, Hydro,  
15 certainly has been obliged to produce voluminous  
16 documents and reports including, you know, as just one  
17 example, all of B.C. Hydro's audit reports virtually  
18 have been produced over the last couple of revenue  
19 requirements. There's mountains of, you know, line  
20 items that intervenors could look at and say, "Isn't  
21 this a sign of inefficiency insofar as it's being  
22 reflected in your operating budgets now?" And when  
23 the witness says, "Yes," or "It could be done better,"  
24 I mean, there's a finding of imprudency.

25 And so they relate in that way, but I guess  
26 what I'm trying to say really is that they relate on



1 the evidence in a particular area of the utility  
2 management's discretion to decide how it's going to  
3 spend its money, or how it's going to provide its  
4 service. They don't arise, in my submission, kind of  
5 on a global level. You don't take out some money off  
6 the top, as it were, to achieve efficiency. I'm not  
7 sure if that's a --

8 THE CHAIRPERSON: It's helping me, thank you. But along  
9 the same line but really coming still back, both items  
10 2 and item 3, I think during this proceeding, B.C.  
11 Hydro seems to have made it quite clear that B.C.  
12 Hydro is somewhat different from other utilities like  
13 Terasen and Fortis. And because B.C. Hydro makes the  
14 point that B.C. Hydro wants to have an opportunity to  
15 earn its return on equity and no more.

16 MR. CHRISTIAN: Yes.

17 THE CHAIRPERSON: And that's why B.C. Hydro also stated  
18 that because of that setting PBR programs will not  
19 really work for B.C. Hydro.

20 MR. CHRISTIAN: Right, and I guess the import of that,  
21 and that's been B.C. Hydro's testimony in two revenue  
22 requirement proceedings now that it's gone to oral  
23 hearings on, both this one and the '05-'06 Revenue  
24 Requirement. Maybe the significance from B.C. Hydro's  
25 perspective is in the difference because B.C. Hydro's  
26 evidence is about what it seeks. And it's submissions

1 of counsel, I suppose, really that draw the  
2 distinction between it and other utilities. But it is  
3 -- has been Hydro's view that it doesn't seek to earn  
4 more than its allowed return on equity, and that's  
5 because it is a unique relationship with its  
6 shareholder.

7 **Proceeding Time 3:33 p.m. T59**

8 THE CHAIRPERSON: So with that background, usually PBR is  
9 set up -- the idea, it's creating additional  
10 incentives for utilities, but in the case of B.C.  
11 Hydro, this doesn't exist. And also during the  
12 proceeding there had been proposals for additional  
13 deferral accounts, which will still be a topic of the  
14 subject 7 as well. But my proposition to you, then,  
15 Mr. Christian, is that in this type of a setting then,  
16 would it not be even more critical for B.C. Hydro to  
17 have drive for efficiency and increased productivity  
18 and show measures to prove it?

19 MR. CHRISTIAN: Well, if I understand --

20 THE CHAIRPERSON: Then the other --

21 MR. CHRISTIAN: Sure, if I understand the question, it's  
22 if those normal incentives aren't there, and there is  
23 no PBR structure, then what is there, really? And I  
24 think the answer is that, you know, part of our  
25 argument kind of listed the type of things Hydro does.  
26 There was a fairly extensive list of the ways that

1 B.C. Hydro goes about trying to be efficient in its  
2 operations. Of course, the oral hearing process lends  
3 itself to questioning on that. But ultimately, the  
4 result, if the Commission isn't satisfied with that,  
5 as I say, is not an off-the-top disallowance or an  
6 arbitrary disallowance, or, you know, a decision that  
7 despite management's best judgment, something maybe  
8 shouldn't be done, but rather, specific direction to  
9 the utility on what the Commission expects to see in  
10 the next revenue requirement proceeding, or the next  
11 application.

12 And you know, this Commission has had, I  
13 think, a fairly long history of being fairly directive  
14 with its regulated utilities, in the course of  
15 hearings, and saying, "Next time you come back to us,  
16 this is the kind of stuff we need to see." And that  
17 puts, you know, the notice to the utility, and it  
18 essentially establishes a threshold which the utility  
19 must meet before it can expect to persuade the  
20 Commission on that issue next time around.

