



# ONTARIO ENERGY BOARD

**FILE NO.:** EB-2007-0905

---

**VOLUME:** Motion for Interim Order

**DATE:** February 7, 2008

<b>BEFORE:</b>	Gordon Kaiser	Presiding Member and Vice Chair
	Bill Rupert	Member
	Cynthia Chaplin	Member

---

THE ONTARIO ENERGY BOARD

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O.1998, c.15, (Schedule B);

**AND IN THE MATTER OF** an application by Ontario Power Generation Inc. pursuant to section 78.1 of the *Ontario Energy Board Act, 1998* for an Order or Orders determining payment amounts for the output of certain of its generating facilities.

Hearing held at 2300 Yonge Street,  
25<sup>th</sup> Floor, Toronto, Ontario, on Thursday,  
February 7, 2008, commencing at 9:30 a.m.

-----  
Motion for Interim Order  
-----

BEFORE:

GORDON KAISER	Presiding Member and Vice Chair
BILL RUPERT	Member
CYNTHIA CHAPLIN	Member

A P P E A R A N C E S

DONNA CAMPBELL	Board Counsel
ALLAN FOGWILL	Board Staff
RUSSELL CHUTE	
CHRIS CINCAR	
MICHAEL PENNY	Ontario Power Generation Inc.
JOSIE ERZETIC	
BASIL ALEXANDER	Pollution Probe
PETER FAYE	Energy Probe Research Foundation
DAVID MacINTOSH	
LARRY SCHWARTZ	
MARK RODGER	Association of Major Power Consumers of Ontario (AMPCO)
JOHN RATTRAY	Independent Electricity System Operator
RICHARD STEPHENSON	Power Workers' Union
ALFREDO BERTOLOTTI	
JOHN DeVELLIS	School Energy Coalition
ROBRRT WARREN	Consumers Council of Canada
DAVID POCH	Green Energy Coalition (GEC)
MICHAEL BUONAGURO	Vulnerable Energy Consumers Coalition
ALSO PRESENT:	
ANDREW BARRETT	Ontario Power Generation Inc.
BARB REUBER	

I N D E X   O F   P R O C E E D I N G S

<u>Description</u>	<u>Page No.</u>
---	
On commencing at 9:30 a.m.	1
Submissions by Mr. Penny	5
Submissions by Mr. Faye	29
Submissions by Mr. Stephenson	40
submissions by Mr. Penny	48
submissions by Mr. Stephenson	60
Submissions by Ms. Campbell	63
---	
Recess taken at 11:20 a.m.	65
On resuming at 11:40 a.m.	65
Submissions by Mr. Rodger	65
Submissions by Mr. DeVellis	67
submissions by Mr. Penny	71
Submissions by Mr. Rattray	82
Submissions by Mr. Stephenson	82
Submissions by Mr. Faye	95
Submissions by Mr. Rodger	102
Submissions by Mr. DeVellis	105
Submissions by Mr. Penny	106
---	
Luncheon recess taken at 12:58 p.m.	111
On resuming at 2:45 p.m.	111
<b>DECISION</b>	111
---	
Whereupon the hearing adjourned at 3:02 p.m.	118

E X H I B I T S

Description Page No.

EXHIBIT NO. MD2.1: MARKED-UP VERSION OF ISSUES  
LIST. 1

EXHIBIT NO. MD2.2: FINAL VERSION OF ISSUES  
LIST. 1

U N D E R T A K I N G S

Description

Page No.

NO UNDERTAKINGS WERE FILED DURING THIS PROCEEDING

1 Thursday, February 7, 2008

2 --- On commencing at 9:30 a.m.

3 MR. KAISER: Please be seated.

4 The first order of business today, counsel, is to deal  
5 with your submissions yesterday with respect to the issues  
6 list. This was a draft issues list. Of course this is  
7 appendix B of the Procedural Order of January 29th.

8 We are going to distribute two documents. One is a  
9 marked-up version showing the changes, and the second one  
10 being the clean and final issues list. Can we have numbers  
11 for those, the two exhibits?

12 MS. CAMPBELL: Yes. We are going to call them MD, for  
13 motions day, MD2.1 and .2.

14 MR. KAISER: MD2.1 is the track changes and MD2.2 is  
15 the final.

16 **EXHIBIT NO. MD2.1: MARKED-UP VERSION OF ISSUES LIST.**

17 **EXHIBIT NO. MD2.2: FINAL VERSION OF ISSUES LIST.**

18 MR. KAISER: So I will go through these briefly. I am  
19 not going to give an elaborate explanation, but some  
20 explanation.

21 The first matter, which is not on any of these two  
22 documents, this was, as Mr. Rodger pointed out on behalf of  
23 AMPCO, he wanted an issue, which he called 1.0: Does the  
24 application meet the requirements set out in Board's filing  
25 guidelines? We had some discussion on this point.

26 Mr. Rodger wasn't in a position at this point to tell  
27 us exactly what the deficiencies were, but he thought there  
28 might be some as he went through the application. I am

1 paraphrasing what he said, of course.

2       The Board doesn't believe this needs to be an issue.  
3 There may or may not be further information requirements to  
4 be provided by the applicant in the course of the hearing,  
5 as it unfolds, and those can be dealt with, as they usually  
6 are, by interrogatories or undertakings. We will deal with  
7 them as they arise.

8       It goes without saying if relevant information is  
9 required, we will ask the application to produce it on the  
10 motion of any party.

11       So that takes us, then, to the draft issue list or the  
12 first of the changes. The first of the changes was 2.1.  
13 There were some wording changes requested by the applicant,  
14 and we have essentially accepted that. As I recall, there  
15 wasn't much objection.

16       The same applies to 2.2. You will see the changes on  
17 MD2.1.

18       2.5, there was, again, some wording requested by OPG,  
19 which was accepted. There was a question that arose in  
20 this case with respect to governmental ownership,  
21 highlighting government ownership in this. I think this  
22 was an AMPCO request.

23       The Board's view on that is that it is inherent in  
24 2.2. We are not going to define these issues with absolute  
25 precision. There are sub-issues, of course, which will  
26 arise. If they're relevant and they're inherent in the  
27 meaning of the original issue, they will be dealt with. So  
28 that would apply to that aspect.



1           That, then, takes us to 3.6. There were some wording  
2 suggested by OPG here, which, in the discussion on the  
3 transcript, appear to be acceptable to the parties. On  
4 looking at it, you will see we have made some changes. Our  
5 view was that the 3.6, as it was initially drafted and in  
6 the draft issues list, is really part of 3.5 and is  
7 inherent in that, but we have drafted some new wording in  
8 3.6, which you will see, which deals with the accounting  
9 policies which we think is a little more precise than was  
10 suggested by Mr. Penny on the record.

11           So you have the new wording on 3.6.

12           MR. RUPERT: Just one clarification on 3.5. The  
13 business case process, capital approval process or whatever  
14 language might have been used in the various iterations, it  
15 was the feeling of the Panel that an examination of -- a  
16 look at those processes could be, and often is, part of an  
17 issue like 3.5, which is additional capital spending, and  
18 no need to highlight it separately. It is not that the  
19 issue is taken it off the table.

20           MR. KAISER: Next, there was some discussion mainly by  
21 AMPCO, to a lesser degree by Mr. Faye on behalf of  
22 Pollution Probe (sic), with respect to 4.1 and 5.1. The  
23 Board has determined those changes are not necessary.

24           We then come to 5.3. There is a minor change there  
25 suggested by OPG, which Mr. DeVellis accepted and the Board  
26 accepts.

27           5.4, to a similar degree, we believe it is okay as it  
28 stands. There was some discussion that requested

1 clarification. That was provided by Mr. Penny and it  
2 satisfied the parties.

3 The same thing would apply to 5.5.

4 That, then, brings us to 5.9. Some wording changes  
5 were requested by Mr. Penny and they are accepted, I  
6 believe, by and large, by the Board and the parties, as  
7 suggested.

8 6.4 was similar. There were some wording changes  
9 suggested by Mr. Penny, and we have modified it on the  
10 basis of submissions to reflect some greater clarity.

11 7.1, if you recall, there was a discussion as to the  
12 utility of the example, and the example has been taken out.  
13 We have added some wording requested by AMPCO. You will  
14 see it underlined, and I think that was generally in  
15 agreement by all of the parties, as well.

16 The next issue that there was some discussion on was  
17 8.1. AMPCO requested some changes. We elected not to make  
18 any changes on the basis of the submissions, so those two  
19 stand.

20 Then there is 9.2. This was some suggested changes to  
21 the wording, suggested by Mr. Penny, which were by and  
22 large accepted. There was some discussion with respect to  
23 what sections of the act this particular issue should refer  
24 to, and you will see we have just limited it to section 5.1  
25 as opposed to breaking that section down.

26 Then I think the next one was 9.6, again some changes  
27 suggested by Mr. Penny on behalf of the applicant.  
28 Generally accepted, as requested.

1           Then, finally, 10.2 and 10.3, again some changed  
2       wording suggested by the applicant, which was accepted by  
3       the Board and I think by all parties.

4           That completes the Board's ruling with respect to the  
5       issues list. Any questions, gentlemen?

6           MR. PENNY: No, thank you.

7           MS. CAMPBELL: Mr. Chair, just one small correction.  
8       Mr. Faye represents Energy Probe, not Pollution Probe.

9           MR. KAISER: Oh, I'm sorry, Mr. Faye. I always get  
10      the two mixed up.

11          MS. CAMPBELL: They will be pleased to hear that.

12          MR. KAISER: All right. Let's proceed with the next  
13      order of business, which is the question of the interim  
14      rate relief requested by the applicant. And, of course,  
15      essentially there are two issues, whether we have the  
16      jurisdiction in the first instance, and, if we do, what we  
17      should do about it.

18          So we will take it in those two chunks, if we can,  
19      hear all of the submissions with respect to the  
20      jurisdictional matter, and then deal with submissions on  
21      the second matter. Mr. Penny.

22          **SUBMISSIONS BY MR. PENNY:**

23          MR. PENNY: Yes, thank you, Mr. Chairman.

24          I will, in my submissions, be making reference to some  
25      of the material in this bound volume which I think we filed  
26      with the Board - we certainly sent it electronically and  
27      sent hard copies - called "Brief of Material Re Interim  
28      Order Argument".

1           Then there was a supplement to that which we just sent  
2 out the other day, which is a further excerpt from the  
3 "Driedger on Construction of Statutes", so I will be making  
4 reference to that, and I will be making reference to the  
5 written argument that we prefiled. So if you have those at  
6 hand, that would be of assistance.

7           I will also I think at the end, unless someone else  
8 wants to do it, at the end of my submissions I will -- at  
9 Mr. Warren's request, just read you a brief submission that  
10 he asked me to make. He apologizes for not being here but  
11 a combination of the snow and some other commitments he had  
12 this morning, he decided that it was more efficient for him  
13 to rely on his written submissions and a brief oral  
14 submission through me, and of course with his usual self-  
15 deprecating humour, asked me to pass that along. I will  
16 leave out the editorial comment when I get to that.

17           So the OPG has as you know applied for two orders of  
18 an interim nature. An order making current payment amounts  
19 interim effective April 1, 2008 and an order granting an  
20 interim increase in OPG's payment amounts representing  
21 approximately 50 percent of the forecast revenue  
22 deficiency.

23           In answer to the OEB's questions, I appreciate Mr.  
24 Chairman, you want me just to deal with the first two, but  
25 just by way of overview, OPG submits that the OEB has the  
26 jurisdiction to order, to make an order making payment  
27 amounts interim and providing for an interim increase or  
28 decrease, pending the final order, provided that no such

1 order could have any effect before April 1, 2008.

2 It is our submission that an interim order should not  
3 be interpreted to be the Board's "first order" under  
4 section 78.1 of the act. We say applying a purposive and  
5 contextual interpretation to section 78 of the act and the  
6 provisions of the regulations, and as the law requires,  
7 seeking a harmonious interaction in these provisions, the  
8 expression "first order" was intended by the legislature  
9 and the LGIC to mean the first order determining just and  
10 reasonable payment amounts which is not an interim order  
11 but would be the Board's final order.

12 And it is our alternative submission on that issue,  
13 that even if you regard -- even if you came to the  
14 conclusion that the interim order was the OEB's first order  
15 within the meaning of section 78.1, that effectively that  
16 triggers no immediate requirement for you to do anything in  
17 the context of the interim order, and that the consequences  
18 that flow from the regulations tied to first order are, we  
19 say, should be interpreted to apply to the final order.

20 Then finally, which we will defer our main argument on  
21 this until the second phase, but we say that the OEB  
22 should, at a minimum, issue an order making current payment  
23 amounts interim. There is no prejudice to anyone in doing  
24 so. All it does is preserve options. Not limit any. We  
25 submit, on the second aspect of the third issue, that the  
26 OEB should grant an interim increase for the purpose of  
27 mitigating the risk of large accumulations of retroactive  
28 charges during the time required to hear, decide and

1 implement this application.

2 So with that, you have our written submissions. I  
3 won't go over the background. Let me dive right into the  
4 analysis which supports our conclusions on the first two  
5 issues that I just gave to you.

6 The analysis of your jurisdiction to make the order  
7 that OPG is requesting starts with section 21(7) of the  
8 act, in my submission, and that is in, quoted in our  
9 written submission. Section 21(7) provides that the Board  
10 may make interim orders pending the file disposition of any  
11 matter before it.

12 There is no question, in my submission, that in  
13 respect of gas distribution transmission rates, electricity  
14 distribution and transmission rates and the unique  
15 regulation of fees paid to the OPA and the IESO, the OEB  
16 has clear jurisdiction and has exercised that jurisdiction  
17 to issue orders making rates interim and, indeed, making  
18 upward or downward adjustments to rates on an interim basis  
19 in the particular circumstances of the given case pending  
20 the file order. There is a number of examples cited in  
21 paragraph 23 of our written argument and excerpts from  
22 those decisions are reproduced in our bound brief of  
23 materials from pages 79 to 90. It is not my intention to  
24 go through them but they simply stand for the proposition  
25 that, in all of that range of circumstances I have just  
26 described, the Board has exercised that jurisdiction.

27 Before turning -- so we say that, then, the only basis  
28 on which you can come to the conclusion that you did not

1 have this jurisdiction if there is something unique about  
2 section 78.1 that deprives you of the jurisdiction to make  
3 interim orders and we say there is not but I will come to  
4 that in a moment.

5 Before coming to that, though, I wanted to deal  
6 briefly - because it does inform the balance of our  
7 submissions - on the issue of what an interim order  
8 actually is and we address the issue of what an interim  
9 order is in paragraphs 26 to 38 of our written argument.

10 I won't take you through it all, but the essence, I  
11 say, of what it means to make an interim order is captured  
12 in two paragraphs from court decisions which are quoted in  
13 our argument.

14 The first appears at page 7. It comes from the  
15 Alberta Court of Appeal which considered on an appeal from  
16 the Alberta Public Utilities Board, an issue of whether a  
17 final order could go back and change interim rates  
18 retrospectively in the case of *Re Coseco*.

19 That in paragraphs 31 and 32 we have quoted the  
20 relevant passage or passages. And you will see that in  
21 making its -- what happened in that case was that an  
22 interim order had been made, and at the end of the day, a  
23 final order was eventually made after several years of  
24 litigation. It reached back not to the very beginning of  
25 the date that the interim order was made, but two years  
26 back, and therefore well before -- reached back well before  
27 the date that the final order was made.

28 Coseco sought an appeal from that decision on the

1 basis that trying to reach back and change the rate that  
2 had been made interim was beyond the jurisdiction of the  
3 Board because it constituted retroactive ratemaking, and  
4 the PUB said no, of course. The Court of Appeal agreed  
5 with the PUB and said no, it's not retroactive ratemaking  
6 because an interim order was made.

7 So they say, instead of making a final order, the  
8 Board made an interim order an reserved matter for further  
9 direction which now has made. In my view, to say answer  
10 interim order may not be replaced by a final order is to  
11 attribute virtually no additional powers to the Board from  
12 section 52, that is similar to 21.7, beyond those already  
13 contained in the legislation contained to make final  
14 orders.

15 Then they went on to say:

16 "The provision for an interim order was intended  
17 to permit rates to be fixed subject to a  
18 correction to be made when the hearing is  
19 subsequently completed. It was urged during  
20 argument that the section 52(2) was merely  
21 intended to enable the Board to achieve rough  
22 justice during the period of its operation until  
23 a final order is issued. However the Board is  
24 required to fix just and reasonable rates, not  
25 roughly just and reasonable rates. The words  
26 'reserved for further distribution,' in my view,  
27 contemplate the changes as soon as the Board is  
28 able to determine those just and reasonable



1 rates."

2 This case was approved by the Supreme Court of Canada  
3 in the Bell case. In the Bell case, Bell was initially  
4 granted a rate increase on an interim basis. Later, in the  
5 final decision, the CRTC decided Bell had not needed that  
6 interim increase, and that it had actually earned excessive  
7 revenues. So they ordered the amounts of the increases and  
8 then some, to be credited back to customers on the basis  
9 that those rates had been interim. And Bell appealed.  
10 Didn't like that result and appealed on the basis, again,  
11 that it constitute retroactive ratemaking. The court held  
12 that one of the differences between interim and final  
13 orders is that interim decisions may only be reviewed and  
14 modified -- or may be reviewed, excuse me, and modified in  
15 a retrospective manner by the final decision.

16 The passage, the essence of their decision is  
17 reproduced at page 8 of our written submission, paragraph  
18 37, which said:

19 "If interim rate increases are worded on the  
20 basis of the same criteria as those applied in  
21 the final decision, the interim decision would  
22 serve as a preliminary decision on the merits as  
23 far as the rate increase is concerned. This,  
24 however, is not the purpose of interim rate  
25 orders. Traditionally, such interim orders  
26 dealing with an interlocutory matter with issues  
27 which remain to be decided in a final decision  
28 are granted for the purpose of relieving the

1           applicant from the deleterious affects caused by  
2           the length of the proceedings. Such decisions  
3           are made in an expeditious manner on the basis of  
4           evidence which would often be insufficient for  
5           the purposes of the final decision. The fact  
6           that an order does not make any decision on the  
7           merits of an issue to be settled in a final  
8           decision and the fact that its purpose is to  
9           provide temporary relief against the deleterious  
10          effects of the duration of the proceedings are  
11          essential characteristics of an interim order."

12          So to summarize, then, we say that there are three  
13          essential characteristics which are relevant to your  
14          consideration in the issues before us today, three  
15          essential characteristics of an interim order. These are  
16          reproduced at page 6 of our written argument in paragraph  
17          28.

18          So we say that the first essential characteristic is  
19          that an interim order does not require any decision on the  
20          merits of an issue. That will be settled in the file  
21          decision. Rather, the purpose of an interim order is to  
22          provide relief from any deleterious effects caused by the  
23          length of the proceedings.

24          Second, an interim order is temporary. It can be  
25          changed retrospectively once the final determination is  
26          made. And, finally, an interim order assumes and requires  
27          that a final order is made.

28          So they go together, if you will, like bookends, and

1 one should be regarded as an initiating the process and the  
2 other ending it, and that will be relevant to one of my  
3 submissions on the implementation aspect of this later on.

4 So section 21(7), in my submission, is broad and  
5 unrestricted. It would take, we say, the clearest of  
6 language to abrogate that broad power of the OEB to make  
7 interim orders. Given the clear authority in section  
8 21(7), then, the only question is whether there is anything  
9 in section 78.1 that precludes the OEB from making an  
10 interim order, and in our submission, there is no such  
11 language in the act.

