ONTARIO ENERGY BOARD

FILE NO.: **EB-2009-0107**

VOLUME: **Motion Hearing**

DATE: **April 17, 2009**

BEFORE:	**Gordon Kaiser**	**Presiding Member and Vice-Chair**
	Cynthia Chaplin	**Member**
	Ken Quesnelle	**Member**

EB-2009-0107

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 Canadian Niagara Power Inc. for an Order or Order setting just and reasonable rates commencing May 1, 2009;

AND IN THE MATTER OF the Board's Decision With Reasons dated March 23, 2009 on a Motion brought by the School Energy Coalition.

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Friday, April 17th, 2009,
commencing at 9:36 a.m.

MOTION HEARING

BEFORE:

Gordon Kaiser	Presiding Member and Vice-Chair
Cynthia Chaplin	Member
Ken Quesnelle	Member

A P P E A R A N C E S

LJUBA COCHRANE	Board Counsel
LEE HARMER	Board Staff
JOHN DeVELLIS	School Energy Coalition (SEC)
ANDREW TAYLOR	Canadian Niagara Power Inc.
DAVID MacINTOSH	Energy Probe Research Foundation

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NO UNDERTAKINGS WERE FILED DURING THIS PROCEEDING

Friday, April 17, 2009

--- On commencing at 9:19 a.m.

MR. KAISER: Please be seated.

The Board is sitting this morning in connection with an application that had been filed by Canadian Niagara Power for an order setting just and reasonable rates commencing May 1st, 2009. That hearing will commence next week.

We are here today, however, with respect to a procedural matter, and that is the notice of motion that was filed by the School Energy Coalition on April 9th. That motion seeks a review and variance of the Board's decision of March 12th, with reasons delivered in writing on March 23rd, in connection with the Board's decision to refuse an application by Schools to require the applicant to answer certain interrogatories.

Those interrogatories were interrogatories of October 23rd, 2009, supplementary interrogatories of February 4th, 2009, and certain questions asked of the applicant at the technical conference on February 18th.

Now, before we start, Mr. DeVellis, we are advised, and possibly you can confirm on the record, that at the end of the day, being today, what you are asking the applicant to produce is the answers to interrogatory 12, 25, 26, 27 and 34. Am I correct?

MR. DeVELLIS: Yes, sir. Good morning, sir.

MR. KAISER: I'm sorry, I forgot to ask for appearances. Excuse me.

APPEARANCES:

MR. DeVELLIS: Well, John DeVellis for the School Energy Coalition.

MR. TAYLOR: Andrew Taylor for Canadian Niagara Power.

MR. MACINTOSH: David MacIntosh for Energy Probe Research Foundation.

MR. KAISER: Thank you, Mr. MacIntosh.

MS. COCHRANE: Ljuba Cochrane, counsel for Board Staff.

MR. KAISER: Yes. Please go ahead.

SUBMISSIONS BY MR. DEVELLIS:

MR. DeVELLIS: Yes, thank you, sir. That is correct.

There were some answers provided by the applicant subsequent to our filing of the motion initially. In some cases the answer is not necessarily complete, but we are content to follow up in cross-examination.

So to answer to your question, those specific questions that you just referred to are the subject of this motion. There are other questions that were answered, but we would like the opportunity to follow up in cross-examination, but, of course, one of the issues that we had, that I was going to make submissions to, that the reasons for the decision, our initial motion, seems to have precluded any discussion of that issue at the hearing.

MR. KAISER: Well, I wanted to deal with that right up front. You are quite right. I must say I myself made the same mistake when I read the decision, but my colleagues pointed out to me, if I had the good sense to read the

transcript, it was clear - I think this is at page 78 - that this issue is not precluded. I will read it.

You asked that question to Mr. Vlahos, who was presiding. The Presiding Member said -- your question was:

> "Mr. DeVellis: Well, the question that arises is we understand that no further information is required. However, there were some issues raised in conjunction with the reason behind the information, whether or not the issue of lease payment being just and reasonable is a live issue in the proceeding. We are not clear on whether that is the case or not."

The Presiding Member said:

> "It pertains to the production of documents that are stipulated in the IRs for Schools. Nothing stops your client, Mr. DeVellis, to argue that the applicant is has not proven his case and only relates to what has been brought before the Board by motion regarding production of documents."