21 Now, I know there were, you know,  
22 directions to B.C. Hydro in the 05/06 revenue  
23 requirement pursuant to that effect. Some of them  
24 were fairly open-ended, and so there wasn't, you know  
25 -- it's hard to come to the hearing now, four years  
26 later, and say, "Well, we did or didn't meet them."

1       Because there were somewhat qualitative. But my  
2       suggestion or my proposition is that if the Commission  
3       remains unsatisfied with what it's heard on that  
4       point, then the relief is to direct and specify the  
5       type of efficiency gains that it needs to see as a  
6       threshold issue for the next proceeding.

7       THE CHAIRPERSON: Thank you. And finally, then, Mr.  
8       Christian, I think I'm more asking your view or advice  
9       here, in the context of all the positions put forward,  
10      especially in B.C. Hydro's case, is that really that  
11      the Commission has less discretion regarding the  
12      decisions we can make than we would have, for  
13      instance, in the case of rate design applications. So  
14      in your view then what is the contribution -- what's  
15      the best way that this Commission can make a  
16      contribution to find that right balance between the  
17      interests of B.C. Hydro and the ratepayers?

18    **Proceeding Time 3:36 p.m. T60**

19      MR. CHRISTIAN: Well, we've already -- you know, the  
20      efficiency question we just discussed, I think, is one  
21      way, clearly. You know, in a normal utility context,  
22      of course, the return on equity hearings which Mr.  
23      Johnson alluded to have been done in a certain way in  
24      this province for some time, but that's obviously  
25      another place where the balancing, I'd say, is in fact  
26      permissible to be done. I'm not sure what more I can

1 add to that.

2 THE CHAIRPERSON: But I mean just finding a balance in  
3 this particular proceeding, which is the revenue  
4 requirement proceeding.

5 MR. CHRISTIAN: I think it's also appropriate to observe  
6 that, you know, the very rigour of the process, you  
7 know, requires B.C. Hydro management to step up in a  
8 public forum and testify under oath as to what it  
9 expects it's going to be doing. The burden on  
10 witnesses in a proceeding like this is not  
11 insignificant. It's not, you know, it's not a  
12 courtroom we're in here today, but nevertheless  
13 witnesses are sworn and they give sworn testimony.  
14 And the rigour of the process, in particular those  
15 that result in an oral hearing, that is I think put  
16 management to the test as to what's required.

17 THE CHAIRPERSON: Thank you, Mr. Christian. I believe we  
18 are then ready to move on to the item number 4. Mr.  
19 Fulton.

20 MR. FULTON: Thank you, Madam Chair. With respect to  
21 items 4 and 5, the parties are proposing that they be  
22 dealt with at the same time, although treated as  
23 discrete items. So that much as we've done with 2 and  
24 3, people will get up once to speak to items 4 and 5.

25 THE CHAIRPERSON: Yes, the Panel accepts that proposal.  
26 So Mr. Christian.

1    **ARGUMENT BY MR. CHRISTIAN ON ITEMS 4:**

2    MR. CHRISTIAN:    Thank you.    This was a proposal that I  
3                    hadn't raised initially because I thought it might  
4                    save a bit of time this afternoon.    Also looking at  
5                    questions 4 and 5, they follow a very similar form.  
6                    Both 4 and 5 ask two questions in essence.    They ask  
7                    whether it's appropriate to determine the prudence  
8                    now.    And in question 4 that's with respect to the  
9                    cost implications of the G.M. Shrum failure, in  
10                    particular the property damage cost implications.    And  
11                    in 5 it's whether or not the prudence of the  
12                    procurement enhancement initiative should be  
13                    determined now or at a later date.    And the other  
14                    question that's asked in each of 4 and 5 is whether or  
15                    not any intergenerational equity or other issues arise  
16                    from delaying a determination of prudence in either of  
17                    those two instances, that is, the consequence of the  
18                    G.M. Shrum failure or PEI.    And I'm going to be very  
19                    brief on this.