12 We quote the relevant passage from section 78.1 at  
13 page 9 of our argument, paragraph 40. The entire amount is  
14 not reproduced, although it is at the beginning of our  
15 brief, if you want to look at it. But effectively it says:  
16 Insofar as the Board's jurisdiction is concerned, of  
17 course, it fixes the payment amount for three years, up to  
18 April 1, 2008, but the effective provision from your  
19 perspective is that:

20 "The payment amount shall be the amount  
21 determined in accordance with the order of the  
22 Board then in effect to the extent the payment  
23 relates to a period that is on or after the later  
24 of the date prescribed for the purposes of this  
25 subsection and the effective date of the Board's  
26 first order under this section in respect of the  
27 generator."

28 Then, of course, the regulation 53/03 specifies the

1 date, the relevant date, and it says that:

2 "the IESO is required to pay OPG for the  
3 output from the prescribed facility from April 1,  
4 2005 to the later of March 31, 2008, a regulated  
5 amount, and then thereafter the date before the  
6 effective date of the Board's first order in  
7 respect of Ontario Power Generation."

8 Now, I will come back to the parsing of that language  
9 in a moment, but let me deal with a couple of issues of  
10 principle first.

11 It is, in my submission, a well-established principle  
12 of statutory interpretation that regulatory provisions are  
13 meant to work together and to be interpreted so as to avoid  
14 conflict.

15 That principle is enunciated in Professor Sullivan's  
16 text, "Driedger On Construction of Statutes", which is at -  
17 - I have reproduced at page 78 of our brief.

18 At page 78 of the brief - this is at page 185 of the  
19 text - there is a passage that captures a couple of  
20 thoughts that we rely on. So there is, of course, lots of  
21 discussion of this issue throughout the text, but this  
22 neatly captured a couple of essential principles, so I  
23 thought it would be useful.

24 Under the heading "Statutes Are Paramount Over  
25 regulations", it says:

26 "The presumption of coherence applies to  
27 regulations as well as to statutes. It is  
28 presumed that regulatory provisions are meant to

1           work together not only with their own enabling  
2           legislation, but with other acts and other  
3           regulations, as well. So far as possible, the  
4           courts seek to avoid conflict between statutory  
5           and regulatory provisions ..."

6           And that's of course true with respect to statutory  
7   provisions alone:

8           "...and to give effect to both. Where conflict  
9           is unavoidable, however, the statutory provision  
10          prevails."

11          So this means, in my submission, first of all, that  
12   you are to read 21(7) and 78.1 as working together and to  
13   avoid conflict. So even -- in my submission, there isn't  
14   even any apparent conflict between the two, but even if you  
15   were to read it that there might be some apparent conflict,  
16   the obligation in the interpretation of legislation is to  
17   read it in a way as to -- if possible, to avoid that  
18   conflict.

19          It also means, though, of course, that regulations  
20   cannot override a clear statutory provision. Statutes are  
21   higher, effectively, in the pecking order than regulations.

22          And in the event that -- we say, again, there is no  
23   conflict. There is nothing in the regulations that says  
24   that you can't make interim orders, but even if there was  
25   an interpretation that enabled you -- that led you in that  
26   direction, that the statute prevails.

27          So a regulation, even if it said the Board may not  
28   make interim orders, in my submission, would not be

1 sufficient, because section 21(7) says you can, and the  
2 statute prevails over the regulation. If section 78.1 said  
3 you could not make interim orders, then I would say you  
4 would have to read the specific would exclude the general  
5 and the exclusion would apply. But, of course, section  
6 78.1 says no such thing.

7 So here that means that unless the act takes away the  
8 power to make interim orders, you have that power, because  
9 the act says you have it and because the regulations can't  
10 take it away. As I say, we don't interpret the regulations  
11 as purporting to take it away in any event, but, even if  
12 they did, they couldn't.

13 Then a second principle of statutory interpretation  
14 also described in Driedger is in the supplement that I  
15 provided a day or two ago. That is just three pages.  
16 There is both an extract from the Driedger text and an  
17 extract from the well-known case of ATCO Gas Pipelines, in  
18 which they dealt with an issue of statutory interpretation.

19 The principle I rely on here is captured in the first  
20 sentence, and then another sentence in the first paragraph  
21 under "Presumed Knowledge and Competence". It says that:

22 "The legislature is presumed to know all that is  
23 necessary to produce rationale and effective  
24 legislation. This presumption is very far-  
25 reaching. It credits the legislature with a vast  
26 body of knowledge, including knowledge of  
27 legislative facts and of adjudicative facts of  
28 which judicial notice may be taken, as well as

1           anything contained in briefs or reports tabled in  
2           the legislature. The legislature is presumed to  
3           have a mastery of existing law..."

4           That is the passage I really rely on:

5           "...both common and statute, as well as case law  
6           interpreting statistics."

7           So, in my submission, the legislature, in passing new  
8           legislation, is presumed to have a mastery of existing law.  
9           So in the specific application here, in enacting section  
10          78.1, which came after the more general provision of 21(7),  
11          or in passing the regulations, the legislature is presumed  
12          to know that the Board had the power to make interim  
13          orders. And so, again, in my submission, in the absence of  
14          clear language taking that power away, the legislation  
15          ought not to be interpreted by any inference, or whatever,  
16          to do so, nor should the regulations, even if they had the  
17          power to change it.

18          The ATCO quote is at page 16 of the decision in  
19          paragraph 59. It is really just the last sentence of that  
20          paragraph in which the Supreme Court of Canada reiterates  
21          that:

22                 "It is a well-established principle that the  
23                 legislature is presumed to have a mastery of  
24                 existing law, both common and statute law."

25          And it is also presumed to have known all of the  
26          circumstances surrounding the adoption of new legislation.

27          So the bottom line here, in my submission, is if the  
28          legislature did not want the OEB to have the power to make

1 interim orders in connection with OPG's payment amounts, it  
2 would have said so, and it did not. Therefore, your  
3 general power to make interim orders applies.

4 Then turning to the more doctrinal analysis, if you  
5 will, of section 78.1 and what it means, let me rely very  
6 briefly just on two paragraphs in our written submission,  
7 which I think capture the essence of our argument. I will  
8 perhaps just read those.

9 It is at page 10. I am going to just draw your  
10 attention to paragraphs 42 and 44, which, as I say, I think  
11 capture the essence of our position.

12 What we say is that:

13 "78.1 does no more than establish that payment  
14 amounts are as prescribed by regulation for three  
15 years until the later of March 31, 2008 and the  
16 effective date of the Board's first order. The  
17 language of section 78.1 does not suggest that  
18 the OEB's power under 21(7) to issue interim  
19 orders is in any way limited or abrogated, other  
20 than..."

21 Other than:

22 "...by the one limitation that any such order  
23 could not purport to have an effective date  
24 before April 1, 2008."

25 In 44, we say that:

26 "78.1(2) requires that each payment amount shall  
27 be determined in accordance with the order of the  
28 Board then in effect, subject again only to the



1           limitation that the effective date of any order  
2           cannot be before April 1, 2008."

3           "If the order", we say, "then in effect at a  
4           point in time is an interim order, which is  
5           subject to subsequent retrospective  
6           reconsideration, then any payment in accordance  
7           with that order would, necessarily, also be  
8           subject to subsequent retrospective revision, if  
9           the final order approves payment amounts  
10          retrospectively which are different from the  
11          interim amount."

12          In other words, assuming that an interim order is then  
13          in effect, the payment amounts must be determined in  
14          accordance with that order at the time they are made, but  
15          because it's inherent in the nature of interim orders -- of  
16          that interim order then in effect that those payment  
17          amounts are subject to retrospective adjustment once final  
18          rates are determined, any payment amount in accordance with  
19          the interim order would be subject to retrospective  
20          adjustment once final rates are determined, any payment  
21          amount in accordance with the interim order would be  
22          subject to retrospective adjustment once the final order is  
23          made.

24          So that's the core of our interpretation of 78.1 and  
25          why it does not exclude your power to make interim orders.  
26          We also rely on the regulations, the regulation, 6(1) says  
27          that the OEB may establish the "form and methodology" to be  
28          used in making an order.

1           We say that it is an entirely reasonable  
2   interpretation and, indeed, the correct interpretation of  
3   section 6(1) of the regulations to say that the discretion  
4   to determine the form and methodology used to set payment  
5   amounts for OPG could well involve a two-stage process  
6   under which an initial interim order is made, followed by a  
7   final order; and it would be for the OEB to decide, of  
8   course, whether it is just and reasonable to provide relief  
9   against the deleterious effects of delay occasioned by the  
10   hearing process, or indeed to mitigate the risk of the  
11   accumulation of significant retroactive charges by  
12   instituting interim payment amounts effective April 1,  
13   2008. And leaving to -- I will come to this later. And of  
14   course leaving until -- to further determination at the  
15   time of the hearing what day you would actually return any  
16   change in the rates, too. The fact that the effective date  
17   of your order is April 1, 2008, of course, does not dictate  
18   that you have to make any retrospective change in rates  
19   back to that date. It is still fully within your  
20   jurisdiction to not make it back to any date or to make it  
21   back to some other date.

22           As I say, I will come back to that, because as I  
23   understand it, my friends take perhaps a different view of  
24   that and I will deal with that shortly.

25           But just to summarize, then, on the principal  
26   submission on your jurisdiction, we have that summary  
27   paragraph 47 of our written agreement. We say: In  
28   summary, the ability to fix just and reasonable payment

1 amounts would be seriously thwarted if the OEB could only  
2 take action after holding a full and final hearing. I am,  
3 here, trying to actually -- actually transposing from some  
4 language from this Cosco case because this is what the  
5 court said about the power to make interim rates there:

6 "The power to make interim orders is clearly  
7 conferred by the act and is necessary for the  
8 protection of both customers and prescribed  
9 generators."

10 I say that just as a matter of principle. Not  
11 necessarily specifically here, but as a matter of principle  
12 that you need the power. The reason you have the power to  
13 make interim orders is to more effectively do your job, and  
14 in a given case it may well be necessary for the protection  
15 of customers to make those orders, or it may well be  
16 necessary for the protection of a prescribed generator that  
17 the power, we say, is there and it is an important power  
18 and it is a necessary power and it is a power that could  
19 only be abrogated by the clearest statutory language and  
20 there is no such language in section 78.1 of the  
21 regulations.

22 Let me, then, turn to the second question, which deals  
23 -- or I guess the second part of the first category, which  
24 is your power to make interim rates. There is also --  
25 there were some questions addressing the issue of whether  
26 an interim order would be the Board's "first order" for the  
27 purposes of 78.1 and section 4 of the regulations.

28 I have two alternative submissions on that. Our main

1 submission, as I alluded to at the outset, is that the an  
2 interim order would not be and -- need not be and would not  
3 be, if you use a purposive and contextual interpretation  
4 and harmonious interpretation of the legislation, be the  
5 first order of the Board. We say that the first order, as  
6 that term is used, of the Board was intended to mean the  
7 first order that sets just and reasonable payment amounts  
8 which, of course, will not be done until you make your  
9 final order.

10 We acknowledge that the term "first order" is of  
11 course not defined in the act or regulations, but we say  
12 that it must be interpreted purposively and in accordance  
13 both with the plain meaning of the words but also taken in  
14 their proper context, given common sense and the objects of  
15 the act and the intention of the legislature.

16 At the top of page 12 of our written argument, we have  
17 quoted from the recent decision of the Supreme Court of  
18 Canada, which just makes the point -- I think, a  
19 fundamental point, probably trite, but indeed they call it  
20 trite but let me just, for the purposes of establishing the  
21 principle, direct your attention to this passage. It says:

22 "It is now trite law that the words of an act and  
23 regulations are to be read in their entire  
24 context, and in their grammatical and ordinary  
25 sense, harmoniously with the scheme of the act,  
26 the object of the act, and the intention of  
27 Parliament. Further, the scope of regulation  
28 such as the provisions of the NOC regulations is

1           constrained by its enabling legislation."

2           So they're in effect making the point in a compendious  
3 way, or in a boiled down, kind of bare essentials way the  
4 point I made earlier.

5           So in my submission, taking that principle or those  
6 principles, the object of the act and the intention of the  
7 legislature are neither complex nor obscure. The only  
8 purpose of section 78.1 and section 4 of the regulations is  
9 to fix OPG's payment amounts for three years until March  
10 31, 2008 and to leave to the OEB thereafter the task of  
11 determining payment amounts that are just and reasonable,  
12 in accordance with the regulations and, of course, the  
13 forms and methodologies and assumptions that the OEB  
14 determines to be appropriate.

15          So we submit that under section 78.1, the IESO is  
16 obligated to make payments to OPG in accordance with the  
17 order of the Board then in effect. I read that language to  
18 you earlier. If the order then in effect is an interim  
19 order, the IESO payment amounts must be made in accordance  
20 with that order.

21          The proviso, in our submission, the proviso in section  
22 78.1 that talks about the "effective date of the Board's  
23 first order" does not relates to the payment amounts  
24 themselves, but to a question of timing.

25          Any payment the IESO makes in accordance with an order  
26 of the Board must relate to a period that is on or after  
27 the later of March 31 and the effective date of the Board's  
28 first order.

1           So it is sufficient, in my submission, for the IESO to  
2   make payments that the effective date of the first order is  
3   April 1, 2008. It need not be the Board's first order. As  
4   we say in paragraph 55 at page 13 of our written argument,  
5   section 78.1, therefore, does not say that for the IESO to  
6   make a payment amount the order must be the Board's "first  
7   order"; nor does the section say that the period to which  
8   the payment relates must be after the later of March 31,  
9   2008 and the OEB's first order. What section 78.1 says is  
10   that the payment must be in accordance with the order of  
11   the Board then in effect and that the payment must relate  
12   to a period that is on or after the effective date of the  
13   Board's first order.

14           So we say, with respect, that an interim order is  
15   effective as an order of the Board requiring the IESO to  
16   make payments without it being considered the Board's first  
17   order, provided, again, I say, subject to the one proviso  
18   that no order of the OEB has an effective date earlier than  
19   April 1, 2008.

20           Under the interim order OPG is seeking, IESO payments  
21   on the basis of the interim order would be in accordance  
22   with the order of the Board then in effect and both the  
23   interim and final or first order, would have an effective  
24   date on or after April 1, 2008.

25           And that, therefore, meets the two critical  
26   requirements of 78.1, that is that the payments be in  
27   accordance with the order of the Board then in effect, and  
28   that the effective date of the order not take place before

1 April 1, 2008.

2 I might say that OPG's submissions on this are  
3 generally aligned with Board Staff's, with one exception.  
4 As I understood the Staff's submission, they say that if  
5 the interim order is not the first order -- and they I  
6 think accept that it is a reasonable interpretation of the  
7 legislation that the interim order is not the first order -  
8 - but they say that if the interim order is not regarded as  
9 the "first order", that it would enable you to make the  
10 payment amounts interim as of April 1, 2008, but that it  
11 would not enable you to make payment amounts that are  
12 different from the current payment amounts. In other  
13 words, no increase or under different circumstances no  
14 decrease.

15 I simply wanted to address that. We appreciate the  
16 Board Staff's discussion. It is useful to have different  
17 viewpoint, but we part company with Staff on this  
18 particular issue, and it is essentially for the reasons  
19 that I articulated a moment ago.

20 There is nothing, we say, in 78.1 or section 4 which  
21 requires that for an order of the Board to determine the  
22 payment amounts to be paid by the IESO, the OEB order must  
23 be -- must be the first order. 78.1 requires the IESO to  
24 make payment amounts in accordance with the order of the  
25 OEB then in effect. And an interim order of the OEB is an  
26 order then in effect, as long as the order doesn't purport  
27 to have an effective day on or before March 31, 2008.

28 And so we say whether it is an order making current

***ASAP Reporting Services Inc.***

***(613) 564-2727***

***(416) 861-8720***

1 payments interim or an order making different interim  
2 payment amounts is irrelevant. If you have the power to do  
3 one, you have the power to do the other.

4 If the OEB has jurisdiction to order payment amounts  
5 interim, as the Board staff concedes, then it also has the  
6 jurisdiction to order new interim payment amounts pending  
7 its final order, as long as these orders don't have an  
8 effective day before April 1, 2008, and that is because  
9 that would be the order of the Board then in effect, as  
10 required by 78.1(2).

11 In connection with the question of what the  
12 implications are of the interim order being or not being  
13 the OEB's first order, our detailed submissions are set out  
14 at paragraphs 66 to 81. I am not going to walk through  
15 them all here, but we of course rely upon those provisions.

16 In essence, OPG is submitting that the first order is  
17 not the interim order, but the order which actually  
18 determines just and reasonable payment amounts is the first  
19 order.

20 So we say that matters that are triggered by the OEB's  
21 first order are, by and large, matters that need not be  
22 and, in fact make no sense to be, dealt with in the context  
23 of an interim order, given the nature of an interim order,  
24 which, as I outlined at the beginning, by definition, is  
25 not a determination of the merits of anything.

26 It is put in place simply to deal with the potential  
27 for deleterious effects resulting from the time required to  
28 process and decide and implement the application.



1           So in this respect, I would say -- make the  
2   observation that OPG's arguments are fully aligned with  
3   those of Staff, with the Consumers Council, with the  
4   Vulnerable Energy Consumers Coalition and the Power  
5   Workers.

6           It is clear, in my submission, that properly  
7   interpreted - in other words, purposively interpreted,  
8   interpreted in the proper context and interpreted with a  
9   view to the harmonious interaction of the various  
10   provisions in the legislation and the regulations - that  
11   the provisions of section 6(2) of the regulations create no  
12   problems and require no special or unique action by the OEB  
13   in the context of making an interim order.

14          The provisions of the regulations requiring the OEB to  
15   take certain actions or accept certain values, et cetera,  
16   are only sensible if they're interpreted to apply to the  
17   making of the OEB's order that actually determines just and  
18   reasonable payment amounts, and that of course is, as I  
19   have said, the final order.

20          Our alternative submission on this is that even if you  
21   interpret the interim order to be the first order -- and we  
22   concede that as a literal matter you can -- it is possible  
23   to interpret an interim order to be the first order, just  
24   because it is chronologically the first order the Board  
25   makes.

26          I mean, we accept that there is -- that there are --  
27   that on the words, if you take a technical interpretation  
28   of the words, that you could come to that view. But just

1 by way of parentheses, let me emphasize that we say that  
2 that, however, does not involve a purposive and contextual  
3 interpretation, and also doesn't attempt to read the words  
4 of all of the provisions harmoniously, but, in fact,  
5 results in sort of oddities, conflicts and unusual results  
6 and so is, therefore, to be avoided.

7 But even if you interpreted the interim order to be  
8 the first order, it is still, in my submission, in law,  
9 only the first step in the first order. And that comes  
10 back to my earlier discussion of the -- of what an interim  
11 order is and what it means, remembering that it decides --  
12 it does not require you to decide anything on the merits,  
13 that it is temporary and that it assumes and requires that  
14 a first order is made.

15 And because the interim order is therefore really only  
16 the first step in the OEB's first order, because of course  
17 the required second step is the final order, that the  
18 regulations, properly interpreted, still don't require you  
19 to deal with the provisions of section 6(2) until the  
20 second step, if you will, of the first order, which would  
21 be the final order, is made.