So this Panel's understanding of that, to the extent that has any weight, is that it remains a live issue and you are free to examine on that. I take it the issue is - it is always a question of what is the relevance of all of this stuff - that there is a lease here with annual payments, as I recall, of one-and-a-half-million dollars and an asset value of 5 million, and your client is presumably going to argue that those costs are inflated and should be reduced on some basis. Is that it?

MR. DeVELLIS: Yes, right.

MR. KAISER: That's the substance of what we're all talking about?

MR. DeVELLIS: Right.

MR. KAISER: So let me continue.

MR. DeVELLIS: Yes, sorry.

MR. KAISER: So let's suppose we dealt with the first matter. That's an issue in these proceedings. You are entitled to examine on it to the extent you wish.

The next question is: These interrogatories that you have now identified this morning, are they all relevant to that issue; i.e., will the information, if produced, assist you in proving your position that these lease costs are inflated and should be reduced for the purpose of calculating the rates for this utility?

MR. DeVELLIS: Well --

MR. KAISER: Is the answer yes or no?

MR. DeVELLIS: Well, we believe they are. And let me give an example --

MR. KAISER: One thing that is clear, and we can debate whether the grounds of the decision were sufficient or not, but in order for us to order an applicant to produce documents -- and we do err on the side of inclusion, but they have to be relevant to an issue that is material before the Board.

This is a material issue. There is no question about that. We can get past that. Is this information, if ordered to be produced by this applicant, going to assist

you and assist the Board in coming to a conclusion on that issue?

MR. DeVELLIS: Yes. And the way we have approached this is we have an asset that has a particular value as of 2002. We don't know the actual net book value as of 2002.

MR. KAISER: Let me deal with it. I have looked at the interrogatories. I have looked at these very quickly, as I am wont to do. But item C, which I understand you want produced, a copy of the advanced tax ruling, what does that have to do with this, whether these lease costs are inflated?

MR. DeVELLIS: Well, they have actually already been provided. It was some other documents that we asked for --

MR. KAISER: But I want to know -- we want to know exactly what you want here. I was told five minutes ago that you wanted that question answered.

MR. DeVELLIS: Well, sorry, there is two parts to that. One is the advanced tax ruling. I will just pull that up.

The advanced tax ruling is the first part of that sentence. That has been provided. It was provided as a result of our last motion. It was provided in my friend's motion materials in the last motion.

The second part of that sentence is: Any additional facts provided to the tax department in the course of obtaining the ruling. That's what is still outstanding for --

MR. KAISER: How is that relevant?

MR. DeVELLIS: Well, the way we have approached this is the issue is whether the lease payments represent a fair return on the net assets of -- that are being leased.

MR. KAISER: Yes.

MR. DeVELLIS: And -- or whether they represent some other rate of return on the fair market value. In other words, is the lease payments -- are they based on what we consider a fair market return on the net book value, or are they based on some other rate of return on the fair market value of the lease?

If it is the former - that is, if it is based on the net book value as the fair rate of return - that's fine. We won't have an issue at the end of the day. But if it is the latter, if these lease payments are based on the fair market value of the assets at the time of the -- when the lease is entered into and they're based on some other rate of return, other than -- when we say some other rate of return, something other than what the Board would consider reasonable in comparison to what the Board would allow for rate base, for example, if that is the basis for what the lease payments are based on -- so these $1.5 million, if they're based on, well, the assets have a fair market value of $10 million and that's what the lease payments are based on, well, in our view, that would mean that -- sorry, some disallowance would be necessary, because the Board does not allow the fair market value of assets to be included in rate base.

MR. KAISER: Did you ask the applicant the simple

question: How did you determine the amount of the $1.5 million annual charge?

MR. DeVELLIS: Yes.

MR. KAISER: They have refused to answer that question?

MR. DeVELLIS: I believe that is the subject of number 27, tab 13. All of these questions -- I mean, we're trying to get at it several different ways. We're trying to get at it -- there is some questions related to the appraisal reports that were done in conjunction with the lease. There were evaluation reports of the assets.

So number 27 is to provide any valuation reports or other documents setting out the value --

MR. KAISER: Let me ask you a question. Let's suppose they answer 27 and they had -- do you have valuation reports?