20                    With respect to the G.M. Shrum issue and  
21                    the cost consequences of that equipment failure, B.C.  
22                    Hydro submits that now is the time to make the  
23                    determination on prudence one way or another.    The  
24                    reason is that two extensive reports have been filed.  
25                    Those are Exhibit B-25 and Exhibit B-50, what B.C.  
26                    Hydro referred to as the technical report and the root

1           cause report respectively. Both those were placed in  
2           evidence fairly early on in the oral phase and there  
3           was a fairly significant cross-examination on those  
4           reports, both by intervenors and by Commission Counsel  
5           and the Panel itself.

6                           And so in my submission, with respect to  
7           determining the prudence of the cost consequences of  
8           that failure, to delay to another time would simply  
9           result in redundancy of process.

10   THE CHAIRPERSON:    I think, Mr. Christian, if I may point  
11           out that was not exactly the question that was in  
12           question 4.

13   MR. CHRISTIAN:       Well, the second question that I think  
14           arises from 4 and 5, and obviously I stand to be  
15           corrected with respect to Commission Panel's  
16           questions, but I understand is whether any  
17           intergenerational equity issues arise with respect to  
18           the deferral of costs.

19   THE CHAIRPERSON:    Perhaps if I may still make sure that  
20           we are on the same page here, I repeat what I stated  
21           at the beginning is that you will have noted that  
22           several of the items are described by way of a  
23           hypothetical scenario. Please be sure that your  
24           submissions address the specific corollary questions  
25           to those scenarios rather than addressing the  
26           scenarios themselves.

1 MR. CHRISTIAN: Well, I'll try again and I'll focus on  
2 the latter part of 4 and then the latter of 5, which  
3 talk about intergeneration equity or other issues of  
4 concern. And all I can say is, because that question  
5 was raised in the context of both G.M. Shrum and PEI  
6 in 4 and 5 respectively.

7 **Proceeding Time 3:41 p.m. T61**

8 And in 4, it was not raised generally with  
9 respect to the cost implications that G.M. Shrum has  
10 raised with respect to the cost of repair, direct and  
11 indirect costs of repair. And so, B.C. Hydro's  
12 evidence is that the amount of -- that total repair  
13 costs are at this time unknown -- will not be known  
14 until the project is back in service. B.C. Hydro's  
15 evidence also is that there is an insurance policy, a  
16 property insurance policy in place, that B.C. Hydro  
17 expects to speak to this loss. And if it does, then  
18 the direct cost to B.C. Hydro as a result of this  
19 failure, the direct property cost, would only be \$5  
20 million.

21 And I can't say that there wouldn't be  
22 another indirect cost, but the point is that the total  
23 cost, property cost, that could be borne by  
24 ratepayers, or B.C. Hydro's shareholder, depending on  
25 which way the Commission rules on this, is relatively  
26 small and therefore deferring the recovery of that



1 amount, or indeed imposing it on the shareholder, if  
2 that's the way the Commission rules on the matter,  
3 doesn't raise the kind of issues that are, I think, in  
4 the Commission's mind in this question, because it is  
5 such a relatively small amount.

6 And so I don't see any intergeneration  
7 equities issues based on the evidence that is before  
8 the Commission right now, given that the quantity of  
9 dollars at issue is likely to be small -- \$5 million,  
10 in my submission, on a \$3 billion revenue requirement  
11 is not a significant amount.

12 THE CHAIRPERSON: But when there are also other costs  
13 assessed, cost of energy --

14 MR. CHRISTIAN: Well, indeed, and now -- I was going back  
15 to --

16 THE CHAIRPERSON: I guess that that -- although it is a  
17 hypothetical scenario still, you know, if you look at  
18 the total cost, it's not just the repair cost. It's  
19 also the cost of energy.