22 MR. KAISER: So what you're really saying is the first  
23 order is the first final order?

24 MR. PENNY: Yes. That is our fundamental submission.  
25 Our alternative submission is that the first order, even if  
26 you looked at it as being an interim order, it is only part  
27 of the first order. The interim order is the first part of  
28 the first order. The final order is the second part of the

1 first order.

2 And that is just consistent with what an interim order  
3 is and a sensible, in my submission, interpretation of the  
4 regulatory or the statutory provisions and the regulation  
5 provision.

6 That concludes my submissions on that first piece, Mr.  
7 Chairman. I was then going to move to the issue of whether  
8 you should and, if so, whether it should involve an  
9 increase. But if you want to split those in two, then I  
10 will come back to that.

11 Perhaps just so we don't interrupt, I can -- I will  
12 save Mr. Warren's brief submission until the end. It  
13 covers both.

14 MR. KAISER: All right. Mr. Faye, anything on this?

15 **SUBMISSIONS BY MR. FAYE:**

16 MR. FAYE: Thank you, Mr. Chair, Members of the Panel.  
17 Energy Probe doesn't take any issue with the authority  
18 of the Board to make interim orders. I think what we would  
19 like to add is that that is not an unfettered discretion.  
20 The Board can make interim orders, but it has to do it on  
21 some evidentiary foundation.

22 In the case of an applicant who is making a request  
23 for an interim order that isn't based on any urgent need,  
24 we would submit that the application of just and reasonable  
25 rates principles applies to interim orders.

26 Now, it may not apply in the sense that you have to  
27 consider all of the evidence that's being presented, but if  
28 you can't find an urgent reason to award an interim relief,

1 then you do have to fall back on what other principles you  
2 might have, and that is just and reasonable rates.

3 In Mr. Penny's submission on the Supreme Court case  
4 concerning Bell v. CRTC -- and I apologize for not having a  
5 copy of this for you. I will make a copy at the break.

6 MR. PENNY: There is a copy in my brief.

7 MR. FAYE: Do you have a copy?

8 MR. PENNY: There is a copy in my brief.

9 MR. FAYE: The excerpt that he makes on his page 9,  
10 where it begins, "It would be useless to order", I think it  
11 is important to look at the sentence just before that in  
12 the Supreme Court's judgment.

13 There it says:

14 "However, interim rates must be just and  
15 reasonable on the basis of the evidence filed by  
16 the applicant at the hearing or otherwise  
17 available for the interim decision."

18 So our point here is that the Board is free to make an  
19 interim order. It is free to grant relief as it sees fit.  
20 It must base that on some principles. In Energy Probe's  
21 submission, it has two choices.

22 One is there is an urgent emergency situation that  
23 affects the financial integrity of the company, and, if you  
24 so find, then we wouldn't have any dispute with you making  
25 an interim relief order. But if you don't find that there  
26 is an urgent emergency situation, then you have to fall  
27 back on just and reasonable rates, and that requires some  
28 review of the evidence that supports giving them 7 percent

1 or X percent. It can't be done in a vacuum.

2 MR. KAISER: But in the Bell case, in the first  
3 instance, the Commission didn't find just and reasonable  
4 rates. They simply said there was concern about the  
5 financial situation with respect to bound and ordered  
6 interim rates, and ultimately determined those rates  
7 weren't just and reasonable and went back and gave a credit  
8 to the customers.

9 Isn't that exactly contrary to the point you are just  
10 making?

11 MR. FAYE: I think your characterization of that case  
12 may disagree with my interpretation of it.

13 Perhaps if we look --

14 MR. KAISER: You say, in making the interim order,  
15 they found the rates to be just and reasonable. Then they  
16 had a hearing and found the rates not to be just and  
17 reasonable. They made a mistake and said, We revoke that  
18 rate increase. Go back and give a credit to the customers.

19 MR. FAYE: No. No. I think what I'm saying is they  
20 first determined that there was an urgent situation  
21 affecting the applicant's financial integrity during the  
22 hearing period.

23 MR. KAISER: Yes.

24 MR. FAYE: And then once they --

25 MR. KAISER: On that basis issued an interim rate  
26 increase?

27 MR. FAYE: Issued an interim rate increase, correct.

28 MS. KAISER: Didn't make any determination that the

1 rates were just and reasonable at that point, or did they?

2 MR. FAYE: Yes, they did, not on the full scope of  
3 evidence.

4 MR. KAISER: No. They looked at the evidence at that  
5 time, if you go back to the Commission decision - I am  
6 familiar with that case - and all the evidence had to do  
7 with the financial situation. It didn't have anything to  
8 do with the just and reasonable rates. It had to do with  
9 whether there was a -- for those particular rates and those  
10 particular communities that were affected, there was a  
11 serious concern that the service would deteriorate if the  
12 interim rate increase wasn't put into effect.

13 MR. FAYE: Yes, and I believe the applicant advanced  
14 such arguments as its interest coverage ratio should be a  
15 certain -- I believe it was 4.0; the Commission concluded  
16 it should be 3.8. But that, I submit, is a consideration  
17 of the evidence available to the Board at the time it is  
18 making that decision.

19 MR. KAISER: But you would accept that when we hear  
20 interim rate applications, we often don't hear the full  
21 case.

22 MR. FAYE: Oh, absolutely. We're not suggesting that  
23 you should.

24 We're saying the first step in interim rates is to  
25 determine that there is an urgent financial situation that  
26 is going to develop if you don't grant those interim rates.

27 Once you have you have made that conclusion, then you  
28 have to consider what evidence is there to bring out the

1 quantum of what that relief should be.

2 MR. KAISER: All right.

3 MR. FAYE: And the Board has broad discretion there.  
4 It doesn't have to consider all of the rate case. There  
5 would be no point in having interim judgments or interim  
6 orders if you had to go through the whole process. But you  
7 do have to consider what evidence there is that leads you  
8 to believe there will be a dire financial situation arise.  
9 So that could be a small subset of the evidence filed in  
10 the main case.

11 What we are saying is, it is not done in isolation.  
12 There is the two-step process. First, find there is an  
13 urgent situation. Second, examine what evidence there is  
14 to support a quantum that you might give them in interim  
15 relief. I would point you to page 9 of the applicant's  
16 written submission.

17 In paragraph 38, I believe the Supreme Court validates  
18 that approach. I will read you the sentence that applies:

19 "Furthermore, the interim rate increase was  
20 granted on the basis that the length of the  
21 proceedings could cause a serious deterioration  
22 in the financial condition of the respondent and  
23 then only once such an emergency situation was  
24 funds to exist did the appellant -" the appellant  
25 being the CRTC - "ask itself what rate increase  
26 would be just and reasonable on the basis of the  
27 available evidence and for the purpose of  
28 preventing such a financial deterioration."

1           So all of that goes to our submission that we agree  
2   interim orders can be made, interim orders for relief can  
3   be made. But there has to be some substantial  
4   consideration behind it. It can't be a frivolously given  
5   relief. It can't be on trivial requests. And it should  
6   follow this two-step process that the Supreme Court  
7   outlines here.

8           MR. PENNY: Mr. Chairman, may I just make the  
9   observation that Mr. Faye is addressing the -- you haven't  
10   heard me from on this yet, of course. Mr. Faye has really  
11   jumped to the second issue.

12          MR. KAISER: Yes, I realize that.

13          MR. FAYE: I understand there is some overlap here. I  
14   am not trying to argue whether or not that urgent situation  
15   exists. I am only pointing out that the interim relief  
16   order has to be grounded on such an analysis.

17          MR. KAISER: Right.

18          MR. FAYE: That's the only submission we would make on  
19   the Board's jurisdiction to provide interim relief.

20          Our submissions on the section 78.1 and 2 and what the  
21   effect of an interim order is, this tends to be a fairly  
22   complicated section. I am trying to boil our submission  
23   down to the essentials.

24          We think that those two sections, section 78.1(2)(a)  
25   and (b), provide that there are two methods to pay OPG.

26          The first one is captured in 78.1(2)(a) that for the  
27   period between January 1st, 1995 and the later of April  
28   1st, 2008 and the effective date of the Board's first order



1 in respect of the generator, those payment amounts will be  
2 as prescribed in the regulation.

3 The effect of that is that the Board -- we agree with  
4 my friend from OPG on this -- that the Board can't put in a  
5 rate order that predates April 1st, 2008.

6 But we also submit that there is no obligation of the  
7 Board to put in a rate order that takes its place on April  
8 1st, 2008. The Board is quite free, here, to ride out  
9 whatever period of time is necessary to come to a final  
10 decision on the application and that effective date could  
11 be any time later than April 1st. But the main point is  
12 that once an order for the purposes of this section are  
13 made, it precludes paying OPG on the basis of the  
14 prescribed payments in the regulation any more. The IESO  
15 is only authorized to make payments under this section  
16 until the first order in respect of the generator is  
17 issued. After that, it has to make payments based on  
18 something else, some other Board order.

19 And that leads us to section 78.1(2)(b), the second  
20 way that OPG can get paid.

21 Once you can't pay them according to the regulation,  
22 you can only pay them in accordance with a Board order in  
23 effect. There is no way of paying them without a Board  
24 order of some sort.

25 We would submit that any Board order that seeks to  
26 make payment amounts other than the prescribed regulation  
27 method, constitutes an order under this section. I mean it  
28 doesn't make sense to say that you could have an order in

1 effect and then deny that that is an order under this  
2 section. Anything that affects payments under section 78.1  
3 is an order. And all of the legal gymnastics of trying to  
4 characterize an interim order as not an order at all, I  
5 think, is probably straining the idea that things must be  
6 evaluated and purposive in contextual approach and  
7 harmonious with the legislation as a whole. I don't think  
8 the legislation as a whole was intended to allow you to jam  
9 any objective into it by straining out these words.

10 So our submission is that any order you make that  
11 affects the payments to OPG is an order under this section  
12 and the two effects are: It triggers an end to making  
13 payments under the prescribed regulation amounts and it  
14 forces you to substitute some other payment method.

15 MR. KAISER: What do you say to Mr. Penny's argument  
16 that order means a final order when rates are finally  
17 determined to be just and reasonable? And if the  
18 legislature had intended to prohibit the Board from  
19 exercising its long-standing ability to issue interim  
20 orders, it would have said so. What do you say to that  
21 argument?

22 MR. FAYE: I think that that argument suggests to the  
23 Board that there is not two ways to pay. There is three.

24 There is this order in effect which is not really an  
25 order for the purpose of 78.1, it's just this order in  
26 isolation. It's an order that can be superimposed on the  
27 act and yet not have to conform to what the act says.

28 I don't think there is three ways. I think there is

1 two ways, there is the prescribed regulation way and  
2 whatever other way the Board would prefer to substitute for  
3 that.

4 So if you do put in something, we would submit that  
5 you have triggered the provisions of section 78.1 and there  
6 are consequences to that that we can go into later on the  
7 other matter.

8 But I think that probably brings me to an end of what  
9 I had to say about those two issues.

10 MR. RUPERT: Mr. Faye, back on the Bell case -- you  
11 quoted the material from page 9 of OPG's submission -- that  
12 dealt with, I guess, to use their words, an emergency  
13 situation.

14 Are you suggesting that the only basis for an interim  
15 order would be an emergency situation? Or are there other  
16 circumstances that you think might exist that would permit  
17 the issuance of an interim order?

18 MR. FAYE: Mr. Rupert, I wouldn't want to conclude  
19 that there are never any other circumstances under which an  
20 interim order of relief could or should be granted.

21 But I think that, if we quote from some of the statute  
22 authority here:

23 "the very purpose of interim rates is to allay  
24 the prospect of financial instability which can  
25 be caused by the duration of proceedings before a  
26 regulatory tribunal."

27 And that is the Supreme Court judgment on the Bell  
28 versus CRTC appeal.

1 I don't think even that excludes all future  
2 developments that might ground some interim relief, but I  
3 do say that it does, for the purposes of this application,  
4 limit you to financial hardship. The applicant hasn't  
5 claimed there is any other reason why this should be given  
6 to them. It is financial hardship.

7 So if they had come forward for instance and said that  
8 they need interim relief because all of a sudden, you know,  
9 the Canadian Nuclear Waste Association has come up with a  
10 final plan and they have to dispense money to them to  
11 finance drilling into granite somewhere, I would say, yes,  
12 that is a reason to give them haven't accumulated enough  
13 funds in the deferral account to finance their obligations.  
14 But they're not arguing there is an emergency situation of  
15 that type occurring.

16 So, yes, there could be operating situations that  
17 occur, but generally what we're talking about is financial  
18 hardship here.

19 MR. RUPERT: The second question on this same quote,  
20 it goes on to say:

21 "What rate increase would be just and reasonable  
22 on the basis of the available evidence?"

23 I am just wondering what your interpretation of  
24 "available evidence" is.

25 If such a situation, an emergency situation existed,  
26 if there are mounds of paper filed in an application, much  
27 of which is financial in nature in rate applications, how  
28 far does one go in looking at the available evidence to be

1 able to reach the conclusion that an emergency situation  
2 exists?

3 Clearly it doesn't involve going through the entire  
4 application. That would make nonsense of the interim rate  
5 order situation.

6 So how much does the regulator, in your view, have to  
7 look at the available evidence in order to reach this kind  
8 of conclusion that the necessary circumstance exists?

9 MR. FAYE: I agree with you. You don't have to go  
10 through all of the evidence that has been submitted on the  
11 main application, but you do have to require the applicant  
12 to present its case. The onus is on the applicant to make  
13 an argument with sufficient evidence to allow the Board to  
14 make a decision on that.

15 Without straying into whether or not they have done  
16 that - that is the subject of our next issue - we would  
17 submit that they're the ones that have to characterize what  
18 the evidence is they think is supporting their case. Then  
19 it would be up to any other intervenors in the process to  
20 argue that that does not support the case, or that  
21 additional evidence should be forthcoming.

22 But I agree, it is a very circumscribed set of the  
23 main evidence that you need to consider here.

24 MR. RUPERT: Okay, thanks.

25 MS. CAMPBELL: Mr. Chair, first of all, I notice that  
26 the -- although two of the three supporters for Mr. Penny's  
27 position are not physically in the room, I believe Mr.  
28 Stephenson is, and I don't know whether PWU wanted to come

1 after Mr. Penny or if they were not going to make any  
2 submissions, at all.

3 MR. STEPHENSON: Thank you, Ms. Campbell. I was going  
4 to make some brief submissions and I am happy to do it now,  
5 or -- I am in the Board's hands. I am happy to do it now.

6 MR. KAISER: Proceed now.

7 **SUBMISSIONS BY MR. STEPHENSON:**

8 MR. STEPHENSON: Thank you.

9 As indicated, you do have our written submissions and  
10 I was not going to review those with you in any detail. I  
11 did want to make a couple of brief points.

12 On the first issue, the jurisdictional issue, we  
13 support OPG's position in both key respects, point number 1  
14 being, yes, the Board does have the jurisdiction to make an  
15 interim order determining payment levels effective April 1,  
16 2008; and, number 2, that for the purposes of section 78.1,  
17 the reference to "first order" must mean the final order.

18 Let me just amplify briefly on each of those two  
19 points.

20 On the narrow jurisdictional issue, do you have the  
21 jurisdiction? In our view, we just don't see any rational  
22 statutory interpretation which would suggest that you  
23 don't. We don't think it is an issue that can seriously be  
24 contested, essentially on the basis of the analysis  
25 presented to you by Mr. Penny.

26 So, in our view, the only real question is the second  
27 question, which is: Would an interim order be the first  
28 order for the purposes of the section?

1           In our submission, it is not, except to the extent  
2   that it sets -- it sets the effective date that the first  
3   order could ultimately be made retroactive to if the Board,  
4   at the end of the case, determined that was the appropriate  
5   thing to do.

6           Mr. Penny has assisted you with a review of the  
7   language of the act and the regulation to give you a road  
8   map of why that is not only a rational interpretation, but  
9   the preferred interpretation, in terms of fitting the parts  
10   of the act and the regulation together.

11          But I just wanted to make one additional submission,  
12   and that is this. As a practical matter, the question  
13   becomes: If the interim order were the first order - and,  
14   as Mr. Penny conceded to you, there is a linguistic basis  
15   that could lead you to that conclusion - if that were the  
16   case, what does that mean?

17          Well, what it means would be that when you proceeded  
18   to hear the case on the merits, it would affect certain  
19   aspects of how the case would have to be presented and  
20   considered by you. In particular, there are the provisions  
21   of the regulation that say that in considering the first  
22   order, the Board is required to accept certain aspects of  
23   the material provided to them.

24          For example, certain matters that have been approved  
25   by the OPG board of directors must be accepted by the Board  
26   for the purposes of making the first order.

27          In my submission, the effect of those provisions and  
28   the government's intention, when it made the regulation,

1 would be thwarted if you determined that the interim order  
2 was the first order. Let me take a step back and tell you  
3 why I think that is the case.

4 In my submission, the scheme of the act and the scheme  
5 of the regulation make it clear that there was an  
6 intention, on the part of the legislature on the one hand  
7 and on the government on the other, that there be a  
8 transition from government-established payment levels to  
9 Board-established payment levels.

10 In my submission, it is clear that that transition was  
11 to take place. There was going to be three parts to that  
12 transition. Part number 1 is the prescribed payment levels  
13 as prescribed by the regulation, which must be in place up  
14 until, at least, April 1, 2008.

15 If I can go from there to step 3, skipping step 2, for  
16 a moment. Step 3, the final resting place would be a  
17 circumstance where the Board has full jurisdiction  
18 exercising all of its powers under the act applicable in  
19 any "rate-like making circumstance" to determine just and  
20 reasonable payment levels.

21 But there is a second step, before you get to that end  
22 state, which is prescribed by the regulation, and that  
23 second step is, in my submission, an important interim step  
24 that the government imposed in making the regulation, and  
25 that is in relation to the circumstances concerning the  
26 first order.

27 In relation to making the first order, as I said to  
28 you before, there are certain aspects that the regulation



1 prescribes that the Board must accept in considering its  
2 first order.

3 There are other aspects where the Board has got full  
4 authority; certain aspects the Board is fettered in its  
5 authority. It must accept certain material that is  
6 provided to it.

7 And that is the clear intention. It is a clear  
8 transition from fully prescribed rates to partially  
9 prescribed rates to non-prescribed rates, if I can call it  
10 that. I apologize by using the word "rates". I know  
11 they're payment levels, but in my view, they are broadly  
12 analogous to rates, although I accept that they are  
13 different.

14 So in this transition, in my submission, the first  
15 application, which is now before you, is that second step.  
16 It is what I would describe as partially prescribed payment  
17 levels, because there are elements that the Board has got  
18 no ability to exercise independent judgment over.

19 If the Board concluded that the interim order which is  
20 now being sought, was in fact the first order, that would  
21 mean that the final order would be the second order. And  
22 if that were the case, we would be moving from what I call  
23 a period of partially prescribed payment levels, to non-  
24 prescribed payment levels all within the context of the  
25 single first application.

26 In my submission, that just is absolutely inconsistent  
27 with the clear intention of the legislature and the  
28 government in the manner in which it is framed, both the

1 act and the regulation.

2 So in my submission, the conclusion urged upon you by  
3 OPG, by Mr. Penny on behalf of OPG, is in terms of  
4 interpreting "first order" to mean the first final order is  
5 fully consistent and it gives effect to the legislature and  
6 government's intention, in terms of this transition from  
7 fully prescribed rates, to partially prescribed rates, to  
8 non-prescribed rates. And to do otherwise would thwart  
9 that intention. In my submission, that is a powerful piece  
10 of the interpretive scheme that you have to take into  
11 consideration when you are interpreting and applying  
12 section 78.1.