MR. TAYLOR: I believe that there was a valuation report that was required for the purpose of getting the advanced tax ruling. We have to look for it but there should be one.

MR. KAISER: You must have looked by now.

MR. TAYLOR: I understand we have looked --

MR. KAISER: I mean we’re not showing up without these documents existing.

MR. TAYLOR: Sorry?

MR. KAISER: We are not just showing up today after all of this not knowing whether these documents exist?

MR. TAYLOR: I understand that a search was conducted

for that particular document, and so far --

MR. KAISER: Right.

MR. TAYLOR: -- there hasn't been success in finding it.

MR. KAISER: Because one of the issues that we can deal with right off the bat, if the applicant doesn't have these documents, they don't have them, right, we can only order them to produce documents that are within their control. That's established law.

MR. DeVELLIS: Yes.

MR. KAISER: But let me ask you a question. Let's suppose they had it and let's suppose the value was X, whatever it was, what else would you need to prove it? That would be say let's say the value of calculating the lease payment.

MR. DeVELLIS: If that's the value, if that was the appraised value, that is the market value, then in our view the market value is not what the ratepayers are generally asked to pay, it is the net book value. So if there is a difference between net book value -- another question we asked is what was the net book value or provide a comparison of the net book value costs to ratepayers versus the cost of the lease.

If the lease is based on the market value then some disallowance would be required.

MR. KAISER: No, I understand your argument. Mr. Taylor, this is a pretty simple issue. I mean, can't you just tell -- the Board ultimately will have an

interest. This is an issue that is in play, will have an interest in learning how, on what basis, your client calculated these annual lease payments.

Can't you provide an answer and we can all go home?

MR. TAYLOR: Well, I don't think it is as simple as that, Mr. Chair. We don't agree it is a live issue.

MR. KAISER: Well, the Board has ruled that it is. That's what I read the Board's decision - not this Panel's decision, the prior Board's decision - to say. Are we here to argue about that?

MR. TAYLOR: Well, maybe we are. I wasn't expecting to, but, you know, there does seem to be an inconsistency between what is in the transcript and what is in the decision.

MR. KAISER: All right. Well, let's agree on that, because that is the threshold question as far as I am concerned. We are not going to order -- if you -- you are not the applicant here.

Do you say that is a live issue? Do you want this Panel to make a determination on that issue? Is that part of your appeal as well?

MR. DeVELLIS: Well, I mean, if the Panel is satisfied that that was not the Board's, the previous panel's finding, then obviously we're satisfied with that. I think when we read the reasons for decision, we were a little confused, because frankly, I was going to take you to the portion of the transcript that you just read from, where I asked Mr. Vlahos whether the issue was still live. It

seemed to us it still was so we could follow up on things in cross-examination. When we got the written decision, that didn't seem to be what was said.

Now, if this Panel is satisfied that, you know, what Mr. Vlahos said in the transcript is what the state of the issue is, then that is still live, we can pursue these issues on cross-examination, that is fine.

MR. KAISER: Well, we are not here, Mr. DeVellis, to interpret the transcript. But if both of you are confused and this issue is just going to get argued next week, if you want, we will hear submissions on it.

I didn't understand it to be part of your motion. But we wouldn't be here, hearing an application for production of documents, in fact, an appeal from a motion for production of documents unless it was a live issue.

If your reason now is that you are not producing this because it's not relevant to the proceedings, then we need to deal with that as a threshold issue.

MR. TAYLOR: Well, I think that the -- it's my understanding from the notice of motion that the error that’s the subject of this motion is really the -- is the subject matter of the decision.

So I get the sense that the SEC believes that the Board believed that this was a dead issue.

I can understand that there does seem to be an inconsistency between what Mr. Vlahos said at the end of the motion and the decision.

But I think it is the decision that has got to stand.

One was a question that was asked in the spur of the moment and an answer was given right away.

The decision came out, you know, weeks after, after the -- or the reasons for decision came out weeks after the decision. So clearly there was time for the panel, the original panel, to think about it. And after having done so, it determined that, you know a prima facie reason has to be given in the circumstance of a long-term lease if it is going to revisit that lease.

It came to the conclusion that a prima facie reason had not been provided, and therefore, because that was a, you know, it was a written decision. It was clearly thought out by the panel, after having some time to do so, then that is what the panel decided on. And that's why the motion record, the notice of motion from the Schools looks the way it does. It doesn't say anything about, well, it's live or it is dead.