20 MR. CHRISTIAN: Right. And I'm again reading just from  
21 the top of page 3 here, and so my submissions were  
22 with respect to direct and indirect costs of repair.  
23 I'm happy to address the cost of energy issue as well.  
24 Clearly at this time, the cost of energy implications  
25 are in B.C. Hydro's cost of energy forecasts, and they  
26 would ultimately be carried through in the Heritage

1        deferral account unless, of course, the Commission  
2        says that the cost consequences of this failure are  
3        not to be borne by B.C. Hydro's ratepayers, in which  
4        case they would not be carried forward.

5                    And if they are carried forward, the  
6        question is, is it too large an amount, is it a  
7        sufficiently large amount that the intergeneration  
8        equity issues would arise in a way that they wouldn't  
9        arise in the property cost issue? Because the size is  
10       not going to be \$5 million. I don't think the amount  
11       can be known with certainty yet, but it's clearly  
12       bigger than that on the evidence. And so I would  
13       suggest that there may well be such an issue, and that  
14       if it -- that the total amount may not be  
15       appropriately amortized in the way that the balance of  
16       the deferral account is. Hydro doesn't have any  
17       position to take on how much it should -- how it  
18       should be amortized, because ultimately the way you  
19       amortize such an amount, I think, largely depends on  
20       what the dollar amount is. And going back to the  
21       property side, if it's 5 million bucks, it doesn't  
22       really make sense to amortize that over a long period  
23       of time. We might as well just put it into the  
24       deferral account, or take it as an expense item in one  
25       year. As a cost of energy impact, if it's large, it  
26       may make perfect sense to spread it over five years,

1 or six years, and if the Commission accepts B.C.  
2 Hydro's proposal on how the cost of energy deferral  
3 account should be amortized, then it would make sense  
4 to leave it in there.

5 So, I'm not sure if I'm helping much here,  
6 because we don't know the dollar amount, and in my  
7 submission, until the dollar amount is known, it's  
8 hard to address a way of amortization that adequately  
9 deals with intergenerational equity issues.

10 COMMISSIONER MILBOURNE: I'm going to try this again. I  
11 think the way I read the question, it says that the  
12 notion -- the hypothetical notion here is to take the  
13 direct and the indirect costs and put them in an  
14 identified deferral account. And if and when B.C.  
15 Hydro comes to apply for recovery of that expense, to  
16 then decide (a) was it prudent -- was it prudently  
17 incurred, and (b) what should be the schedule for  
18 recovery, and to what degree should it be recovered?

19 MR. CHRISTIAN: Right.

20 COMMISSIONER MILBOURNE: That's what the question conveys  
21 to me.

22 MR. CHRISTIAN: Right. And that's why I started off by  
23 saying, the first question is, whether prudence should  
24 be determined now or later. Because I think, with  
25 respect, Commissioner Milbourne, the way you  
26 formulated it is, should prudence be determined later,

1 or now? And we're saying now. It doesn't -- and  
2 because the evidence is before the Commission, and  
3 it's been the subject of cross-examination. And the  
4 amount, and how it gets amortized, and whether it  
5 should go into a separate deferral account, sort of  
6 depends on the amount, frankly. And I guess the other  
7 alternative really here is, you know, a specific  
8 deferral account to carry those costs could, of  
9 course, be created, but a probably more expeditious  
10 solution might be, at least until the final amount is  
11 known, is to simply require B.C. Hydro, in its  
12 deferral account reports, to itemize exactly what  
13 dollars are being carried and the costs of any  
14 deferral accounts that relate to the G.M. Shrum  
15 failure. And in that way the transparency of those  
16 dollars and how they look, I think would be maintained  
17 without the need to establish a new account.

18 **Proceeding Time 3:46 p.m. T62**

19 **ARGUMENT OF MR. CHRISTIAN ON ITEM 5:**

20 So then 5 deals with the same issues, and  
21 the wording of the questions is virtually identical at  
22 least at the outset, but 5 deals with the procurement  
23 enhancement initiative. And there of course Hydro is  
24 asking only for an order with respect to deferring the  
25 costs and not seeking to recover on rates now, and  
26 it's doing that specifically to address

1 intergenerational equity issues. As stated in B.C.  
2 Hydro's application, the reason it wants to defer the  
3 costs is to match the time that the benefits will  
4 accrue to when the costs would be borne by ratepayers  
5 in rates. And so he has a proposal exactly to do  
6 that.