13 Just one other small point, just in response to Mr.  
14 Faye's submissions, and that is, from my submission, the  
15 issue about whether there is any kind of financial urgency  
16 that either has been demonstrated or needs to be  
17 demonstrated, in my view, that is not a jurisdictional  
18 question at all.

19 It may well be a relevant consideration. It is  
20 certainly a relevant consideration. Whether it is an  
21 essential consideration, in terms of the exercise of your  
22 jurisdiction, is a valid question. But in my view, that is  
23 clearly, on the two-part analysis that you have set up,  
24 that is a part two question and not a part one question, in  
25 my submission.

26 Subject to any questions, those are my submissions.

27 MR. KAISER: Thank you, Mr. Stephenson. Mr. Faye, do  
28 you want to respond in any way to Mr. Stephenson? I took

1 the parties out of line here. I was just going down the  
2 line, but if you have any comments you wanted to make,  
3 please go ahead.

4 MR. FAYE: No, I think we're okay with what he said.

5 MR. KAISER: Thank you. Mr. Stephenson --

6 MS. CAMPBELL: Mr. Chair? Excuse me. I was wondering  
7 if it would be possible for Staff to simply clarify  
8 something that Mr. Penny raised before we move to the  
9 additional parties who wish to speak in opposition to what  
10 Mr. Penny is discussing, to clarify Staff's position.

11 Mr. Penny made reference to the fact that he parted  
12 company with Staff on one point. I would simply like to  
13 clarify what the point is that Staff was making.

14 MR. KAISER: All right. Before we do that let's just  
15 finish with Mr. Stephenson.

16 MR. RUPERT: Mr. Stephenson, I had a question on this  
17 issue of what constitutes the first order. If you go to  
18 section 78.1(2). This is along the lines Mr. Faye was just  
19 setting out.

20 Let's say that the Board does, in fact, in this month  
21 or next month or some point before April 1, issue the  
22 interim payment order that OPG requests to increase payment  
23 amounts as of April 1st.

24 So April passes by and we're in the first week or two  
25 of May and the IESO staff are busily doing what they  
26 normally do after the month end which is to figure out how  
27 much do we pay generators, how much do we pay, charge loads  
28 for that month.

1       So they're sitting in the first week of May and  
2       looking at section 78.1(2) and they're saying which section  
3       are we in? Now, which subsection are we in? Doesn't it  
4       require them to make a positive finding -- presumably have  
5       a piece of paper in their hands to document that if they're  
6       going to be in 78.2(b) there has to be a first order of the  
7       Board issued? Like how could they get out of A without  
8       that in their hand? What would they use -- if the interim  
9       order doesn't constitute that first order, what would be  
10      the document that the IESO could point to that gives them  
11      authority to start paying under that section?

12      MR. STEPHENSON: I agree completely that the IESO  
13      would be then operating under 78.1(2)(b). That is, that  
14      would be the scheme that they would then be operating  
15      under. The question is: What is it that they are paying  
16      under? And that is, they are paying in accordance with the  
17      order of the Board then in effect.

18      MR. RUPERT: Before you get to that. Just the one and  
19      two under B are just talking in terms of time. It says:

20                "to the extent that payment relates to a period  
21                that is on or after the later of one, the day the  
22                prescribed," which I think is April 1st, 2008,  
23                "and two, the effective date of the Board's first  
24                order..."

25      Leaving aside the amount of the payment or anything  
26      else, just the time period here, how would the IESO  
27      demonstrate April 2008 is in fact a time period that fits  
28      within 78.2(b) if it did not also take the position that

1 the interim order represents the effective date of the  
2 Board's first order?

3 MR. STEPHENSON: Let me deal with this in two parts,  
4 if I can.

5 Let's assume for a moment that the Board made an order  
6 establishing that the payment amounts were interim as of  
7 April 1, 2008 but determined the interim amount was  
8 precisely the same as the prescribed amount. Let's use  
9 that as the first scenario. Under that scenario, of  
10 course, they would obviously continue to do precisely what  
11 they were doing before, in the sense of, practically  
12 speaking, calculating the amounts and paying them.

13 Further, let's assume that at the end of this case the  
14 Board determined that there was going to be some kind of an  
15 increase, and that that increase, whatever it was, was  
16 going to be fully retroactive back to April 1, 2008.

17 Stop there.

18 Of course, the IESO would then have to do some kind of  
19 a calculation, which would permit the recovery of those  
20 retroactive amounts. And under that scenario, they would  
21 be, then, dealing with an order then in effect, which is  
22 the final order, in that particular case, which has an  
23 effective date of April 1, 2008.

24 MR. RUPERT: You have gone beyond where my question is  
25 going. I am talking about a time period, April or May or  
26 June, before this Board has made any decision on final  
27 rates and there is payments being made every month. I am  
28 just wondering, in that period of time, what is it that

1 indicates -- what piece of paper, what document indicates  
2 to the IESO that it is okay for them to pay more than  
3 current amounts, if the Board were to grant the interim  
4 order, what evidence is the effective date of the Board's  
5 first order is April 1st, 2008 to allow them in this  
6 section --

7 MR. PENNY: May I respond to that, Mr. Rupert, since  
8 it is really a question that goes to the core of my  
9 argument.

10 MR. RUPERT: Sure. Yes.

11 **SUBMISSIONS BY MR. PENNY:**

12 MR. PENNY: The answer to your question is the Board's  
13 interim order. That is the order that is then in effect.  
14 And the effective date is not before April 1, 2008 and  
15 therefore it complies with the statutory requirements. So  
16 the IESO pays in accordance with that order, that is then  
17 in effect.

18 MR. RUPERT: So that is for the purpose of this  
19 section -- and what I am talking about this time period,  
20 that is, "the effective date of the Board's first order"  
21 means the effective date of the interim rate order, i.e.,  
22 April 1st, 2008.

23 MR. PENNY: The interim order - well, I think we're  
24 saying the same thing. The way I analyze it is to say the  
25 interim order is an order of the Board then in effect, as  
26 soon as it is made. And the only statutory limitation on  
27 that is it can't be made before April 1, 2008.

28 So as long as the effective date of your order is not

1 before April 1, 2008, then the interim order is an order of  
2 the Board then in effect. The IESO pays in accordance with  
3 that order.

4 MR. RUPERT: You gave two arguments on this. One is  
5 you said your preferred position is the first order, the  
6 interim order is not the first order for purposes of the  
7 regulation.

8 MR. PENNY: Yes. Because I say that "first order" is  
9 kind of a technical term that is used here and in the  
10 regulation.

11 MR. RUPERT: The first order is the interim order, but  
12 that you have to interpret the regulations more sensibly.

13 MR. PENNY: It is chronologically the first order, I  
14 don't dispute that, and it is certainly contrary to what  
15 Mr. Faye says. It is certainly an order. We're not saying  
16 it is not an order. We're just saying it is not the first  
17 order as that term is intended to be used.

18 MR. RUPERT: Again, go back to my question to Mr.  
19 Stephenson. If we're in April or May, there has to be a  
20 first order, at that point, for the IESO to start making  
21 these increased payments that you have requested. If there  
22 is not, I can't see how you could possibly be in section B.

23 MR. PENNY: Well, I guess my response to that is, I  
24 think to reiterate, that there is an order and it complies  
25 with the statutory requirement that it not -- that it is  
26 not effective before April 1, 2008. So there is an order.  
27 The Board has issued an order. It happens to be an interim  
28 order, and its effective date is not before April 1, 2008.

1           When it makes its final order, that is the "first  
2   order", which -- the effective date of which was April 1,  
3   2008 by virtue of the interim order having been made.

4           MR. RUPERT: I will move on. I guess what I am  
5   struggling with is the term, "effective date of the Board's  
6   first order", is used precisely in that way in several  
7   occasions in the regulations.

8           MR. PENNY: Yes.

9           MR. RUPERT: Earlier you made the case about the all-  
10   knowing legislature and how everything fits together  
11   harmoniously, and presumably if they wanted to use  
12   different words in the regulations. It sounds like you're  
13   saying they would have used them.

14          MR. PENNY: Yes.

15          MR. RUPERT: On what basis does one -- other than  
16   maybe it doesn't lead to a common-sense answer, but is  
17   there any other basis for saying that they intentionally  
18   used an equivalent term in the regulations to what is in  
19   the legislation, but had in mind a completely different  
20   meaning?

21          MR. PENNY: No, and it's not my submission that they  
22   do have a completely different meaning.

23          I agree entirely with Mr. Stephenson, the intention  
24   was to create this three-stage process in the -- there is  
25   the regulated rate prescribed by the Lieutenant Governor in  
26   Council. There is the payment amount that applies when the  
27   Board makes its first order - in other words, in response  
28   to OPG's first application - and then once the first



1 application is dealt with, a number of those prescriptions  
2 in section 6(2) fall by the wayside.

3 So in OPG's second application, you will not be  
4 constrained by those requirements.

5 MR. RUPERT: One last question and I will move on.

6 Let's just assume, hypothetically, that the Board  
7 decided to give an interim order, but it made it effective  
8 June 1st. So tomorrow we issue an interim rate order to  
9 increase payments, but make it effective June 1st.

10 So now we're in May again. The IESO is making these  
11 payments. What does it do?

12 MR. PENNY: It makes the prescribed payment, because  
13 the effective date of the Board's first order is June 1.

14 MR. RUPERT: So the effective date of the interim  
15 order is June 1, so the first order is --

16 MR. PENNY: By its terms.

17 MR. RUPERT: So the first order is the interim order?

18 MR. PENNY: No, it is an order of the Board then in  
19 effect.

20 MR. RUPERT: Let's move on. I think we're crossing  
21 each other there.

22 MS. CHAPLIN: I actually want to try it one more time.

23 Mr. Penny, using the same scenario of the IESO  
24 figuring out what to do in May, I take your point about the  
25 reference to the order then in effect.

26 But how is the IESO to assure itself that the  
27 effective date of the Board's first order will in fact be  
28 April 1? Because it has to find its way into that

1 category 2, little (ii). Otherwise, it has to continue  
2 making the prescribed -- the payments that were prescribed  
3 as per the regulation.

4 MR. PENNY: Sorry. In your question, are you assuming  
5 the June 1 scenario or the April 1 scenario?

6 MS. CHAPLIN: No. I am prepared to assume an April 1  
7 interim order. And so May comes along, and it seems to me  
8 that in order to make payments that are any different than  
9 what were prescribed by the regulation, the prescribed  
10 payments, the IESO has to assure itself that the effective  
11 date of the Board's first order will in fact be April 1.

12 How can it do that, because it doesn't have the first  
13 order; in your construction of this, the first order is the  
14 final order.

15 MR. PENNY: Yes.

16 MS. CHAPLIN: So does it have to assume that the final  
17 order will be effective April 1?

18 MR. PENNY: It doesn't have to assume anything, in my  
19 submission. It knows that the effective date of the  
20 Board's first order is April 1, because the Board has  
21 issued an interim order that says so.

22 That is the long and short of it. It doesn't mean  
23 that -- that doesn't necessarily mean that when you make  
24 your final payment amount, that you will necessarily order  
25 the recovery of any difference right back to April 1. That  
26 is an entirely separate question, which will be subject to  
27 argument and so on. But it permits you to do so and it  
28 makes your first order -- this is -- as I say, put another

1 way, it is the first step. The interim order is like step  
2 1. The final order is step 2.

3 I guess my alternative submission, of course, is that  
4 it is still the first order. It is just the beginning and  
5 the end. It is just kind of like dragging it out a little  
6 bit, because you start the process with an interim and you  
7 finish it with a final. But in either scenario, the IESO  
8 knows that the effective date of the Board's first order  
9 was April 1, because it said so.

10 MS. CHAPLIN: Yes. Your position is an interim order  
11 -- whatever the effective date of the interim order is, the  
12 effective date of the final order will have to be the same,  
13 although how final payments are implemented may go back to  
14 a different date?

15 MR. PENNY: Absolutely correct.

16 MS. CHAPLIN: Thanks.

17 MR. PENNY: Subject only to the limitation it can't be  
18 before April 1.

19 MS. CHAPLIN: Yes.

20 MR. KAISER: I suppose it is fair to say that is the  
21 only thing about an interim order that carries on? It  
22 establishes the date --

23 MR. PENNY: That's right.

24 MR. KAISER: -- at which the rates will ultimately  
25 take place?

26 MR. PENNY: That's exactly right, Mr. Chairman. That  
27 is exactly my position.

28 MR. KAISER: Everything else doesn't change.

1           MR. RUPERT: You're saying, so it is clear, if the  
2 final order were to say, We're setting payments and our  
3 final order is payments for April 1, 2008 to October 31st,  
4 2008 are at \$33 a megawatt hour to 49.50. After that date,  
5 they are increasing.

6           You're saying that that is no change in the effective  
7 date of the Board's first order. That is just confirming  
8 April 1 is still the effective date, with payments that  
9 were the same as the regulation?

10          MR. PENNY: They stay the same, that is correct.

11          MR. RUPERT: Thank you.

12          MR. PENNY: In other words, put another way, it  
13 doesn't fetter your jurisdiction to determine how  
14 retrospective to make the new rates.

15          MR. RUPERT: With that in mind, can I just move on to  
16 one of the detailed questions on this. This is 5.2(1) of  
17 the regulation.

18          This is -- sorry. Let's say 5.1. This is a nuclear  
19 liability deferral account. The first sentence of that  
20 says, in the second line -- includes the words:

21                 "The period up to the effective date of the  
22                 Board's first order under 78.1."

23          Same language as in 78.1.

24          In subsection 2 of that, it has, for example, this  
25 requirement that any amounts in this particular deferral  
26 account accrue simple interest on the monthly opening  
27 balance at 6 percent.

28          Does that mean, then, that since the effective date of

1 Board's first order is April the 1st, as soon as it enters  
2 the interim rate order, does that mean, then, that this  
3 section now ceases, for example -- and I don't -- it  
4 doesn't matter what the particular issue is, but in this  
5 case it is 6 percent interest. Does that mean that OPG no  
6 longer has authority to accrue the 6 percent interest on  
7 that balance at that point? That ends. As soon as we  
8 issue the interim rate order you're requesting, that ends,  
9 because we have now past that date?

10 MR. PENNY: Well, I agree that the -- I think I would  
11 put it slightly differently, but I think I agree in  
12 substance with that direction.

13 I think we recognize, and I think my written  
14 submission says, that if the effective date of the Board's  
15 first order is April 1, because you say it is by virtue of  
16 an interim order, then that is the date at which that  
17 particular deferral account ceases to record amounts and  
18 that is the day on which the second deferral account starts  
19 to record amounts.

20 I wouldn't say that that ends the OPG's authority to  
21 collect 6 percent. I mean, it is an interim order, so it  
22 is subject to change. It doesn't end the authority, but it  
23 ends their entitlement to it, and then it is up to you to  
24 decide what the entitlement should be after the effective  
25 day.

26 I think I maybe making a very -- perhaps making too  
27 fine a point, but it ends their entitlements to have that 6  
28 percent. If you decide ultimately that it should be 5

1 percent or 7 percent, then you would do so and that would -  
2 - all of the accounts would be reconciled back to that date  
3 to make that happen.

4 MR. RUPERT: So for that purpose, 5.1(1), the first  
5 order under that interpretation is the interim order?

6 MR. PENNY: No. It is the effective date. Again,  
7 there is -- the use of the term "effective date of the  
8 Board's first order", it seems to me, clearly contemplates  
9 that when the order is made and when its effective date is  
10 are two different things.

11 It doesn't mean it is the Board's first order. It  
12 means it is the effective date of the Board's first order.  
13 Otherwise, it all would have referred to the date of the  
14 making of the Board's first order. That isn't what it  
15 says. It says the effective date of the Board's first  
16 order, which I think contemplates, clearly, that the  
17 effective date of the Board's first order may well be  
18 different than the day on which it is made.

19 MR. RUPERT: Well, no. I think that is not my  
20 question. I agree with that. I guess what I hear you  
21 saying.

22 MR. PENNY: You asked me to agree if that was,  
23 therefore, the Board's first order. It is really the same  
24 question you asked me before. I am saying, No, it is not  
25 the Board's first order, but it is the effective date of  
26 the Board's first order by virtue of the interim order  
27 having been made.

28 MR. KAISER: Well, does that mean that if the first

1 order was the final order, the only way there could be an  
2 effective date prior to the date of that order is if there  
3 was an interim order --

4 MR. PENNY: Yes.

5 MR. KAISER: -- to give meaning to those words  
6 "effective date"?

7 MR. PENNY: Well, it could be later, as well.

8 MR. KAISER: It could be later.

9 MR. PENNY: It could be later, but the only way it  
10 could be before is by virtue of an interim order, that's  
11 right.

12 MR. RUPERT: Just to summarize and then we will move  
13 on. You're saying, I think, that any interim order that is  
14 issued that has a date in it, April 1, 2008.

15 MR. PENNY: Or later.

16 MR. RUPERT: Let's choose April 1, 2008, that that  
17 means that that is the effective -- the effective date of  
18 whatever the Board subsequently does has been set in stone;  
19 right?

20 If the Board decides not to change rates for a period  
21 of time and make new rates effective later that still means  
22 the new rates, the rate order is effective on that date.  
23 It is just that --

24 MR. PENNY: What it actually means is subject to your  
25 ultimate decision.

26 MR. RUPERT: That would contrast with an alternative  
27 view of interim rate orders which I have heard expressed  
28 from time to time, that it is kind of an option, if you

1 will. It gives you the option to later decide whether it  
2 makes something effective at a certain date, but in fact  
3 you may make new rates effective at a subsequent date.

4 MR. PENNY: I don't think it contrasts, because that  
5 is my position. It still leaves you with that option.  
6 Your option is you can make new rates retrospective back to  
7 April 1, 2008 or some other date if you determine, for some  
8 reason, that it ought not to go back to that date. So it  
9 is still an option. I do regard it as an option. It is my  
10 submission that it is an option.

11 It is not my submission -- I don't think my submission  
12 doesn't turn on whether it is on a distinction between  
13 whether the retrospective amount necessarily goes back to  
14 that date, or not. It is the effective date.

15 MR. RUPERT: This is the one difference between  
16 conventional rate cases here where the Board is making  
17 interim rates it itself has already established, and those  
18 continue.

19 MR. PENNY: Yes, yes that's correct.

20 MR. RUPERT: Whereas this one, there is a break  
21 between someone else doing it and the Board doing it. In  
22 this particular case, you're saying the effective date of  
23 the interim rate order sets forever the effective date of  
24 the Board's --

25 MR. PENNY: It gives you the option. It gives you the  
26 option of taking things back to that date, or not, as you  
27 ultimately decide.

28 MR. KAISER: Or to put differently, whether we



1 ultimately went back to April 1st, or not, in the final  
2 decision...

3 MR. PENNY: Yes.

4 MR. KAISER: ..we could not go back beyond the date of  
5 the final order unless there was an interim order. That  
6 would give us the option to go back to some earlier date  
7 right to April 1st or June 1st or whatever. But without an  
8 interim order, the effective date has to become the date of  
9 the final order.

10 MR. PENNY: I believe that is the law. So, yes. I'm  
11 not sure how else you would be entitled, given the  
12 principles against retroactivity, how you would be able to  
13 do that.

14 I suppose there might be an argument that as long as  
15 OPG brought its application before April 1, 2008 but that  
16 is not, certainly, how I understand the law and it is not  
17 how the Board has operated in the past.