This is the first that I am actually considering the issue of whether it was live or dead. To me, coming in here, clearly it was a dead issue and what we're talking about today is whether or not it should be a dead issue, whether or not there was some sort of mistake as to the determination whether it is a dead issue.

MR. KAISER: All right. Well we can proceed on that basis, I suppose. If what you are, you are supporting the dead issue position which you take is the position of the Board. And you are saying that it either wasn't the position of the Board, but if it was, it was wrong and it

is an issue? You are asking this Panel to make that determination. Have I got that right?

MR. DeVELLIS: Well, that's true.

MR. KAISER: Okay.

MR. DeVELLIS: We think that Mr. Vlahos's initial reaction to my question was the correct one.

MR. KAISER: I understand. Why don't we proceed, gentlemen, on that basis and deal with that issue before we get into the specifics of any documents?

MR. TAYLOR: The principal issue?

MR. KAISER: Yes.

MR. TAYLOR: Absolutely.

MR. KAISER: Can you address that, sir.

MR. DeVELLIS: Yes. Well, the Board denied SEC motion on two grounds -- this is on the written decision, now. The first was that the 2000 decision approving the lease --

MR. KAISER: We know all of that. We understand all of that.

Tell us why this issue -- and I am going to describe the issue and you correct me if I am wrong. As I see the ratemaking implications of this issue, it is that the lease payments that the applicant seeks to recover in rates are inflated and do not represent the proper costs. That's the issue for the rate case.

MR. DeVELLIS: Well, the reason we say it is an important issue for rate base --

MR. KAISER: Is that right or not?

MR. DeVELLIS: Pardon?

MR. KAISER: That's the issue?

MR. DeVELLIS: Yes, that is the issue.

MR. KAISER: Okay. All right.

MR. DeVELLIS: So the lease payments are $1.5 million. The applicant's revenue requirements for the City of Port Colborne --

MR. KAISER: We know all that.

MR. DeVELLIS: So it is a significant portion of the applicant's revenue requirement. We have what we believe are significant prima facie reasons for why the Board should look at this, to look at this.

Before I even get to that, I think what the whole issue of whether a prima facie case is necessary before intervenors can say this is an issue in a hearing, when it is a revenue item or a cost item that the applicant seeks recovery is cost of service. We believe the legislation, the Ontario Energy Board Act, clearly says the applicant has the onus to prove its revenues or its costs -- the rates it seeks approval for are just and reasonable.

Now, it is possible that the applicant can argue at the end of the day, well, this is approved in 2006 or we relied on this to our detriment, but that is something that should be decided at the end of the hearing after all of the evidence has been heard.

If the Board accepts Mr. Taylor's interpretation, that the Board decided summarily in the motion decision, this issue is dead. That means the Board will have decided without hearing any evidence that the issue should not be

heard. That is $1.5 million in lease payments should simply be recorded into the cost of service of the applicant even though it is a cost of service application, but it should be baked into rates without even hearing evidence on the issue. We think it is wrong and it is inconsistent with the -- you are enabling legislation and inconsistent with the practice of the Board.

One of the issues, for example, that was raised in the motion decision is that -- in the 2006 decision this was included in the applicant's cost of service. Nobody made submissions on it. This was, there was 90 cost of service applications going on at the same time. They're all done in a sort of, you know, I hate to say this, but summary fashion because there were so many applicants at once and a lot of things got missed. On this basis, the issue shouldn't be heard again.

Well, there was no evidence that the applicant relied on that 2006 decision to its detriment; that is, that it took some action in reaction to the 2006 decision such as, for example, extending the term of the lease.

There was a submission made by my friend during the hearing of the motion that the company organized its affairs based on the strength of the 2006 decision, but there was no evidence to that effect. I don't think the Board can decide, in a motion for production, that this issue should not be heard because of the 2006 decision, based on a submission by my friend that the company had organized its affairs on the strength of the 2006 decision.

If that is the evidence at the end of the day and the company provides evidence that that is what happened and it somehow organized its affairs to its detriment based on the 2006 decision, then that may well be an argument that the company could point to and say as to why these lease payments should not now be altered.