7 The related questions still exists though,  
8 whether or not prudence should be determined now or at  
9 the time when Hydro seeks to bring those costs into  
10 rates. And of course Hydro's proposal is to do the  
11 latter. That's what's on the table. But similar with  
12 respect to the G.M. Shrum issue, there has been quite  
13 a bit of evidence on PEI already. B.C. Hydro filed a  
14 business case. Mr. Morris testified at length to it.  
15 The only thing I think that really distinguishes PEI  
16 from G.M. Shrum with respect to whether the issues  
17 have been properly canvassed and therefore are ripe  
18 for resolution on the prudence issue, is that in the  
19 case of PEI a significant number of the documents that  
20 management relied on for the purpose of proceeding  
21 with that initiative were filed fairly late in the  
22 proceeding. And if I can -- I have the exhibit number  
23 handy here, I'll refer to that.

24 Yes, so it's undertaking 59, Exhibit B-78,  
25 and so that was about an inch and a half of paper that  
26 had been reviewed by management over the course of the

1 development of the PEI. And unlike G.M. Shrum, where  
2 everything we talked about was related to the subject  
3 of examination, I think it's fair to say that that  
4 material filed in response to the undertaking was not  
5 canvassed, came in fairly late.

6 And so the only thing that distinguishes  
7 the two and whether they are ripe for resolution on  
8 the prudence issue is the fact that the significant  
9 bit of evidence arrived so late that practically  
10 speaking there wasn't an opportunity to review it.

11 THE CHAIRPERSON: Could you please still repeat that  
12 reference for me, by the way?

13 MR. CHRISTIAN: It's undertaking number 59.

14 THE CHAIRPERSON: 59.

15 MR. CHRISTIAN: Exhibit B-78.

16 THE CHAIRPERSON: Thank you.

17 MR. CHRISTIAN: And those are all my submissions on 4 and  
18 5.

19 THE CHAIRPERSON: Thank you very much, Mr. Christian, and  
20 next we'll have BCOAPO.

21 **ARGUMENT BY MR. QUAIL ON ITEMS 4 AND 5:**

22 I think I'm next although we don't have too  
23 much to say. As I understand the question you're  
24 posing is not asking us about the factual details or,  
25 you know, when prudence should be assessed, but simply  
26 assuming this hypothetical situation or comments on

1 the issue of intergenerational equity. And our  
2 clients didn't call for the disallowance of these  
3 costs in the first place, but we note that  
4 intergenerational equity would become somewhat moot if  
5 there were a high level of uncertainty that the costs  
6 B.C. Hydro would be charging current customers are  
7 correct and prudent. So in other words, concerns that  
8 customers will pay the right amount trump concerns  
9 that the correct generation of customers are paying  
10 that amount. So we say that the  
11 intergeneration/generation concerns would be -- are  
12 secondary to getting the number right.

13 And that's it.

14 THE CHAIRPERSON: Thank you, Mr. Quail.

15 COMMISSIONER MILBOURNE: Before you go, Mr. Quail,  
16 somewhere, I think, in your argument, you made the  
17 comment that -- maybe it wasn't what you had in mind  
18 but that's what I'd like to clarify. You made the  
19 comment that PEI should be looked at when it became  
20 operational.

21 MR. QUAIL: Yes.

22 COMMISSIONER MILBOURNE: On a kind of retrospective  
23 thing.

24 MR. QUAIL: Yes.

25 COMMISSIONER MILBOURNE: What did you have in mind by  
26 that?

1 MR. QUAIL: Yes, that is that, you know, the kind of  
2 process that is posited by the hypothetical would be  
3 within the range of what we think would be an  
4 appropriate way to deal with it, that we think that  
5 it's pretty mature at this point to make that  
6 determination, and therefore in argument we've said  
7 that a deferral account may well be the -- where that  
8 would lead to is a deferral account as perhaps being  
9 an appropriate way of dealing with it, rather than  
10 attempting to dispose of it now. And the question  
11 specifically of intergenerational concerns, we're  
12 saying that those are secondary to getting them out  
13 right. I hope that helps to clarify.