18 MR. KAISER: I just had one other question, leaving  
19 aside this mental gymnastics of whether a final order is  
20 first order or whether it is chronological or whatever.

21 Mr. Stephenson went to -- which I think was a useful  
22 point, trying to look behind all of the language and see  
23 what is unique about this process.

24 If the Board had the ability to issue an interim  
25 order, is there anything that does that can be identified  
26 as harming the scheme, or that is contrary to the scheme  
27 which the legislature has set out in this transition  
28 exercise that we're in? I am using Mr. Stephenson's three

1 boxes, which I think is useful.

2 MR. PENNY: It is my submission there isn't. Indeed,  
3 all it does is aid the process. There is no harm.

4 MR. KAISER: By creating some flexibility as to dates  
5 of the -- the effective dates, rather?

6 MR. PENNY: Yes, yes. At the end of it, it is getting  
7 into the second aspect of the issue, but at the end of the  
8 day we're saying we're not asking you to say today OPG is  
9 entitled to any increases that we might ultimately get in  
10 the final order back to April 1. We're saying leave that  
11 to the hearing. But we would like the option to ask for it  
12 and we would like you to have the ability to do it, if you  
13 agree with us. So it is creating options. not taking  
14 anything away.

15 In my submission, as you track it through -- I mean I  
16 didn't go through all of my detailed submissions on the  
17 various sections, but as you track it through, there is no  
18 harm, in my submission. There is nothing adverse to anyone  
19 about the effect of the interim order. Or it not being  
20 "the first order" as that term is used in 78.1. In fact  
21 all it does is protect people's interests rather than take  
22 anything away.

23 MR. KAISER: Thank you. Mr. Stephenson, do you have  
24 something?

25 **SUBMISSIONS BY MR. STEPHENSON:**

26 MR. STEPHENSON: Thank you. If I could perhaps just  
27 chime in briefly on one of the submissions earlier.

28 It comes back to this issue of the making -- the

1 effective date of the first order becomes the effective  
2 date of the final order. I agree with that submission.

3 And I agree with it, not because you have to find some  
4 language in the act or the regulation that inextricably  
5 leads you to that conclusion. The reason I say that must  
6 be so derives from the nature of interim orders.

7 The nature of interim orders is such that it finally  
8 determines nothing. The entire purpose of the interim  
9 order is to establish something in the interim, subject to  
10 the Board's full consideration of the matter, when the case  
11 is heard on its merits.

12 When the Board does that, at the end of the case, the  
13 Board is required, in my submission, to do something about  
14 the interim order. It must exhaustively deal with the  
15 matters that were covered by the interim order because the  
16 interim order just can't exist out there in the ether. The  
17 interim order has to be confirmed ultimately by the Board  
18 in its final order in some fashion. When I say "confirmed"  
19 I mean that in the broadest possible sense because a  
20 variety of things can happen and this perhaps speaks to the  
21 issue that Ms. Chaplin raised, and that is: Let's assume  
22 for a moment that the Board made an interim order  
23 increasing rates effective April 1, 2008.

24 When the Board makes its final order it can do a wide  
25 variety of things in respect to the period covered by the  
26 interim order.

27 It could determine that, in fact, the amounts  
28 collected during the interim order period were too high,

1 and they could lower those amounts retrospectively. It  
2 could increase the amounts retrospectively. It could leave  
3 them the same.

4 But in every case, regardless of what it does, -- and  
5 it, sorry, it could change the period of retrospectivity in  
6 the sense of, we're only going to go back to June 1 or  
7 September 1 or whatever.

8 But if it determined that it was only going to go back  
9 under this example to June 1, in terms of a different level  
10 of retrospectivity, it has to implicitly, and I say  
11 explicitly, do something else about the period from April 1  
12 to June 1. It has to confirm what it did in the interim  
13 order, or change what it did in the interim order.

14 It can't say nothing about what it did in the interim  
15 order, because it -- only the final order can ultimately  
16 determine what is being done for the entire period.  
17 Because at the end of the day, the Board -- as I think the  
18 Supreme Court of Canada says, the Board's jurisdiction is  
19 to set just and reasonable rates, or in this case "payment  
20 amounts". Not to set what "roughly" just and reasonable  
21 payment amounts.

22 So it has to -- what I am saying is, at the end of the  
23 day the Board in its final, end must exhaustively deal with  
24 the entire period, which, by definition, requires it to go  
25 back to the effective date of the interim order because it  
26 must either confirm what it did in the interim order or  
27 change what it did in the interim order.

28 So as I say, by necessity, given the nature of what

1 interim orders are, the final order must always have the  
2 effective date of the start date of the interim order, in  
3 one way or another. And that is how you get to that  
4 conclusion and you don't need to find it by virtue of some  
5 parsing of the language of the act. It is just the -- it  
6 is intrinsic in the nature of interim orders.

7 I hope that is helpful and not further confusing.

8 Those are my submissions

9 MR. KAISER: Thank you, Mr. Stephenson.

10 MR. KAISER: Ms. Campbell, before we take the break it  
11 did you want to deal with your clarification?

12 MS. CAMPBELL: Yes.

13 **SUBMISSIONS BY MS. CAMPBELL:**

14 MS. CAMPBELL: Perfectly enough, the issue I wanted to  
15 address fits right into the discussion that has been taking  
16 place.

17 Mr. Penny, as I indicated previously, had expressed  
18 some concern that Board Staff and he parted company with  
19 regard to the Board's ability to order an increase through  
20 an interim order. We weren't saying, and I would like to  
21 clarify this, that the Board can't order an increase.

22 What we were raising was the question that has just  
23 been debated quite hotly here, which is: How does IESO  
24 implement an increase, given the language of 78.1(2) either  
25 (a) or (b), but particularly (b), obviously, for an  
26 increase, and that is the phrase "and the effective date of  
27 the Board's first order".

28 So what we questioned was the practical effect of an

1 interim increase if the ability of IESO to implement isn't  
2 there until you know the effective date of the first order.

3 Now, what can be done -- and we point out that Mr.  
4 Warren has placed this in the very last paragraph of his  
5 submission, which is quite simply the practical step is to  
6 determine, today, that the effective date of the first  
7 order is the date of the interim order. And that has  
8 already been discussed, but that's the thing that I wish to  
9 clarify, and I believe Mr. Penny touched on it, also.

10 So we weren't saying that the Board cannot increase.  
11 Our issue was how to implement, given the language that is  
12 in the act, and there's been a fairly fulsome discussion on  
13 that, so we just add our two cents' worth by pointing out  
14 that in his final paragraph, Mr. Warren suggests the same  
15 thing, which is -- and I will simply read it:

16 ~"Finally, the Council observes that the Board  
17 can make an interim order rate and in the process  
18 say that it will be the effective date when the  
19 final order is issued. Doing so would get around  
20 the problem identified in the submissions of the  
21 Board Staff that the payments which the IESO  
22 would make to OPG would only be based on  
23 regulated payment amounts."

24 So that is the submission I wish to make. My final  
25 submission, actually, is on behalf of Mr. Buonaguro. I  
26 don't believe I put on the record that Mr. Buonaguro is  
27 ill. He does support the OPG and he is in substantial  
28 agreement with the OPG's position on the jurisdiction of

1 the Board and the requested relief, and he asks that I  
2 bring that to your attention at this point in the hearing.

3 MR. KAISER: Thank you.

4 We will come back in 15 minutes.

5 --- Recess taken at 11:20 a.m.

6 --- On resuming at 11:40 a.m.

7 MR. KAISER: Please be seated. Mr. Rodger, did you  
8 have submissions on this point?

9 MR. PENNY: Mr. Chairman perhaps in the interests of  
10 fairness, since Ms. Campbell raised it, I said I would  
11 leave Mr. Warren's submission, but given that he supports  
12 our position maybe people should know it, if they don't  
13 already. With your leave, I might just read that portion  
14 of his submission that deals with the first issue.

15 What Mr. Warren said on the first issue is:

16 "I have said in my written submission that I  
17 believe that the OEB has the jurisdiction to make  
18 an interim order including an interim order  
19 increasing the payment amount. I have reviewed  
20 your," meaning my, "written argument and would,  
21 if I were present, say I agree with the analysis  
22 in it."

23 Then he has something on the second issue too which I  
24 will perhaps read later.

25 MR. KAISER: Thank you. Mr. Rodger.

26 **SUBMISSIONS BY MR. RODGER:**

27 MR. RODGER: Yes, thank you Mr. Chairman. AMPCO would  
28 support the submissions of Mr. Faye and I will deal with

1 the bulk of those issues in the next phase of this  
2 discussion, phase 2. But I would just like to make one  
3 comment and observation on the "first order" discussion  
4 that occurred before the break, the somewhat tortured  
5 debate which seems to have revolved around the issue when  
6 an order of this Board is not an order of the Board. And  
7 the old saying, If it walks like a duck and squawks like a  
8 duck, it is probably a duck.

9 But this concept that Mr. Stephenson raised, the  
10 three-stage process, that is certainly a new concept to  
11 AMPCO. I think you said, Mr. Chairman, that it might be  
12 helpful to look to some of the policy context of this whole  
13 debate that might be of assistance here.

14 AMPCO's understanding is quite different.

15 In AMPCO's view, the pact that was struck which  
16 involves consumers was that industrial consumers and other  
17 consumers are ultimately going to pay for all of this.  
18 That we have relied on the quantum of payments, prescribed  
19 payments, set by the province up until the time the Board  
20 makes an order changing those payments, changing the  
21 amounts that AMPCO members have to pay.

22 The OEB would only do this if the applicant had met  
23 certain tests. And that will be the focus of my  
24 submissions, but that is the plain understanding of what is  
25 happening here: That they would only pay the prescribed  
26 amount until the Board changes it and the Board would only  
27 change it if it heard certain evidence and made certain  
28 findings.



1           With that I will leave the balance of my submissions  
2 until we get to the second issue.

3           Those are my comments, sir.

4           MR. KAISER: Thank you. Mr. DeVellis.

5           **SUBMISSIONS BY MR. DEVELLIS:**

6           MR. DeVELLIS: Thank you, Mr. Chairman.

7           SEC also believes that the Board does not have  
8 jurisdiction to issue payment amounts on an interim basis,  
9 and we say that because we believe the legislation is clear  
10 that the prescribed payment amounts must stay in place  
11 until the Board's first order.

12           With that, I think I will jump to the discussion that  
13 we had before the break with respect to the meaning of  
14 order of the Board then in effect in section 78.1(2)(b) of  
15 the act.

16           I think if you look at that section, it is clearly --  
17 that order of the Board then in effect is clearly only  
18 meant to apply after the effective date of the first order.  
19 I understood Mr. Penny's and I guess Mr. Stephenson's reply  
20 to that to be: Well, the interim order, the effective date  
21 of the interim order would then change on the basis of the  
22 Board's final determination of the final order. So in that  
23 way there would be no conflict with the section. But in  
24 the interim period it is the interim order that takes  
25 effect. And according to the act, that can't take place  
26 until there is a first order.

27           So I mean I just don't see how an interim order cannot  
28 be a first order. I think it is tortured reading of the

1 act to suggest otherwise.

2 Because an interim order would be the first order is  
3 precisely why we say the Board has no jurisdiction to set  
4 rates on an interim basis. The Statute provides a scheme  
5 for how the first order is to be determined and that does  
6 not allow rates to be set on an interim basis.

7 That is, there is a procedure in the Statute and in  
8 the regulations which are incorporated into the Statute by  
9 reference, and that procedure does not allow, in our view,  
10 for rates to be set on an interim basis.

11 Mr. Penny said this morning that, there was a conflict  
12 between the statute and regulations that the Statute, he  
13 was referring to section 21(7), prevails. But here the  
14 statute incorporates by reference the regulation. And the  
15 statutory provisions and the regulation taken as a whole  
16 provide a comprehensive procedure for how the Board is to  
17 go about setting a first order, and that is incompatible,  
18 in our view, with the Board setting rates on an interim  
19 basis.

20 Now, in their submissions at paragraph 10, OPG  
21 suggests that interim payments would not prejudice any  
22 party in the proceeding since many of the increases OPG is  
23 seeking are effectively required by the regulations. Well,  
24 OPG can't have it both ways. It cannot suggest on the one  
25 hand that the Board's jurisdiction is circumscribed, in any  
26 event, so it is okay to make rates interim, but on the  
27 other hand the Board retains its broad jurisdiction under  
28 section 21(7) to issue rates on an interim basis.

1           OPG also suggests at paragraph 46 of its submissions  
2   that it is a reasonable interpretation of section 6(1) of  
3   the regulations to say that the discretion to determine the  
4   form and methodology used to set payment amounts could  
5   involve a two-stage process under which an initial interim  
6   order is made, followed later by a following order.

7           A more reasonable interpretation, in SEC's submission,  
8   is that the Lieutenant Governor in Council expected at the  
9   time that this regulation came into force in 2005, that  
10   there would be plenty of time to have a final rate order in  
11   place by April 1st, 2008. Now, that hasn't happened; and  
12   OPG has submissions as to why that hasn't happened. But  
13   that doesn't mean we can start to contort the clear  
14   intention of the legislature and the Lieutenant Governor in  
15   Council.

16          If the Lieutenant Governor in Council wanted to make  
17   provision for a two-stage process in setting payment  
18   amounts, it would have created one explicitly. Instead,  
19   what we have is a legislative and regulatory scheme that  
20   says: Payment amounts are prescribed payments until the  
21   Board's first order. And the Board's first order must  
22   include a consideration of the factors set out in the  
23   regulations. And that consideration cannot be made on an  
24   interim basis. It has to be made after consideration of  
25   the evidence.

26          Now, finally on this point. Much has been made of the  
27   use of the term "effective date" in section 78.1 of the  
28   act, and the suggestion has been made that the term

1 "effective date" suggests that the Board's first order can  
2 be effective on an earlier date on which the order is made.

3 Again, in SEC's submission, if the legislature had  
4 intended that section to authorize the Board to issue a  
5 rate order to be applied retroactively, it would have done  
6 so explicitly, and I say that given the nature -- the  
7 contentious nature of retroactive rates in Ontario.

8 But in any event, if the Board believes that the use  
9 of the term "effective date" gives it the ability to make  
10 the order effective on an earlier date on which the order  
11 is made, then it would mean that the legislature has given  
12 the Board the statutory authority to make its rate order  
13 effective on a date that is earlier than the date of the  
14 order. In other words, the Board would not require -- you  
15 wouldn't be required to make rates interim because that  
16 section of the act would have given you the power to make  
17 rates retroactive to an earlier date.

18 We believe that is the -- if the Board believes it has  
19 the jurisdiction to set rates retroactively, that is the  
20 proper way to do it. In other words, make a determination  
21 on the effective date of the order after the conclusion of  
22 the hearing, after the evidence is heard.

23 Subject to any questions, those are our submissions on  
24 those issues.

25 MR. KAISER: Thank you, Mr. DeVellis. Ms. Campbell?

26 MS. CAMPBELL: Nothing, thank you.

27 MR. KAISER: All right. Any reply, Mr. Penny?

28 MR. PENNY: Just very briefly on perhaps one or two

1 points.

2 **SUBMISSIONS BY MR. PENNY:**

3 MR. PENNY: The main point, I guess, coming from Mr.  
4 Faye and Mr. Rodger, their claim that OPG is somehow  
5 arguing that an order isn't an order. I guess this is the  
6 illustration of the adage that if you shoot a straw man,  
7 then you miss the target, and that is very much the case in  
8 my submission here.

9 OPG is not arguing and does not submit that an interim  
10 order is not an order. The issue is whether -- we say it  
11 is an order, and our whole submission is that it is an  
12 order then in effect, which is why it is sufficient for the  
13 needs of the IESO to make different payment amounts.

14 The question is whether, within the meaning of the  
15 legislative scheme, it is the "first order", and that is of  
16 course what all of the submissions are about, and that's  
17 what my exchange with Mr. Rupert and Ms. Chaplin was about.

18 And of course to reiterate, we say that the interim  
19 order is either not the first order at all, because the  
20 legislative scheme makes it clear that first order means  
21 the first order setting just and reasonable payment  
22 amounts, or, if it is, that it is only the beginning of the  
23 process and not the end.

24 But it is a technical term used in section 78.1, which  
25 requires interpretation.

26 I think I would only otherwise say, with respect to a  
27 submission of Mr. DeVellis's, that he said the question is  
28 -- or he made the submission that the payment amounts are

1 prescribed by the regulation until the Board makes its  
2 first order, and that is, in my submission, plainly not  
3 what 78.1 says.

4 It says that it is -- that the payment amounts are  
5 prescribed by regulation until the later of March 31st or  
6 the effective date of the Board's first order. And, as we  
7 discussed with the Board earlier, the effective date  
8 clearly contemplates it being a different date than the  
9 actual date of the first order.

10 But those are -- so those are the only submissions I  
11 have -- oh. This issue of financial hardship arose. I  
12 guess I should speak to that, although it is probably more  
13 appropriately dealt with in the submissions we are about to  
14 make.

15 But it is my submission that -- Mr. Faye said, Well,  
16 OPG's relying on financial hardship, and then he said but  
17 they have no evidence to support it. That is of course  
18 completely wrong.

19 We are not relying on financial hardship. Mr. Rupert,  
20 you asked whether that was the only circumstance under  
21 which interim relief could be made.

22 We say, no, it's not. It is clearly one. It is one  
23 condition or circumstance under which interim relief may be  
24 made, but it is not exclusive and there are others. And I  
25 will make those submissions shortly.

26 The only other point I wanted to make about that is  
27 that that clearly is only -- even that issue is clearly  
28 only relevant to the question of an increase. The mere

1 making of the payment amounts interim, of course, wouldn't  
2 require any demonstration of any hardship or even any harm,  
3 for that matter.

4 It is -- as I said earlier to Mr. Kaiser, it is an  
5 issue of preserving options, not deciding anything at this  
6 stage. So those are my submissions in reply.

7 MR. KAISER: Thank you. Are you ready to proceed with  
8 the second issue?

9 MR. PENNY: I am, absolutely, Mr. Chairman. Thank  
10 you.

11 So the questions now are: Assuming the OEB could  
12 issue an order making payment amounts interim or providing  
13 for an interim increase, should it do so?

14 On the first issue, whether to make current payment  
15 amounts interim, there is, in my submission, no credible  
16 argument against doing so.

17 First, the amount of the current payment amounts are  
18 not changed under that scenario, so there is no impact on  
19 customers at all, pending the resolution of the hearing.

20 Second, making OPG's payment amounts interim is  
21 completely without prejudice to everyone, because -- and  
22 that's because OPG is not asking the OEB to decide now  
23 whether any ultimate increase that may be granted in  
24 payment amounts should, necessarily, have full  
25 retrospective effect back to April 1, 2008. As I said in  
26 my submissions earlier, that will be up to the OEB, in  
27 light of the evidence and submissions made at the hearing.

28 But it preserves -- it merely preserves that option.

1 So all OPG is seeking at this stage is the opportunity or  
2 ability to do so. Parties who wish to argue that recovery  
3 of any increase should not be retrospective to April 1,  
4 2008 or who want to argue for some other date, or no  
5 retrospective aspect, will be at full liberty to do so in  
6 the hearing.

7 Some intervenors, such as AMPCO, have, as I understand  
8 their written submissions, submitted, Well, OPG shouldn't  
9 be protected against its own delays, and therefore no  
10 interim order should be made at all.