Others, like us, would point to, well, there would be countervailing facts, like, Well, the lease payments don't represent just and reasonable costs to ratepayers. They're based on market value of the assets, not on the net book value of the assets.

But the Board would have to weigh that at the end of the day and weigh all of the facts at the end of the day. If you accept that the decision prevents this issue from even being heard, then, in our view, the Board, it would be acting contrary to enabling legislation. It would be creating an onus on other parties, other than the applicant, to demonstrate why an issue should be heard -- a significant cost item should be examined, when we think the legislation clearly puts the onus on the applicant to demonstrate that all of its costs and revenues are just and reasonable.

In addition, even if you think that a prima facie case is required, we think that that has been demonstrated. As I said, this single cost item represents 26 percent of the applicant's revenue requirement. We know --

MR. KAISER: What percent, 26?

MR. DeVELLIS: Twenty-six percent of the total revenue

requirement from the City of Port Colborne, 12.5 million on total revenue requirement of 5.9 million. So it is a quarter of their total revenue requirement, this single item.

In addition, we know, for example, that the 1.5 million is -- well, we have a strong feeling, strong suspicion. We don't know the actual net book value of the assets today, but we know they were 8.9 million in 2000, and we don't know the value in 2002. That's one of the questions we asked for.

But we know that -- and the terms of the lease are -- any capital additions are not added to the assets that are leased. They're added to the applicant's rate base. So the value of the assets was essentially -- in terms of the lease, was frozen in 2002 and can only have come down since then.

So if it was 8.9 million in 2000, we assume it is much less than that today, because it is -- it can only have depreciated. That's why we say $5 million.

So that would be -- that would mean the lease payments today that the applicant is being asked to put in cost of service are 30 percent of what we estimate as the net book value of the assets.

In addition, there is some information in the -- from the leave decision, and this is -- I would like to refer the Board to a package of documents that I handed out this morning. I sent out yesterday --

MR. KAISER: I think we have them. Can we mark these,

please?

MS. COCHRANE: Let me just see if you have this. It's the 2001 application. Yes, you have it.

MR. KAISER: Thank you.

MR. DeVELLIS: If we can mark that?

MR. KAISER: What number is that?

MS. COCHRANE: That would be Exhibit No. 1.

EXHIBIT NO. 1: BUNDLE OF DOCUMENTS.

MR. DeVELLIS: If I could ask the Board to turn to page 30 of that, what we have done is reproduced the contents --

MR. KAISER: Do you have a copy, Mr. Taylor?

MR. TAYLOR: I do.

MR. KAISER: Okay.

MR. DeVELLIS: What we have done is reproduced a copy of the Board's record in the 2002 leave decision.

MR. KAISER: Yes.

MR. DeVELLIS: So at page 30, this is sort of, I guess, a questionnaire that the applicant had to fill out. It was preset questions from the Board's form, and the applicant in this case was K-9 Power and PC Hydro? You will see some of the answers, or actually most of the answers are actually PC Hydro providing the answer. The first one is at 2.3.6. The question is:

> "Describe the changes of any rate levels that parties to the proposed transaction are planning."

The answer was:

"PC Hydro is in the process of establishing its unbundled and market adjusted electricity distribution rates."

I won't read the whole section, but basically it is referring to the fact that the Board's existing PVR formula was going on at the time. The point of that is that PC Hydro was not applying to have rates changed at that time. And it concludes at the last sentence:

"There will be no changes in rate levels as a result of this transaction."

So clearly this 2002 application was not dealing with rates, and I was going to point the Board to other portions of the Board's decision in the matter where it said that the existing rates, they would actually continue until 2006 when the next cost of service rate application.

Then at section 2.5.1 on that table -- on that page, rather:

"The applicant is asked to provide a valuation of any assets or shares that will be transferred in the proposed transaction. Provide details on how this value was determined, including any assumptions made about future rate levels."

And the answer was, from PC Hydro:

"PC Hydro received a number of competitive offers for the acquisition of PC Hydro from its request for proposals process and is therefore confident that payment terms set out in the lease agreement and master implementation agreement represent

fair and reasonable value for the distribution system being leased."

So that is an indication, in our view, that the value of the -- the way the lease payments were calculated were based on the fair market value, because they're talking about having done a request for proposal and having had competitive bids for the assets.