14 **Proceeding Time 3:51 p.m. T63**

15 COMMISSIONER MILBOURNE: Thank you.

16 MR. QUAIL: That's about as clear as I can be at this  
17 point.

18 COMMISSIONER MILBOURNE: No, that's helpful. And that's  
19 what I thought you were going to say.

20 THE CHAIRPERSON: Mr. Wallace?

21 **ARGUMENT BY MR. WALLACE ON ITEM 4:**

22 Thank you, Madam Chair, Commissioners.  
23 With respect to question 4, the JIESC agrees with Mr.  
24 Christian that this is the appropriate time to  
25 determine the prudence with respect to G. M. Shrum.  
26 That being said, we do not feel there's an



1 intergenerational problem with the creating of a  
2 deferral account to allow the quantification of the  
3 direct and indirect costs, and I appreciate the  
4 clarification that indirect costs includes foregone  
5 generation, because that obviously is probably the  
6 most important aspect, and it may be hard to know  
7 that, to be able to quantify that at this time, until  
8 the work is actually done and what the costs of it  
9 are, in terms of replacement energy or whatever,  
10 again, until the time period is gone.

11 As far as intergenerational equity goes,  
12 the costs of this catastrophic failure are likely, but  
13 again, it's a little hard, not knowing the amount,  
14 but if they are as substantial as they appear they  
15 might be recovered over a significant period of time,  
16 and we think that probably ameliorates any  
17 intergenerational equity, whether it starts a year  
18 early or a year later. If it's going to be a five-  
19 year recovery, they're going to be substantially the  
20 same customers that it's going to be recovered from.

21 **ARGUMENT BY MR. WALLACE ON ITEM 5:**

22 With respect to item 5 and the purchasing  
23 enhancement initiative, we would suggest that this is  
24 the time to determine prudence, again, because  
25 hindsight, as you've heard in a number of the  
26 arguments earlier today, is really not a factor that

1           should properly be taken into account in determining  
2           prudence. That being said, we recognize that the  
3           record is not as tight, and was not examined on, as  
4           closely as the record on G. M. Shrum, and accordingly  
5           the Commission may wish to look at it a little  
6           differently.

7                         Again, the amounts are significant, but  
8           particularly on this case, a deferral account appears  
9           appropriate, is already in place and in any event, the  
10          costs, whatever they are, that are allowed, if they  
11          are allowed, should be matched against the benefits,  
12          and that is not going to start to commence until F2011  
13          in any event. So, there isn't a generational equity  
14          problem with respect to the PEI costs. And that  
15          completes my submissions, unless you have any  
16          questions. Thank you.

17 THE CHAIRPERSON: Thank you, Mr. Wallace. We are moving  
18          on. Next, Mr. Weafer.

19 MR. WEAFER: Thank you, Madam Chair, members of the  
20          panel.

21                         Before dealing with hypotheticals, just for  
22          the convenience of the Commission, the CEC did deal  
23          with both question 4 and 5, or the issues in 4 and 5,  
24          with respect to G. M. Shrum at pages 121 and 122 of  
25          our submissions, and with respect to issue 5 on the  
26          PEI at page 113 of our submissions. And I won't

1 review those, but just for ease of reference.

2 **ARGUMENT BY MR. WEAVER ON ITEM 4:**

3 With respect to the hypothetical issue  
4 raised firstly in item 4, and the intergenerational  
5 equity question, we support the earlier submissions  
6 that the use of a deferral account is the appropriate  
7 way to assess what the quantity of the impact is going  
8 to be, and with respect to intergenerational equity,  
9 establishing that deferral account on amortization  
10 periods which take into account the rarity of the  
11 event, and the order of magnitude of the amount  
12 determined for the deferral account. That will be the  
13 best way to manage any potential intergenerational  
14 equity issue, and we have principles set out in our  
15 arguments on page 130 to 132 in terms of what should  
16 be the principles in establishing deferral accounts.  
17 But on the intergenerational equity issue, again, this  
18 is a rare event. A determination of how often it  
19 happens is important and, again, at the end of the  
20 day, what the amount which is determined to be caused,  
21 in terms of costs, both direct and indirect, once  
22 that's established, the term of that deferral account  
23 can be set.