11 In my submission, the central flaw in that position is  
12 that it relies upon a finding of fact by the OEB which has  
13 not been made at this stage and could not be made at this  
14 stage, and that is that there has been some wrongdoing on  
15 OPG's part that has resulted in the application not having  
16 been resolved well in advance of April 1, 2008.

17 And that is simply -- there's simply no evidence of  
18 that. In fact, as you know from reading my written  
19 submissions, it is very much OPG's position that it is not  
20 responsible for any material delay in the bringing of its  
21 application. But I think the real point -- again, I  
22 emphasize that is not necessary to decide that issue now.

23 The real point I think is summarized in paragraph 96  
24 of my written argument, where we say:

25 "OPG submits that the length of time required to  
26 resolve the methodology, the form of the filing  
27 and to develop evidence, conduct stakeholder  
28 sessions, publish notice and conduct a hearing



1           with appropriate due process, all in the context  
2           of a large, complex and previously unregulated  
3           undertaking where the company, the regulator and  
4           the stakeholders are dealing with entirely new  
5           legislation, have all created scheduling and  
6           other timing pressures not of OPG's making."

7           In any event, and I guess this is really my point, the  
8           issue of whether and to what extent retrospective  
9           adjustments should be made need not and should not be  
10          decided now, but should be left to the hearing and to final  
11          argument.

12          At that time, AMPCO and others can say whatever they  
13          want about the extent to which OPG should recover any  
14          retrospective increases.

15          On the second question of interim increases, OPG's  
16          submission is grounded not on direct financial harm to  
17          itself, but on the basis of mitigating the risk of large  
18          accumulations of -- and I emphasize risk, because of course  
19          the outcome of the case is not a foregone conclusion, but  
20          it is mitigating the risk of large accumulations of  
21          retroactive charges to customers during the time it takes  
22          to decide and implement the case.

23          The evidence -- I have made brief reference to this in  
24          our written argument, but the evidence is that based on the  
25          revenue deficiency being sought, that accumulates at the  
26          rate of some 39 million a month. So it is that, the risk  
27          of retrospective increases coming -- collecting or  
28          accumulating in the time it takes to finalize and implement

1 the decision that we are seeking to mitigate.

2 Clearly, clearly, any interim increase, by virtue of  
3 being interim, as I said earlier, is itself subject to  
4 retrospective adjustment, up or down, once the Energy Board  
5 finally decides the case.

6 Now, the Energy Probe written submission argues that  
7 an increase would somehow be an indication of bias or  
8 prejudgment. That is clearly wrong as a matter of law, in  
9 my submission, and that's because of the nature and  
10 characteristics of interim orders. They are, by  
11 definition, not prejudgments on the merits. That was the  
12 passage from the Supreme Court of Canada decision in Bell  
13 that I read, not prejudgments on the merits.

14 The Board Staff submission says OPG has a burden of  
15 establishing that it will be harmed. I respectfully  
16 disagree. Financial harm to OPG, as I said a moment ago,  
17 is only one reason for granting an interim increase, but it  
18 is not the only one.

19 The OEB could well conclude that it is just and  
20 reasonable to mitigate the risk of the accumulated  
21 increases due to the time required to conclude the hearing,  
22 and that, too, would be a sufficient harm, if you will, for  
23 an interim increase.

24 That type of harm was presumably the basis for interim  
25 increases granted to Union Gas recently, where increases  
26 related to rates that had already been approved in prior  
27 proceedings or to increases that were granted in recent  
28 decisions of the Board, which are in my brief and referred

1 to in my written argument, for both the OPA and the IESO  
2 fees.

3 So the interim increases are sought, in other words,  
4 not because there will necessarily be an increase, but  
5 because there is a plausible risk that there will be an  
6 increase.

7 On this question of evidentiary burden, of course,  
8 albeit the evidence of course is not tested at this point,  
9 but the four volumes of evidence that OPG has filed are in  
10 support of a net of tax loss mitigation, \$760 million  
11 revenue deficiency for the test period. So there is prima  
12 facie evidence of the need for an increase. I totally  
13 accept the fact that that evidence has not been tested but  
14 we are at the early stage. It is an application for  
15 interim only, and there is no prejudice to anyone because  
16 of the nature of interim orders.

17 I wanted to emphasize the fact - and this came up in a  
18 slightly different context in our earlier exchange - that  
19 unlike the typical case where there has already been a  
20 finding by the OEB that the current rate was just and  
21 reasonable, there can be no such presumption in this case.

22 And that is so for several reasons. First, the  
23 current payment amounts were determined by the government.  
24 And that was, we understand it, with input from the  
25 Ministries of Finance and Energy, but they were not  
26 determined under a statutory regime that required them to  
27 be just and reasonable.

28 They were determined in accordance with whatever

1 criteria the Lieutenant Governor in Council chose to adopt.  
2 So it is sort of in effect a black box of kinds.

3 Second, they were not determined, and I suppose this  
4 is just an expansion on the point I just made -- they were  
5 not determined through a transparent hearing process, but  
6 by regulation.

7 Third, to the extent that current payment amounts  
8 involved any data provided by OPG -- and as the evidence  
9 says, the OPG did provide evidence or information, I should  
10 say, to the government -- but it was 2004 data. So it is  
11 now long out of date.

12 So I say, with respect, this case is different from  
13 most, because there is no basis for a presumption that  
14 current payment amounts are just and reasonable.

15 On the increase itself, OPG is not proposing an  
16 interim increase based on 100 percent of its forecast  
17 revenue deficiency. OPG is suggesting using roughly 50  
18 percent of its forecast revenue deficiency as the basis for  
19 an interim rate increase pending the final order.

20 Now, we accept 50 percent is of, course, arbitrary  
21 and, in that connection, we also looked at several of the  
22 key drivers of the deficiency and analyzed what the  
23 financial impact was that some of those issues might have.  
24 Of course, as you know from the evidence, the two largest  
25 drivers of the deficiency are ROE and nuclear waste  
26 liabilities. So let me just touch briefly on those.

27 With respect to ROE, OPG has filed evidence supporting  
28 a 10.5 percent return on a 57.5 percent equity structure.

1 For purposes, though, of assessing the proposed interim  
2 increase based on 50 percent of the revenue deficiency, we  
3 said, well, let's assume we got, say, what Hydro One got.  
4 That's only 8.35 percent on 40 percent equity.

5 Now, we think it is highly unlikely that it would ever  
6 be that low for OPG on either front, because of OPG's  
7 business being in nuclear generation largely, but if we  
8 could assume that for interim purposes, that generates a  
9 \$244 -- if you assumed an 8.35 percent ROE on a 40 percent  
10 equity base, that would generate a net of tax mitigation  
11 deficiency from the current payment amounts of \$244  
12 million, which is, as it turns out, roughly half of what  
13 OPG is actually seeking in the application.

14 Then if we then take just the deferral account portion  
15 of the nuclear liabilities -- in other words, only the  
16 historic amounts accumulated to date, not the full impact  
17 over the test period, that generates \$85 million of revenue  
18 deficiency. Of course, the nuclear liabilities are matters  
19 in respect of which the regulations ensure recovery. Then  
20 we looked at some other costs in respect of which the  
21 regulations ensure recovery, and those total another \$67.7  
22 million.

23 You can see all of this in a table at page 23 of our  
24 argument, paragraph 108 where we -- where the prior  
25 discussion in the written argument goes through each of  
26 these but then we summarize it here.

27 So the accumulated total of those three elements, if  
28 you will, is \$397 million. That's using the Hydro One cost

1 of capital, the nuclear liability deferral accounts only,  
2 and then the, several of the other specified deferral and  
3 variance accounts which, in respect of which recovery is  
4 required. That gets you a total of \$397 million of revenue  
5 deficiency and that is, of course, in excess of the amount  
6 that we are proposing at the 50 percent level.

7 So that is just another way, I guess, you could slice  
8 and dice it. Again, I emphasize, we are not making any  
9 assumptions here about what may or may not happen in the  
10 future. We are simply saying that there is at least a  
11 prima facie case for a revenue deficiency and therefore an  
12 increase in payment amounts. And it is purely without  
13 prejudice to anyone at the end of the day, purely to  
14 mitigate the potential risk of accumulations of significant  
15 amounts in the interim that we ask for the increase.

16 I would say that Staff have raised a potential concern  
17 about the IESO's ability to deal with interim rates, and to  
18 effect retrospective adjustments once final rates are  
19 determined. The IESO has put in a brief written submission  
20 which, in my submission, ends that debate. The IESO has  
21 said it can and will implement whatever the OEB determines  
22 in this connection.

23 So based -- it is for those reasons, based on that  
24 outline and of course our full written submission on the  
25 issue, that OPG respectfully requests from the Board that  
26 there be an interim order made, making OPG payment amounts  
27 interim effective April 1, 2008. And coming back to our  
28 earlier discussion, specifying in that order that the

1 effective date of the order is April 1, 2008 for the  
2 comfort of the IESO.

3 Secondly, that the Board grant an interim increase,  
4 again, on a fully without prejudice basis to everyone at  
5 the end of the day, for increases to \$35.35 per megawatt  
6 hour for hydroelectric production and \$53 per megawatt hour  
7 for nuclear production. Those are my submissions, Mr.  
8 Chairman.

9 If you bear with me for one second, I will fulfil my  
10 obligations to Mr. Warren and tell you what Mr. Warren  
11 asked me to say.

12 So on the second question, Mr. Warren says:

13 "My client, CCC, is prepared to support an  
14 interim order including one increasing the  
15 payment amounts for two reasons. First, and  
16 foremost, residential customers do not like and  
17 in some cases find it difficult to pay  
18 retrospective increases in rates. Such  
19 retrospective increases would be one of the  
20 deleterious consequences that interim orders are  
21 employed to avoid. We think it reasonable given  
22 the lapse of time since the OPG payments were  
23 fixed, to believe that some increase is likely.  
24 We say that without prejudice to the arguments we  
25 may make once we have reviewed the evidence in  
26 detail and heard the testimony of OPG's  
27 witnesses, but if some increase is likely, then  
28 it is in the interests of residential consumers

1 to deal with that increase sooner rather than  
2 later and in an orderly way. The second reason  
3 is that the merits of OPG's application are not  
4 resolved by the making of an interim order.  
5 There is no substantive prejudice to the making  
6 of an interim order. If it avoids an adverse  
7 effect on residential customers then there is a  
8 benefit."

9 That was all that Mr. Warren had to say. Thank you  
10 very much, sir.

11 MR. KAISER: Thank you. Mr. Rattray, can I just ask  
12 you a question. Mr. Penny referred to your position on  
13 this question of implementing interim increases.

14 Did he correctly state your position?

15 **SUBMISSIONS BY MR. RATTRAY:**

16 MR. RATTRAY: Yes, he did, Mr. Chairman. And it is  
17 set out in the brief written submissions that we provided  
18 to the Board.

19 MR. KAISER: Thank you.

20 All right. Who wants to go next? I suppose we should  
21 have knows in support. We have had Mr. Warren's position.  
22 Who else is in support? Mr. Stephenson.

23 **SUBMISSIONS BY MR. STEPHENSON:**

24 MR. STEPHENSON: Thank you, Mr. Chairman.

25 The PWU supports both propositions advanced by Mr.  
26 Penny on behalf of OPG, namely that there should be an  
27 order for interim rates effective April 1, 2008, and  
28 secondly, that there should be some increase reflected in



1 that -- in those interim rates.

2 Let me deal with the first one first.

3 In my submission, there is a strong policy reason in  
4 favour of making an order for interim rates, in addition to  
5 the -- simply the keeping the options open, no prejudice  
6 position that Mr. Penny has advanced and a position which I  
7 support entirely.

8 This is a case where obviously you would be taking  
9 nothing off the table by making the order, whereas the  
10 persons opposing the making of rates interim would be  
11 asking you, in effect, to prejudge this issue, the very  
12 thing that, in my submission, you should not do.

13 Making an interim rate order allows you -- all options  
14 are on the table. All submissions will be heard at the  
15 right time; namely, at the time you have the full record at  
16 the end of the case.

17 But in addition to all of that, in my submission,  
18 there is a clear government policy that customers in  
19 Ontario should pay the true cost of power. One of the --  
20 the prescribed payment amounts may or may not reflect the  
21 true cost of power.

22 As Mr. Penny said, I think quite accurately, those  
23 payment levels were set in a black box and they were  
24 considered by the government to be appropriate payment  
25 levels, by definition; but whether they were considered by  
26 the government to reflect the true cost of power, or not,  
27 we have no idea, because they were set politically. I  
28 don't mean politically in any pejorative sense, but I mean

1 merely in the sense that it was a political decision to set  
2 payment levels at whatever they were set at. They were  
3 considered to be appropriate.

4 Now, by giving the Board the jurisdiction, as we have  
5 indicated, in a staged fashion to set these payment levels,  
6 in my submission, is entirely consistent with the notion  
7 that people in Ontario should face the true cost of power;  
8 that is, we are going to set rates on a just and reasonable  
9 basis that does that.

10 In my submission, doing that sooner rather than later  
11 is entirely consistent with the government policy. So  
12 enabling yourself - that is the Board - to have the option  
13 of making those cost-based rates come into effect at the  
14 earliest possible date - namely, April 1, 2008 - in my  
15 submission, is entirely consistent with government policy,  
16 that you should be -- people in Ontario should be facing  
17 the true cost of power.

18 That's point number 1.

19 Point number 2 is - and I echo Mr. Penny in this  
20 regard, as well - there can be no presumption that, unlike  
21 other cases where we are adjusting rates from a prior  
22 Board-determined rate, that the current rates are just and  
23 reasonable rates.

24 That is the very issue that the Board has already  
25 determined back in the first stage of this proceeding, when  
26 it issued its report regarding the regulatory methodology,  
27 because you may recollect in the Board's report, at the  
28 time of the Board's report, there were certain groups,

1 Board Staff, in particular, that advocated using the  
2 existing payment levels as the platform for the  
3 introduction of an incentive ratemaking scheme for the  
4 future.

5 The Board specifically rejected that approach, because  
6 it said that however the rates were set, they were not set  
7 in a transparent fashion. So we don't know -- "we", the  
8 Board, don't know and, we, the Board, cannot satisfy the  
9 public that those existing levels are, in fact, just and  
10 reasonable.

11 So the Board specifically decided that it would  
12 undertake the process that it is now engaged in, which is a  
13 limited cost of service review, in order to discharge its  
14 obligation to transparently demonstrate that the payment  
15 levels are set in a fashion which is just and reasonable.

16 So the key point, I say, is you can take no  
17 presumption that the current payment levels (a) were ever  
18 just and reasonable in the manner that you would determine  
19 just and reasonableness if it were determined by you,  
20 number 1; and, number 2, you certainly cannot conclude that  
21 the current -- that the payment levels, if they were ever  
22 just and reasonable, are presently just and reasonable.

23 So, in my submission, there is a very, very strong  
24 policy reason why you can anticipate that the payment  
25 levels are going to -- even if the absolute number never  
26 changed at all, it seems to me you would be doing a service  
27 to the public by concluding, whatever the payment levels  
28 are, they have been reviewed by you and they have been

1 transparently determined by you to be just and reasonable,  
2 and those will be the rates that the public will pay,  
3 consumers will pay, and they will pay them at the earliest  
4 possible date.

5 So, in my submission, it is entirely consistent both  
6 with government policy and with the Board's policy in  
7 favour of setting just and reasonable rates on a  
8 transparent basis and to get those in place as soon as  
9 possible.

10 Those are my submissions.

11 MR. RUPERT: Mr. Stephenson, and maybe this is to Mr.  
12 Penny, as well, before we move on to the people who oppose  
13 this, but this question of just and reasonable I wanted to  
14 ask about.

15 It strikes me that any time we get an application from  
16 the Board -- from an entity we regulate that is asking for  
17 a rate increase, that one has to assume the applicant at  
18 least believes the current rates are not just and  
19 reasonable; otherwise, it wouldn't have come in asking for  
20 a big increase.

21 They may have been just and reasonable when they were  
22 set, but the applicant is coming in and saying, I need new  
23 rates, I need higher rates.

24 I am not sure why we should treat the existing rates  
25 for OPG any different than any applicant who comes in and  
26 says I want new rates. You seem to be making a distinction  
27 between these rates and rates that an applicant in other  
28 situations may want us to increase.

1           The fact that they may or may not have been set on a  
2   just and reasonable basis in the past doesn't say anything  
3   about whether they're currently just and reasonable. That  
4   is true of Board rates, as well.

5           MR. PENNY: May I respond to that, and then perhaps  
6   Mr. Stephenson could, as well, Mr. Rupert?

7           Our position, the difference -- the core of the  
8   difference, in my submission, is that in the first example,  
9   where there is a history of regulation, the Board did  
10   determine at a point in time, through a transparent  
11   process, with the benefit of input from customers and  
12   others, that the rate -- that the amount was just and  
13   reasonable. And it is a presumption, in my submission,  
14   that that rate remains just and reasonable until it is  
15   changed.

16          And that is why utilities come and ask for a change,  
17   and that's why often intervenors say that you ought not to  
18   get one, because you're earning your regulated return, on  
19   whatever.

20          The difference here is that there was no transparent  
21   process and there was no statutory requirement that the  
22   amounts be just and reasonable. As Mr. Stephenson says,  
23   they were pegged for political - not in the nefarious sense  
24   of the word, but -- we don't know how they were pegged, but  
25   they were pegged for political reasons, on the basis of  
26   whatever criteria the government thought were appropriate.

27          We don't know what those were. It involved some input  
28   from OPG, as the evidence shows, but we don't know how that

1 information was used, and the net amount was not the same  
2 at the end. It was similar, but not the same.

3 So the difference, in my submission, is the absence of  
4 the transparent process, the absence of the statutory  
5 requirement that some independent body have determined that  
6 the rate was just and reasonable. So that's why we say, at  
7 least, that there can be no presumption that the current  
8 rate is just and reasonable.

9 MR. RUPERT: But, equally, you are not making the  
10 presumption that the current rates are demonstrably unjust  
11 and unreasonable, that the government intentionally set  
12 unjust and unreasonable rates?

13 MR. PENNY: No, we're not saying that. We are saying  
14 they are today demonstrably unjust and unreasonable,  
15 because we have a \$760 million revenue deficiency, but that  
16 is of course just our position. I appreciate others may  
17 disagree with that.

18 MR. RUPERT: The other question is on the basis -- as  
19 I hear you, the sole basis for the interim rate increase  
20 that you are seeking seems to be to smooth the rate impact  
21 for consumers, because you are so convinced there ought to  
22 be and will be a rate increase, that you might as well  
23 start now rather than build it up to later.

24 Is that the only sort of basis OPG is coming forward  
25 with?

26 MR. PENNY: Well, if what you are asking is, Are we --  
27 is this a hardship case? Are we claiming that we are on  
28 the rocks if we don't get this increase? The answer is

1 "no".

2 I mean this isn't -- that's why I said earlier about  
3 the Bell case. We are not relying on financial distress.

4 Our proposition is that, given the history, given the  
5 amount of time that has taken place since those rates were  
6 fixed, that there is a prima facie indication of a  
7 deficiency, and that it is better for -- and for example,  
8 Mr. Warren agrees with this, as a representative of  
9 consumers, as does Mr. Buonaguro -- better that if there is  
10 going to be a \$100 charge at the end of the day, say, to  
11 take an example, that rather than getting hit with that  
12 \$100 all at once, that we take it in little pieces. We're  
13 not saying we take it all, we're saying let's get \$50 of it  
14 and let's spread it over the next six or seven months or  
15 whatever the time is.