And, also, what you see there is that the concern is not whether ratepayers are getting a good deal. The concern is whether PC Hydro is getting a good deal. So that is not what the issue is in this proceeding. The issue in this proceeding is: Is this lease fair for ratepayers?

And the way that the -- at least from this answer, the way that the leave decision was structured is to make sure that PC Hydro wasn't getting a raw deal.

Well, in other words, wasn't getting fair market value for the assets. The answer, well -- the answer, Yes, we got fair market value. The lease payments are based on fair market value. That is not what the Board in this proceeding would be looking at.

The Board in this proceeding should be looking at: Are the assets based on -- are the lease payments based on the net book value of the assets?

So that -- and then the leave decision proceeded on that basis, and then you will see there was also reference in our notice of motion that the leave decision referred to the wrong statutory test, section 8.2.3, which only looks

at the impact on the proposed transaction on the development of competitive electricity market in Ontario. That was the basis for the Board's decision.

So there is clearly nothing in the 2002 leave decision that looked at whether the amount of the lease payments are fair to ratepayers. I mean, in fact, if you look at this, it seems to be that (a) the rates were never in issue, and (b) what was in issue was whether PC Hydro was getting a good deal or not.

In our view, that is not the issue for this rate proceeding. The issue in this rate proceeding is: Are the amounts that are being now passed on to ratepayers in a cost of service application fair to ratepayers?

In that case, you have to look at what the net book value is and that's what --

MR. KAISER: It's not surprising that rates were not an issue. As I understand it, the applicant gave an undertaking that there would be no rate increase as a result of the transaction, and no further rate increase without approval of the Board.

MR. DeVELLIS: That's right.

MR. KAISER: The panel that was dealing with the leave application didn't have to deal with that issue at all, and didn't. There is certainly no controversy on that point.

MR. DeVELLIS: That is exactly our position. But when you say that there is no rate increase as a result of that transaction, that is true in 2002. We don't think it is true once the actual cost of the lease is passed on to

ratepayers in rates, which is what is being asked to be done now, because now, all of a sudden, you have $1.5 million included in the cost of service, which was not included initially.

When the rates were set at the time, in 2002, presumably these rates would have been based on the net book value of the assets. So whatever was in rate base would have been what ratepayers were paying.

Now, something different will be passed on to ratepayers, and, in our view, it is not the net book value. It is the fair market value at the time the transaction was entered into.

MR. KAISER: Without getting into an argument of the ultimate issue as to what -- whether it should be market value or net book value, you are dealing here with this ruling in the decision that essentially says -- and I think it is at page 4 -- that an issue won't be revisited unless there is a compelling prima facie case.

Now, if that were a correct principle -- and I know you argue that the burden of proof provided for in section 78 of the statute mitigates that finding -- and I think this is where you are going and I would like you to concentrate on it, such a ruling would have to be dependent on a finding that the previous decisions disposing of the issue did dispose of that issue on the facts.

I take it your argument, without getting into what you are ultimately going to argue here, is that in the 2002 leave decision, there is no basis for concluding that the

Board dealt with that issue in any shape or form; and in the 2006 rate case, in the manner in which that was done, there is no evidence whatsoever - I might be overstating your statement - that the Board dealt with that issue in any shape or form.

Would that be your position?

MR. DeVELLIS: Yes. That is exactly my position.

MR. KAISER: All right. So let's hear from Mr. Taylor.

MR. TAYLOR: Well, when you say --

MR. KAISER: For the principle to stand that we are not going to revisit an issue, we need to make sure that in the previous determinations, the issue was dealt with.

MR. TAYLOR: Well, I would like to speak to --

MR. KAISER: We are having difficulty reaching that conclusion. I, at least, see some basis for Mr. DeVellis' point. So I want you just to deal with that issue and not argue about ultimately what the value of this lease should or should not be.

SUBMISSIONS BY MR. TAYLOR:

MR. TAYLOR: I also wanted to make submissions on the other claims in the notice of motion like the test that was applied and -- there were some like fettering of jurisdiction and onus and shifting of onus. I would like to address all of those alleged errors that were made in the decision.

As part of that, I would like to talk about the MAAD application and the 2006 application. So I know you want

me to just talk about those two decisions, but with your permission, I would like to take you through what I had planned on which was like a coherent -- to provide you with a little bit of context, the way that I structured my argument in the last motion was to divide it into two parts.