24 **Proceeding Time 3:57 p.m. T64**

25 **ARGUMENT BY MR. WEAVER ON ITEM 5:**

26 MR. WEAVER: With respect to item 5, the procurement

1 enhancement initiatives, we do accept a look back in  
2 terms of prudence in 2012 when this project is  
3 completed and all the costs are set out in the  
4 deferral account. We don't think there's an inter-  
5 generational equity issue caused by a look back at  
6 that time, once the project is more near complete and  
7 we know the costs.

8 Those are our submissions.

9 THE CHAIRPERSON: Thank you, Mr. Weafer.

10 MR. WEAFFER: Thank you.

11 THE CHAIRPERSON: Next, Terasen, Mr. Johnson.

12 MR. JOHNSON: Madam Chair, I took long enough dealing  
13 with items 2 and 3 and will make no submissions on 4  
14 and 5.

15 THE CHAIRPERSON: Thank you. That's truly balancing. A  
16 balancing act. And efficient, right. With that then,  
17 it's B.C. Hydro reply.

18 MR. CHRISTIAN: I have no reply submissions.

19 THE CHAIRPERSON: Thank you. We are then ready to -- we  
20 are really being efficient. We are ready to move on  
21 to item 6.

22 MR. CHRISTIAN: As I mentioned earlier this morning, Mr.  
23 Webb will be addressing items 6 and 7, so if we could  
24 have the Commission's indulgence just for a minute so  
25 we can switch seats. I assume that we are proceeding  
26 until 4:30 today. Is my understanding correct?

1 THE CHAIRPERSON: That's the plan, approximate plan,  
2 depending where we find it. If there is a good time  
3 to stop just before, then we'll do that. We certainly  
4 don't want to go beyond 4:30.

5 Okay, let's do a time estimate. Is it  
6 possible to complete today?

7 MR. CHRISTIAN: So Mr. Webb tells me that his submissions  
8 on item 6 alone are about 10 minutes, so we're going  
9 to clearly be able to finish his submissions and then  
10 move on to the submissions of other parties on item 6  
11 before 4:30. But I would be surprised, not having  
12 heard from all my friends here, but I'd be surprised  
13 if we're finishing item 6 in the next half hour.

14 THE CHAIRPERSON: So one option we have then, perhaps  
15 finish now and then we are focusing on this item 6  
16 right away Monday morning rather than -- having the  
17 weekend break. Are there any concerns with that plan?  
18 Mr. Oulton?

19 MR. OULTON: I have a feeling that I'm the maverick on  
20 issue 6 and will be forging my own path opposite B.C.  
21 Hydro and a couple of other intervenors. I expect  
22 that I'll be at least 20 minutes on item 6, although I  
23 do speak quickly. I'd rather that I try to go slowly.  
24 So I have no preference whether we continue on today.  
25 It is Friday and I probably would appreciate the  
26 earlier end, but I don't think we're going to finish

1 item 6 today and I'm happy, content to stop now and do  
2 it Monday morning.

3 THE CHAIRPERSON: Because it seems like we will have to  
4 come back Monday morning, but yet we will be able to  
5 finish Monday morning. So maybe it makes more sense  
6 to adjourn now, and then return Monday morning and  
7 start with item 6?

8 MR. CHRISTIAN: Yes, I think that having considered it  
9 and seen that we're clearly not going to finish by  
10 4:30, it would be our preference since we're not going  
11 to finish by 4:30 item 6 even, that we should adjourn  
12 until Monday.

13 THE CHAIRPERSON: Yes, so agreeable. Thank you, have a  
14 good weekend.

15 (PROCEEDINGS ADJOURNED AT 4:01 P.M.)  
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