16 MR. RUPERT: I understand your position. I understand  
17 your view as to what may be the appropriate outcome for  
18 this case. But you said earlier in your argument that the  
19 Board authorizing increased payments on an interim ways  
20 basis would be taking no position as to the merits of your  
21 case.

22 It strikes me that if there is no sense of what the  
23 probability of an increase or decrease is, why would one go  
24 for an increase? I understand your position, where you are  
25 coming from. But my question is, you don't believe that  
26 the Board to approve an increase would be taken as clear  
27 evidence that the Board is also, before hearing the facts,  
28 prejudged the fact there will be an increase?

1           MR. PENNY: It is very clear, in my submission, on  
2 both the law and in the circumstances, that the Board would  
3 not be doing that, because you have the absolute ability to  
4 go back and change that after the fact. So it is not a  
5 question of prejudging. The way I put it, I think, is the  
6 accurate would I to put it, which is there is a risk of  
7 large accumulations of charge. We think it is a good risk,  
8 because we think we have a good case. Others may say it is  
9 not, but you can't say there is no risk because we have  
10 prima facie evidence of a \$760 million revenue deficiency.

11           So it is to mitigate the risk of the accumulation of  
12 large, after-the-fact charges that we seek -- that we see  
13 that an interim increase is warranted.

14           MR. RUPERT: I understand. But I'm saying if one had  
15 a view there is no sense of the probabilities of increase,  
16 decrease or keep the rates the same, that it would be --  
17 I'm not sure if I understand the basis for starting a rate-  
18 smoothing exercise if one is taking absolutely no position  
19 as to the final outcome, why rate smoothing would be  
20 considered appropriate since you are not making an --

21           MR. PENNY: Then I will probably just be repeating  
22 myself but let me try one more time. You are not saying  
23 whether there will or won't be an increase at the end of  
24 the day. You are recognizing there is prima facie evidence  
25 and that there is a possibility that there may be an  
26 increase at the end of the day.

27           Whether it needs to be -- you spoke about  
28 probabilities. I mean I guess maybe you could get into



1 that, although my submission would be that on the law, that  
2 it's not necessary to do that.

3 I do agree that if you -- that if, for example, we  
4 weren't seeking an increase, then there would of course be  
5 no risk and therefore there would be no prima facie basis  
6 for an increase at all. I agree with that. But we say  
7 that there is a prima facie basis. You are not prejudging  
8 it. You are just recognizing there is a prima facie case.

9 MR. RUPERT: I asked the question because when you  
10 take financial hardship or emergency situation off the  
11 table as the basis and say, as I hear it, the sole basis is  
12 wanting to be kind to consumers by phasing in a rate  
13 increase, that doesn't have the same sort of even-  
14 handedness. It assumes there will be a rate increase;  
15 therefore we're being kind to people.

16 If, in fact, there was a rate decrease, one won't  
17 start decreasing to rate smooth, presumably.

18 MR. PENNY: I agree with that.

19 MR. RUPERT: You only get into rate smoothing when you  
20 bought into the increase there is a rate increase.

21 MR. PENNY: This is déjà vu, as Mr. Kaiser and Ms.  
22 Chaplin will know, but I can't disagree with that, sir.

23 MS. CAMPBELL: Mr. Chair, could I ask just a  
24 clarification of something Mr. Penny said.

25 I am looking at paragraph 46 of your argument, sir.

26 You have spent a fair amount of time talking about the  
27 mitigation of risk, et cetera. But there is also -- the  
28 sentence says:

1            "It is for the OEB to decide whether it is just  
2            and reasonable to provide relief against the  
3            deleterious effects of delays occasioned by the  
4            hearing process, or to mitigate the risk of the  
5            accumulation of significant retroactive charges."

6            Are you abandoning the deleterious effects of delays  
7            occasioned by the hearing process? Is it simply the  
8            mitigation of risk of the accumulation of the significant  
9            retroactive charges? It is simply you haven't addressed  
10          it. You haven't said anything about that, so I thought I  
11          would raise that for clarification.

12          MR. PENNY: Novel to be fielding questions from Board  
13          Staff, but I am happy to answer it, Mr. Chairman.

14          MS. CAMPBELL: I am just seeking clarification.

15          MR. PENNY: I think the issues apply to different  
16          aspects. I am covering both the interim and the increase  
17          here.

18          So with respect to just making the rates interim,  
19          forget the increase, just the issue, the first issue of an  
20          order making the rates interim, that is to avoid the  
21          deleterious effects of systemic delay.

22          On the question of increase, that's mitigating the  
23          risk of the accumulation of significant retroactive  
24          charges. So I have just dealt with both here in a kind of  
25          summary fashion.

26          MS. CAMPBELL: Thank you for the clarification, Mr.  
27          Penny.

28          MR. STEPHENSON: Mr. Chairman, if I might, just on

1 this question. I am not here speaking to the issue so much  
2 of should there be an increase, and if so how much should  
3 the increase be. I am speaking to the issue of, at a  
4 minimum, should the Board declare rates interim effective  
5 April 1, 2008.

6 The point I wanted to make was the point that, in our  
7 view, there is a clear public interest and a board policy  
8 in favour of getting the rates onto a just and reasonable,  
9 transparently determined basis as soon as possible.

10 Making the current rates interim will give the Board  
11 the option of doing that and getting it happening whatever,  
12 six months earlier, or some period of time, give the Board  
13 that option.

14 It seems to me the merit of that view is demonstrated  
15 in a case where -- just imagine that after a -- assume the  
16 Board concluded, at the end of the case, that not only were  
17 the payments not going to be increased in the manner OPG  
18 wanted, but it concluded that the payment levels, the  
19 current payment levels were too high. If the Board hasn't  
20 made the interim order, the Board doesn't have the ability  
21 to then go back to reduce levels.

22 From my perspective, looking at it from the public  
23 interest and the customer's interests, isn't it in the  
24 public's interests to get these rates or these payment  
25 levels on to a transparently determined, just and  
26 reasonable basis, as soon as possible? If they were going  
27 down, you know what the answer is.

28 In my submission, the fact that they may be going up

1 doesn't lead you to a different conclusion. That's just  
2 the facts. And the facts lead you where they go. But it  
3 does demonstrate the point, it seems to me, that the public  
4 interest is served by getting these payment levels on to a  
5 transparently determined, just and reasonable basis, at the  
6 earliest possible moment and making the current rates  
7 interim or making the order for interim rates effective  
8 April 1 allows you that option. It doesn't conclusively  
9 determine you are going to go down that road, but it sure  
10 as heck gives you that option and I can't see any reason  
11 why you would want to take that off the table.

12 On the other issue, should there be an increase than  
13 what the amount is? I don't think I can add anything to  
14 what Mr. Penny has said.

15 MR. KAISER: Are you in support of his requested  
16 increase, though?

17 MR. STEPHENSON: We are. But we can't sit here and  
18 say to you -- add anything of any particular insight as to  
19 what the amount should be. We haven't delved into the  
20 facts enough.

21 What we say in our written submissions is that, viewed  
22 intuitively, it is hard to imagine, even -- that the ROE is  
23 going to ever be at 5 percent at the end of the case. That  
24 seems highly unlikely.

25 So on that issue alone, some increase would appear to  
26 be coming down the pike. And simply for the purpose of  
27 mitigation of impact, it makes sense. How much, we don't  
28 have any particular unique insight.

1 MR. KAISER: Thank you. Mr. Faye.

2 SUBMISSIONS BY MR. FAYE:

3 MR. FAYE: Thank you, Mr. Chair.

4 I would like to make a couple of comments on Mr.  
5 Penny's submissions. The first issue was that there is no  
6 impact to making current payments interim. And if the  
7 Board decides on the previous issue of whether or not that  
8 interim order constitutes a first order, if you decide it  
9 does not constitute a first order, can find some way of  
10 characterizing it as an order but not a first order, then  
11 we would have to agree there is no impact.

12 But if that is a first order, then a number of things  
13 in the regulation are triggered. And at this point, Energy  
14 Probe can't assess what the ultimate impact of those things  
15 that are triggered will be. We would submit that we would  
16 only be able to assess that as the evidence is tested  
17 throughout the hearing.

18 So our caution would be that if you come to the  
19 conclusion that the interim order is a first order for the  
20 purposes of 78.1, then you need to consider whether there  
21 is a lot of unforeseen things that might occur by  
22 triggering the provisions of the regulation.

23 The second comment I would like to make is Mr. Penny's  
24 characterization of our last statement in our written  
25 submissions as suggesting bias or prejudgment of the Board,  
26 and that certainly was not the intention.

27 Our intention there is related to our argument  
28 previously that interim relief is granted on the basis of

1 some relatively urgent situation.

2 And I will address Mr. Penny's alternate option for  
3 interim relief, but our position is there should be some  
4 urgent reason why you are going to do this, and, if you  
5 don't find any urgent reason, then you have to fall back on  
6 just and reasonable. And to get to just and reasonable,  
7 you have to consider some evidence.

8 So if you just make an interim order without an urgent  
9 reason and not -- and without considering enough evidence  
10 to conclude that they're just and reasonable, then the  
11 perception of intervenors and onlookers might be that there  
12 was no real foundation for the interim order.

13 That's what we meant by "anticipating and possibly  
14 colouring", colouring the perception of those looking at  
15 the final decision.

16 Mr. Penny has suggested that avoiding the accumulation  
17 of charges during the hearing period is a sound rationale  
18 for giving interim relief, and we suggest that that is a  
19 new category, that our understanding of why interim relief  
20 has been granted in the past is that it is related to  
21 financial hardship or some deleterious financial situation.

22 Just going to the enquiry of Ms. Campbell, that the  
23 words "deleterious financial situation" are mentioned in  
24 the applicant's submission --

25 MR. PENNY: I have to interject. That is flatly  
26 wrong. It doesn't say anything about deleterious financial  
27 condition. I would ask my friend to have his facts  
28 correct, please.

1 MR. FAYE: "It is for the OEB to decide whether it is  
2 just and reasonable to provide relief against the  
3 deleterious effects of delays."

4 All right. If there are other deleterious effects  
5 that are unrelated to financial situations, then we would  
6 like to hear what those are.

7 MR. KAISER: I think he said the delay was the reason  
8 that he was asking existing rates be declared interim. It  
9 didn't have anything to do with the increase. Is that  
10 right, Mr. Penny?

11 MR. PENNY: That's correct.

12 MR. FAYE: Sorry, I didn't catch that, Mr. Chair.

13 MR. KAISER: Mr. Penny cited the delays in this  
14 process as being one of the reasons why the existing rates  
15 should be declared interim. It didn't have anything to do  
16 with the request for an increase.

17 MR. FAYE: Would it not raise the question of what  
18 that deleterious effect is? Certainly there's been delays.  
19 We won't wouldn't dispute that, but in order for that to be  
20 a foundation for an interim order, surely there must be  
21 some deleterious effect? If those effects are not  
22 economic, I'm not certain what other effects there might be  
23 - operating effects, perhaps - but those haven't been  
24 pointed to.

25 MR. KAISER: One effect is the accumulating deficiency  
26 in the rate shock impact.

27 MR. FAYE: Yes, that is the argument that has been  
28 made, that we should try to avoid accumulation of charges

1 during the hearing period and that that is a good reason  
2 for interim relief. And that, to me, is an administrative  
3 convenience. There is no doubt it is convenient, but the  
4 Board has other options for making up any shortfall in  
5 revenue.

6 If the decision, for instance, is made as of September  
7 1st -- say there is a four-month period between April 1st  
8 and when the decision is made. There's lots of options for  
9 the Board to attach a rider to pick up the difference. You  
10 could even increase the rates by a little bit more than you  
11 might have to compensate for the fact that the test period  
12 is now a 17-month period rather than a 21-month period.

13 So for administrative convenience, there are other  
14 options available to the Board.

15 Our submission would be that the real reason for  
16 interim relief is some sort of deleterious financial  
17 effect, and looking at the kinds of effects that could  
18 occur --

19 MR. KAISER: Well, he has already agreed he is not  
20 relying on that.

21 MR. FAYE: I'm sorry?

22 MR. KAISER: The applicant is agreeing that they're  
23 not relying on deleterious financial effects, so what is  
24 the point of speculating on them? He is not relying on  
25 that. He is not claiming that.

26 MR. FAYE: All right. We will move on to the quantum  
27 being claimed here is 7 percent, half of the requested 14  
28 percent. And the justification is that most of this is



1 return on equity. Our submission would be that it is very  
2 premature to conclude that any particular return on equity  
3 is going to be greater than 5 percent. There must be some  
4 justification at the time that 5 percent was arrived at,  
5 and this Board might find that 5 percent is the appropriate  
6 return on equity for the company. That can only be arrived  
7 at by testing the evidence.

8       So as most of the increase that is going to make these  
9 accumulated charges roll up is attributable to the  
10 difference between ROE presently in the rates and the 10-  
11 1/2 percent being requested, we would suggest that that is  
12 predetermining the outcome that the Board will decide on.

13       One of the other claims is that the need to make  
14 prescribed contributions for nuclear liabilities is a good  
15 reason to give some interim relief. Energy Probe  
16 recognizes that the company is under some obligation to  
17 make contributions to that fund, but it can also be done  
18 from the date of the final decision by means of a rate  
19 rider.

20       One of the other submissions of Mr. Penny is that the  
21 cost to bring back Pickering A, that is cited at \$26.5  
22 million, and the costs associated with refurbishment or  
23 adding operating capacity, that's cited at \$32.3 million.  
24 And that the fact that during the hearing process they will  
25 not be recovering the amounts over the test period that  
26 would be attributable to recovery of those costs, that  
27 that's a good reason. But if we're talking about  
28 potentially a four-month period here, and if my

1 understanding is correct that these amounts are recoverable  
2 over the 21 month test period, we're really talking about 5  
3 percent of these not being recovered. That is four months  
4 on 21 months.

5 When you work out the math there, you are only talking  
6 about 1.3 million on the Pickering costs and 1.6 million on  
7 the refurbishment and additional operating capacity costs.  
8 Energy Probe would submit that those costs are not material  
9 and would not be difficult to recover by some other  
10 mechanism.

11 MS. CHAPLIN: Mr. Faye, I want to make sure I  
12 understand your position. I am interpreting it to be that  
13 if the Board were to not make the payments interim and were  
14 not to make any change, in its final order it could effect  
15 the recovery of a deficiency that arose beginning April 1,  
16 even though it didn't make the rates interim as of April 1.

17 MR. FAYE: Yes, that's our submission.

18 MS. CHAPLIN: So you would not perceive that to be  
19 retroactive ratemaking, as long as it was collected  
20 prospectively, even though it related to a period prior to  
21 the date of the Board's order?

22 MR. FAYE: No. I think it could be justified on the  
23 grounds that the applicant is looking for a lump sum of  
24 revenue recovery. And all the Board would be saying is,  
25 we're going to schedule that lump sum recovery over 18  
26 months.

27 If the Board agrees with the numbers that are  
28 submitted or comes up with whatever numbers it feels are

1 justified, it has the right to make that recoverable over  
2 18 months rather than 21 months, or 17 months; whatever the  
3 period it has going forward from the effective date is.

4 So I don't think that that falls into the basket of  
5 retroactive ratemaking. It simply saying we agree in is  
6 the amount of money that needs to be recovered and here is  
7 the period of time we will give you to recover it in.

8 MS. CHAPLIN: Thank you.

9 MR. KAISER: Sometimes in these cases when they talk  
10 about rate smoothing they come up with a device that  
11 spreads the increase over a longer period of time going  
12 forward. Is that limited in this case, in your view,  
13 because of the 21-month test period, or not?

14 MR. FAYE: No. I don't think it is limited. I think  
15 it presents complications. That if the Board, for  
16 instance, is -- settles on the 10-1/2 percent return on  
17 investment that the company wants and then decides that  
18 that would create too much hardship for rates, that would  
19 introduce rate shock, then there is the prospect of  
20 deferring some of it to future periods but it then becomes  
21 a matter that has to be dealt with in future periods and it  
22 is probably not advisable if it can be avoided.

23 But it is a way of arriving at a decision that draws  
24 some compromise between what the company wants, what is  
25 reasonable, and what customers are able to bear over the  
26 test period. It could be some of it thrown into a future  
27 test period to recover. Part of the reason I am delaying  
28 here is that a lot of what I had here relates to that

1 argument about urgent need. Since we are not going to  
2 pursue that further, I am just scanning to the end.

3 I think I have covered all of my points, Mr. Chair,  
4 subject to any questions.

5 MR. KAISER: Thank you, Mr. Faye. Mr. Rodger.

6 **SUBMISSIONS BY MR. RODGER:**

7 MR. RODGER: Thank you, Mr. Chair.

8 We agree with the submissions of Mr. Faye and I think  
9 I can summarize my submissions into a few points.

10 We oppose the granting of the interim relief that OPG  
11 seeks and would indicate, remind the Board that the onus is  
12 entirely on OPG to justify its claim for interim relief.  
13 There is no right that an applicant has to interim relief.  
14 There is no entitlement to interim relief.

15 We have heard a lot about the test. Frankly, I am a  
16 little surprised at the, some of the case law that OPG has  
17 put forward in support of its grounds, because they all  
18 have to do with financial distress, essentially, and now  
19 that has been taken off the table.

20 So we go to this point that OPG has asked you to look  
21 at to determine whether they met the test, this smoothing  
22 consumer rate impacts. And our view that this is not an  
23 appropriate case where you should grant interim relief when  
24 the fundamental driving issue of the increased revenues  
25 that they seek is on the question for ROE in this case.

26 That is because the Board cannot and should not ignore  
27 the history leading up to where we are today.

28 We fundamentally disagree with Mr. Stephenson, and you

1 will hear evidence from AMPCO during this case. We believe  
2 that 5 percent could be an entirely reasonable outcome of  
3 this process given the history of the restructuring of what  
4 was then the old Ontario Hydro.

5 I just remind the Board - as I say, we will do this  
6 through the hearing - that at the time Ontario Hydro was  
7 restructured, in the real world of investor-owned utilities  
8 which OPG this is now part of, Ontario Hydro would be  
9 called bankrupt. But in the parlance of Ontario, those  
10 debts that couldn't be serviced went into the category of  
11 "stranded assets". The companies were restructured, and  
12 we're all paying for that in terms of the debt retirement  
13 charge. So we can't ignore that history when we come to  
14 this case.

15 And that is why, when the province was establishing  
16 these initial sets of rates - again, looking to the history  
17 - OPG did some work on this. They hired some investment  
18 bankers and they came up with around 10 percent, and the  
19 province said: No, that is not appropriate and we're going  
20 to reduce it to 5 percent.

21 So when you go to the test that you are applying and  
22 you look at the primary driver of the increases being on  
23 this very contentious issue, we say that cannot be a basis.  
24 That doesn't help consumers. And certainly AMPCO members  
25 do not look to OPG to protect them in this, as Mr. Penny  
26 suggested, in terms of this smoothing. That, for us, is a  
27 red herring. Let's have the hearing and let's have the  
28 Board decide based on the evidence what is appropriate on a

1 go-forward basis.

2 Now, the second ground which OPG puts forward, and it  
3 is still not clear to me whether it is still one of the  
4 bases for the interim relief, is this length of hearing  
5 time, the delay issue. And in our view, that is just a  
6 complete red herring.

7 We are not trying to ascribe blame here, but this date  
8 of April 1st, 2008 has been known for years. And the fact  
9 that the applicant now finds itself dealing with these  
10 issues in February and a hearing in the summer; again,  
11 we're not ascribing blame, but that is certainly not the  
12 fault of consumers and we should not have to bear the brunt  
13 of that.