The first part dealt with what I call a benchmarking argument. What's the appropriate -- in order to calculate what the appropriate amount that should be included in rates that's different from the lease payment, the School Energy Coalition was proposing that we look at, What's the capital cost of these assets, and to figure that out we obviously have to know what the book value is of those assets.

My argument for that part was that it is an inappropriate benchmark, because in fact there was no sale. We had a true lease here. This was important because the questions that were posed by the School Energy Coalition and an affidavit that was filed with their motion materials, dealt with the issue of: Well, is this a lease or is this a sale?

As I took it, the purpose of arguing that this was a sale was to support the position that the correct number that should be included in rates is the number that -- the number that would support a sale. In other words, we bought the assets, we put them in our rate base, and there is a return.

I argued that since we know this was a lease, we filed

the advanced tax ruling, it wasn't a sale. It would be inappropriate to say that that's the comparator, that is the right number. The right number is what we actually have, which is the lease payment. That was part 1 of the argument. Part 2 was an issue estoppel argument.

For that argument, what I said was, the 2006 decision was determinative of inclusion of the lease amount in revenue requirement. We had rates based on that.

Therefore, based on the issue estoppel tests, the same issue, same parties --

MR. KAISER: But is that correct, Mr. Taylor? You say rates were based on that, but as I understand the decision they simply say we're going to keep the existing rates in place regardless of what the costs are.

MR. TAYLOR: That is the MAAD application. I am talking about, there was the MAAD, then there was the 2006 afterwards.

I acknowledge there was no actual like a typical cost of service rate analysis done in the MAAD application. That's on the transcript.

Anyways, so those were the two parts of my argument. Then as part of the issue estoppel argument, there is the Danyluk case which talks about an adjudicator having broad discretion as to whether or not it wants to apply the issue estoppel principle and that's usually done based on fairness or unfairness.

I said it would be unfair, after 2006, you know, they've made plans to now switch it.

I don't think I ever said they were prejudiced and I don't think the Board in its decision said it would be harmed or prejudiced. I said it was unfair. I think that is the language used. I don't think it is a real stretch to say when they're doing their budgeting, they budget based on certain amounts and one of the amounts would have been this lease payment.

Anyways, so that's sets the context.

When I read the original panel's decision, there is a section that deals with the MAAD application. A great deal of focus of this motion has been placed on that, on the MAAD application, how it was treated in the decision.

So I've got a couple of things to say about that. First of all, I don't think that there was a mistake made by the original panel in its comment about the MAAD application. It acknowledged that it wasn't a rate proceeding, number 1.

Number 2, according to Schools, there was a lower threshold test applied in the MAAD application and the test was whether or not there would be an adverse impact on a competitive market. That's a mistake and I will explain why.

The MAAD application was more than just a section 86 application. Canadian Niagara Power is a generator, and as a generator acquiring an interest in distribution facilities under section 81 of the OEB Act, it requires leave of the Board to do so.

At the same time, Port Colborne Hydro Inc is a

distributor who is transferring an interest in distribution facilities, and therefore under section 86 of the OEB Act it needs leave of the Board.

So the MAAD -- what I refer to as the MAAD application was both a MAAD application by Port Colborne Hydro as well as a section 81 application by Canadian Niagara Power. And the test for section 81 is the test that was described by Mr. DeVellis, which is, is there an adverse impact on, on the market.

That's because obviously generators having an interest in distribution, potentially could gain in the market. But at the same time, in that decision, the Board made the comment -- this is the 2001 decision -- that it is in the public interest for the transaction to go through. That was essentially the part that dealt with the section 86 MAAD application.

The section 81 test, the impact on competitive market, that wasn't what was only applied in that decision. So I think that the regular MAAD application test -- and that predates the no harm test, but by saying that it is in the public interest, it is pretty much the same as the no harm test. In fact it even goes further than the no harm because it is saying it is in the interest of the public as opposed to, there is nothing harming the public. So I think that the SEC is wrong in its assertion about the test that was applied.

The SEC also argued in its notice of motion, well, the Board in that case it could only grant leave under 86, or

not. And it couldn't impose conditions.

I don't agree with that either, because under section 23.1 of the OEB Act, the Board can impose conditions on any order.

So that being said, I don't think that the original panel made a mistake in regard to its description of the MAAD application.