14 So in short, we don't see any reasonable basis to  
15 grant the relief requested. There should not be a new test  
16 that the Board is putting forward, to be blunt, to try and  
17 reward tardiness in a filing. I am not saying that to  
18 blame OPG, but as I say, we have known about this for  
19 years. And this is not a basis to grant the relief sought.

20 Finally, Mr. Chairman, I would just point out that if  
21 these interim payments are made on an annual basis, they  
22 represent about \$50 million in extra costs to AMPCO  
23 members. As you know from other proceedings and generally,  
24 there are certain industries in this province that are  
25 going through very serious times and cannot sustain any  
26 increase in rates. As I said to you earlier on, the  
27 compact that AMPCO members understand is: Rates would not  
28 be changed until the Board makes an order; and the Board

1 wouldn't make an order unless it heard the evidence or  
2 unless OPG had passed certain tests, which we believe they  
3 have not done so.

4 So finally, sir, when you are reviewing these issues  
5 we would ask you to take these in account and also, as you  
6 must do, look to the section 1 objectives of the act which  
7 among other things is to protect consumers with respect to  
8 prices. And I think when you look at this whole envelope  
9 of issues and the history that brought us here, the  
10 conclusion should be that the interim relief should not be  
11 sought. Those are my submissions, sir.

12 MR. KAISER: Thank you. Mr. DeVellis.

13 **SUBMISSIONS BY MR. DEVELLIS:**

14 MR. DEVELLIS: Thank you, Mr. Chairman. I will be  
15 brief. We agree with the submissions of Mr. Faye and Mr.  
16 Rodger.

17 We believe that the legislature recognized the  
18 importance of a fair and transparent process to determine  
19 payment amounts that are different from the prescribed  
20 payment amounts. This, perhaps, echoes Mr. Faye's point  
21 earlier, and that is that following the Board's processes  
22 prior to making a rate order, or payment order in this  
23 case, is important for consumers and it sends the wrong  
24 message to consumers, in our submission, to set payment  
25 amounts of X amount on no particular basis.

26 I understand Mr. Penny's position that there is sort  
27 of some basis for the amounts that they're suggesting, but  
28 that would require you to make some kind of determination

1 that that evidence is reasonable. In our submission, you  
2 can't do that at this point.

3 In any application for rates, the applicant has the  
4 onus of filing in a manner to have final rates in place as  
5 of a certain date. OPG filed its application in this case  
6 in a manner that could not possibly have allowed for the  
7 Board to set rates or have a final order in place by April  
8 1st. So in SEC's submission there is no reason for the  
9 Board to take extraordinary steps to ensure that the  
10 payments amounts are different or increase as of April 1st.

11 Those are our submissions.

12 MR. KAISER: Thank you. Ms. Campbell, do you have  
13 anything?

14 MS. CAMPBELL: No, thank you, Mr. Chair.

15 MR. KAISER: Mr. Penny.

16 **SUBMISSIONS BY MR. PENNY:**

17 MR. PENNY: Yes, thank you Mr. Chairman.

18 With respect to Mr. Faye's submission on interim rates  
19 and the ability to add rate riders and so on, I think I  
20 would say that all of the submissions you have heard fail  
21 to distinguish and suffer from failing to distinguish  
22 between the application for, just to make rates interim  
23 simplicitor, leave the actual payment amounts the way they  
24 are but order the rates to become interim, and the request  
25 for an increase. Those are, of course, conceptually and  
26 legally and from the perspective of what we're asking for,  
27 two completely separate things.

28 The failure to distinguish between those two things

***ASAP Reporting Services Inc.***

***(613) 564-2727***

***(416) 861-8720***



1 has, I think, enabled the intervenors, intentionally or  
2 not, to blend all of these arguments together and glom them  
3 into a kind of general opposition to the concept of interim  
4 at all.

5 I think that is incorrect, because the application is,  
6 of course, for two completely separate things.

7 But with respect to Mr. Faye's submission on the  
8 nature of interim rates, if all of the intervenors agreed  
9 irrevocably that the Board could reach back and allow  
10 recovery of historic deficiencies from whatever time it  
11 makes its order, then I guess we wouldn't need to be here.  
12 But I don't hear intervenors saying they're willing to do  
13 that, and, frankly, it may well be, as a result of the  
14 discussion that we had earlier, I am not at all sure it is  
15 correct in law, in any event, and so it is to protect  
16 against that.

17 My understanding of the law is that if the rates are  
18 not interim, the Board does not have the ability that Mr.  
19 Faye says that you do, but, if I am wrong, I suppose that  
20 would be fine, but only if everyone agreed that they  
21 wouldn't change their minds on this later.

22 So I question Mr. Faye's understanding of the law in  
23 this, and, in any event, it would only be workable if  
24 anyone with any possible interest in the outcome of this  
25 case were to agree, irrevocably agree, to that proposition.

26 Mr. Rodger made the general proposition that all of  
27 the interim increase cases had to do with financial  
28 distress. That is of course not correct. The Bell case

1 had to do with financial distress.

2 None of the interim cases that I cited from this Board  
3 that are in my material, which included the Union Gas  
4 increases and the OPA and IESO increases, were on the basis  
5 of financial distress. So Mr. Rodger is simply wrong when  
6 he makes that assertion.

7 I don't think anything turns on this, but Mr. Rodger  
8 was also incorrect when he said that OPG hired investment  
9 bankers to recommend 10 percent. That is factually  
10 incorrect, as well. I don't think anything turns on it  
11 here, but I, just for the record, wanted to say that it was  
12 the province that hired those investment bankers, not OPG.

13 And with respect to Mr. Rodger's submission on this  
14 compact, I have no idea what Mr. Rodger means by that. It  
15 sounds like what he's telling us is what AMPCO members  
16 thought the legislation meant, but the legislation, of  
17 course, means what it means. And whatever an AMPCO member  
18 thought the legislation meant is completely irrelevant, in  
19 my submission.

20 The issue before you is: Does the legislation permit  
21 you to make interim orders, and is it just and reasonable  
22 for you to do so? And that is the long and short of it.

23 I think, subject to -- if I could just have your  
24 indulgence for a moment, sir?

25 On this question of the tardiness in the filing, I  
26 mean, as I said earlier, that, in my submission, is an  
27 issue of fact. If what Mr. Rodger is saying is that  
28 regardless of the facts, that just the mere fact that the

1 hearing was not dealt with before -- that a final order of  
2 the Board could not issue before April 1, 2008 is the  
3 reason for denying interim rates, then that just has to be  
4 wrong.

5 As we outline in our submissions on the background,  
6 there was a process. Mr. Rodger participated and his  
7 client participated in that process to determine the  
8 methodology, and then there was another process which Mr.  
9 Rodger and his client also participated in. So they took  
10 the benefit of these processes to determine the filing  
11 guidelines, and that was not concluded until July 27, 2007.

12 So if there is delay, it can only be a delay between  
13 July 27, basically August, and November when we filed, and  
14 given the newness and the complexity of the issue, in my  
15 submission, by any test, you couldn't conclude that the  
16 time between August and November was some kind of  
17 contumelious delay in the processing of the application.

18 So, in my submission, there is at least prima facie  
19 evidence, if not rock solid evidence, that OPG is not  
20 responsible for any delay in filing. And if OPG -- the  
21 mere fact that it is not the consumers' fault either it  
22 seems to me is not an argument for saying OPG has to,  
23 therefore, eat the difference.

24 So it is, at the very least, in my respectful  
25 submission, just and reasonable that you allow everyone  
26 their option to argue this at the end of the day, and,  
27 therefore, as Mr. Stephenson said, preserve the option.

28 Thank you.

1 MR. KAISER: Thank you, Mr. Penny.

2 MS. CHAPLIN: I have some questions.

3 Mr. Penny, in the case of the Union interim order, am  
4 I correct in my recollection that the increases that were  
5 incorporated were all related to items that had been  
6 decided on by the Board before?

7 MR. PENNY: That's correct, and I said that when I  
8 referred to that case earlier. I didn't repeat it the  
9 second time I referred to it, but that is correct.

10 I guess all I would say to that, Ms. Chaplin, is that  
11 perhaps the ROE doesn't fall quite into this category, but  
12 the analogue to that in this case would be the deferral  
13 accounts in respect of which the regulation requires you to  
14 ensure recovery.

15 MS. CHAPLIN: Okay. And in the Union case, would I  
16 also be correct in my recollection - I think it is at page  
17 83 of your book --

18 MR. PENNY: Yes.

19 MS. CHAPLIN: -- that the observation was made that  
20 Union -- one of the arguments that Union advanced was that  
21 it was in the interests of consumers to collect higher  
22 amounts?

23 MR. PENNY: Yes.

24 MS. CHAPLIN: In that case, the groups that  
25 represented the consumer interests in fact opposed that  
26 position?

27 MR. PENNY: That's right. That was my reference to  
28 déjà vu earlier this afternoon. But, again, the difference

1 here, of course, is that we have two, at least two, of the  
2 significant intervenors who represent consumers - that is,  
3 CCC and VECC - acknowledging, in this case, that it does  
4 make sense to think about some rate smoothing.

5 MS. CHAPLIN: But I guess in this case we have  
6 residential consumer groups perhaps agreeing with that --

7 MR. PENNY: Yes.

8 MS. CHAPLIN: -- but industrial consumer groups  
9 retaining that position that it is better to under-collect  
10 than to over-collect?

11 MR. PENNY: Absolutely. No doubt about it.

12 MS. CHAPLIN: Okay, thank you.

13 MR. KAISER: Thank you. We will come back at 2:15.

14 --- Luncheon recess taken at 12:58 p.m.

15 --- On resuming at 2:45 p.m.

16 MR. KAISER: Please be seated.

17 **DECISION:**

18 MR. KAISER: The Board heard submissions this morning  
19 from a number of interested parties with respect to an  
20 application by Ontario Power Generation for interim rates.  
21 This relates to the application OPG filed on November 30th  
22 under section 78.1 of the Ontario Energy Board Act for  
23 approval of increases in payment amounts for the output of  
24 certain next generation facilities effective April 1st,  
25 2008.

26 In particular, OPG seeks two Interim Orders. The  
27 first Order would make its current payment amounts interim,  
28 effective April 1st, 2008. Secondly, they seek an Interim

1 Order increasing OPG's payment amounts on an interim basis  
2 to \$35.35 per megawatt hour for hydro-electric production,  
3 and \$53 per megawatt hour for nuclear production.

4 There are two questions before us. The first is, does  
5 the Board have jurisdiction in this case to issue these  
6 types of orders? And the second is, if we do have the  
7 jurisdiction, should we exercise that jurisdiction, and to  
8 what extent?

9 Dealing with the first question, first. Mr. Penny, on  
10 behalf of OPG, has referred the Board to a number of cases  
11 with respect to the issuance of interim orders throughout  
12 the country. It is useful in the context of this case to  
13 identify the essential characteristics of an Interim Order.  
14 This is at paragraph 28 of his factum.

15 First, an Interim Order does not require any decision  
16 on the merits of an issue. That will be settled in the  
17 final decision. The purpose of an Interim Order is to  
18 provide relief for any deleterious affects caused by the  
19 length of the proceedings. Secondly an Interim Order is  
20 temporary. It can be changed retrospectively once the  
21 final determination is made. Thirdly, an Interim Order  
22 assumes and requires that a final order will be made. One  
23 initiates the process and the other ends it, a point that  
24 Mr. Penny made on a number of occasions.

25 Mr. Penny has also referred us to the Supreme Court of  
26 Canada decision in the Bell Canada case where the Court  
27 stated:

28 "Traditionally, such interim rate orders dealing

1 in interlocutory manner with issues which remain  
2 to be decided in a final decision are granted for  
3 the purpose of relieving the applicant from the  
4 deleterious effects caused by the length of the  
5 proceeding.

6 "Such decisions are made in an expeditious  
7 manner on the basis of evidence that would often  
8 be insufficient for the purposes of a final  
9 decision. The fact that an order does not make  
10 any decision on the merits of an issue to be  
11 settled in the final decision and the fact that  
12 its purpose is to provide temporary relief  
13 against deleterious effects caused by the  
14 duration of the proceedings are essential  
15 characteristics of an interim order."

16 There is no question that section 21(7) of the OEB Act  
17 grants the Board clear authority to issue interim orders.  
18 It has done so on a number of occasions. Mr. Penny  
19 referred to a number of those decisions including decisions  
20 involving IESO, the OPA, and various gas companies.

21 Of particular interest here is whether a reading of  
22 section 78.1 of the Act leads to a conclusion that the  
23 Board cannot or should not issue an interim order in this  
24 case.

25 Section 78.1(2)(b) provides, in relevant part, that  
26 the payment amount shall be the amount determined:

27 "in accordance with the order of the Board then  
28 in effect to the extent the payment relates to a

1           period that is on or after the latter of  
2           (i) the date prescribed for the purpose of this  
3           subsection; and  
4           (ii) the effective date of the Board's first  
5           Order under this section in respect to the  
6           generator.

7           O. Reg 53/05 specifies the amount, for the purposes of  
8           section 78.1(2) that the IESO is required to pay OPG for  
9           the output from the prescribed facilities from April 1st,  
10          2005 to the later of:

11           (i) March 31st, 2008; and  
12           (ii) the day before the effective date of the  
13           Board's first Order in respect of Ontario Power  
14           Generation Inc.

15          Now, much was made of the fact as to whether a first  
16          order in this section meant an Interim Order or whether it  
17          meant a Final Order.

18          It was Mr. Penny's position that it meant a Final  
19          Order.

20          Mr. Faye, in his submissions on behalf of Energy  
21          Probe, argued that if we were to look, for instance, at  
22          Regulation 62.5, that this Regulation required the Board to  
23          accept certain amounts and take certain steps in a very  
24          distinct fashion. He argues that if a first order was an  
25          Interim Order (which chronologically it might seem to be),  
26          some real complications would result and leads to the  
27          conclusion that an interim order should not be granted.

28          Having listened to the submissions of all of the



1 parties, the Board is of the view that there is nothing in  
2 the language of section 78.1 or section 4 of Ontario  
3 Regulation 53/05 that removes the power of the OEB to set  
4 interim payment amounts, nor can that restriction be  
5 implied as necessary to the operation of the legislative  
6 scheme. In fact, the language of these provisions  
7 recognizes that when an OEB order concerning payment  
8 amounts is made, may well be different from the effective  
9 date of that order. This supports the interpretation that  
10 the OEB's power to make interim orders applies to payment  
11 amounts under section 78.1.

12 An Interim Order is not necessarily a first order  
13 within the meaning of the Act. A reasonable interpretation  
14 of the words "first order" is that it is a Final Order  
15 which determines what might be described as the first rates  
16 set definitively by the Board and not prescribed by  
17 Regulation. An Interim Order can by its nature be time  
18 limited and subject to whatever is determined in the Final  
19 Order. Section 78.1 does no more than establish that the  
20 payment amounts are as prescribed by regulation until the  
21 latter of March 31st, 2008 and the effective date of the  
22 OEB's first order. The language of section 78.1 does not  
23 suggest that the OEB's power under section 21.7 to issue  
24 interim orders is in any way limited or abrogated other  
25 than by the limitation that any such order could not  
26 purport to have an effective date before April 1st, 2008.

27 The object of the Act and the intention of the  
28 legislature is clear. In our view, the clear purpose of

1 section 78.1 of the Act and section 4 of the Regulations is  
2 to fix the OPG payments for three years until March 31st,  
3 2008 and to leave to the OEB thereafter the task of  
4 determining payment amounts that are just and reasonable in  
5 accordance with the regulations.

6 In summary, the ability to fix just and reasonable  
7 payment amounts would be compromised, in our view, if the  
8 Board can only take action after a full and final hearing.  
9 The power to make interim orders is clearly confirmed by  
10 the Act and is necessary for the protection of both  
11 customers and generators. This power can be abrogated only  
12 by the clearest statutory language. There is nothing in  
13 section 78.1 that supports that conclusion.

14 This, then, leads us to the second aspect of this  
15 motion. This is the Applicant's request, in the first  
16 instance, that the existing or current payment amounts be  
17 declared interim effective April 1st, 2008. And in the  
18 second case that a Interim Order be issued, increasing  
19 those payment amounts, on an interim basis, to the amounts  
20 I described earlier, namely \$35.35 per megawatt hour for  
21 hydroelectric production and \$53 per megawatt-hour for  
22 nuclear production.

23 We will consider the first aspect first; whether the  
24 existing payment amounts should be declared interim  
25 effective April 1st, 2008. The Board agrees that that  
26 should be the case and an Order will issue to that effect.

27 We see no harm resulting to any party as a result of  
28 such an Order. It is not unusual for such Orders to issue.

1 It preserves the ability of the Board to set rates  
2 effective April 1st, 2008. And the ability of the utility  
3 to recover any ultimately determined revenue deficiency  
4 from that date.

5 That leads us to the second question; whether the  
6 payment amount should be increased to the requested amount  
7 on an interim basis effective the same date, April 1st,  
8 2008.

9 This application is denied. The requested amount,  
10 which I have described earlier, is said by the Applicant to  
11 be 50 percent of the amount claimed in its Application.  
12 This calculation is set out at paragraph 108 of the  
13 Applicant's Factum. It refers in part to the cost of  
14 capital. Instead of claiming the whole amount they would  
15 receive if they receive an ROE of 10.5 percent, they have  
16 reduced that to Hydro One's 8.34 percent ROE. They also  
17 added two recovery amounts, 85.3 million for the nuclear  
18 liability deferral account, and another 67.7 million for  
19 recovery of specified deferral and variance accounts  
20 balance. The latter two accounts are accounts where  
21 recovery is required by the Regulation.

22 OPG has claimed a total revenue deficiency of some  
23 \$760 million accumulating, they say, at the rate of about  
24 \$39 million a month.

25 The Board is concerned, at this point, with granting  
26 the requested payment increase. The main argument was not  
27 financial harm, which we often hear in these cases and is  
28 often the basis for interim rate increases. Rather, OPG

1 seeks rate smoothing to avoid rate shock to consumers.

2 Of course, any concern with rate shock assumes that  
3 there will be some rate increase; otherwise, smoothing is  
4 not necessary. Mr. Stephenson, on behalf of his client,  
5 the Power Workers' Union, supported the applicant and said,  
6 "we know some increase is coming, and we might as well  
7 start to absorb some of it sooner rather than later".

8 I should add that the applicant was supported by three  
9 consumer groups in this regard, the Consumers Council of  
10 Canada, VECC and Power Workers' Union, but was opposed by  
11 three other consumer groups, the School Energy Coalition,  
12 AMPCO and Energy Probe. So the consumer groups were  
13 divided on the issue.

14 In the end, the Board believes that if smoothing is  
15 the objective and if smoothing is required, at it can be  
16 achieved prospectively. It is not necessary to do that by  
17 early rate implementation.

18 We also note the concerns of AMPCO, that some of the  
19 increase sought relates to increased cost of capital,  
20 particularly return on equity. They expect this will be a  
21 contentious issue. AMPCO was concerned that the Board not  
22 be seen to prejudge that issue at that point.

23 That completes the Board's ruling in this matter. Any  
24 questions?

25 MR. PENNY: No, thank you.

26 MR. KAISER: Thank you. Thank you, gentlemen, ladies.

27 --- Whereupon the hearing adjourned at 3:02 p.m.

28