Now, let's say you disagree with me and you think there was a mistake. Even if that was the case and there were a mistake made, and I don't think there was, because this is a motion to review and vary, it is not an opportunity just for another kick at the can because you don't like the decision that you got.

You've got to point out that there was a mistake made and that the decision would turn on that mistake. It's got to be a relevant -- a material mistake to the decision. And, in my submission, the comments made about the MAAD application are not material to the Board's ultimate decision.

As I said, I made two arguments that were separate. There was the issue estoppel argument, and then there was the benchmarking argument.

The Board rejected my issue estoppel argument. It didn't buy it. You are either estopped or not. It is like being pregnant. You are or you're not. There is no half way about it. The Board came up with this test and said, sure, it could be opened if there is a prima facie reason to review this type of cost.

So, to me, that is a clear rejection of the issue estoppel argument that I made.

The comments made by the Board in regard to the MAAD application, those comments pertained to the issue estoppel argument. They didn't pertain to the benchmarking argument.

Later on in the decision, a couple of paragraphs down, the original panel starts to deal with the benchmarking, and that is where the gist of the decision is.

So nothing turns on what the Board panel thought about what was done in the MAAD application, one way or another, and that is why, for that reason, all of this discussion about the MAAD application and how it was treated by the Board, by the original panel in this proceeding, nothing turns on it and it shouldn't make any difference in the context of this review and variance motion.

Now, we know that the Schools has suggested that, and they say this in paragraph 18 of their motion, that the Board relied to a great extent on that decision as a reason why the cost of the lease payments cannot be reviewed as part of the applicant's current cost of service application.

We don't agree that that is the case. I don't think it really relied on that at all.

Anyways, the other issue that the Schools seems to have with the decision, there seems to be consternation over this issue about the Board fettering its jurisdiction by not revisiting this cost in the context of a cost of

service application.

As we've discussed, the Board set out that there has to be a prima facie reason to reopen this type of cost in the context of a hearing.

We would argue that, in fact, this is not fettering jurisdiction, at all. There is an analogous situation here, and that is a long-term debt cost.

LDCs -- let's just use an example. An LDC in 2005 goes to a bank, borrows money for an extended period of time, let's say 10 years, at 10 percent. And in 2006, they have a cost of service application and that debt rate is approved. The debt instrument is approved.

We know from the Board's cost of capital report that if that LDC comes in in 2009 with that debt instrument and is trying to recover costs based on that 10 percent rate, and even if the deemed debt rate, which would reflect the current market rates, was, say, 5 percent, much lower than what they're actually paying, that the LDC would still be able to recover the 10 percent.

And it is analogous to this situation, because in both cases you've got this long-term contract where the LDC is stuck. You've got a rate which carries forward, and then you get to a point where you look at, What's the current market? And that would be the deemed debt rate.

I think that what Schools is suggesting is, Well, now, today, based on the asset value, the book value of the assets that we're leasing, well, they're lower, just like in the case of the deemed debt rate.

Well, the market rate could be lower, as well, but does the Board say, You know what, LDC, 10 percent is too high. You're only going to recover at 5 percent, because the market -- that would be unfair, because they're stuck in this long-term contract that has been approved by the Board. And that's the key component, being approved by the Board, and I am going to get to that.

And that's what the cost of capital report specifically says with regard to embedded debt. You get to keep it until the end of the debt instrument. It doesn't matter what the rate is. And when it is renegotiated, then it has to be renegotiated at market rates.

So the original panel wasn't breaking any new ground when it was treating this type of cost differently from other costs that are typically reviewed in a cost of service application. It was looking at it as a contract, just like the Board looks at these long-term debt instruments, which are long-term contracts.

Now, as I said, when you go back before the Board with one of these long-term debt contracts, the reason why the Board doesn't revisit it is because it has been approved in a prior proceeding.

It is my submission that the lease payment was approved in 2006. And I guess what I am hearing today is that a lot turns on this 2006 decision.

Canadian Niagara Power filed an application for 2006 rates. In the manager's summary right up front, and it is in one of the tabs -- do you want me to take you to it or

do you trust me on that?

MR. KAISER: I trust you.

MR. TAYLOR: Okay. They say, We're including the lease payments in the revenue requirement as an operating cost. It is there. It is up front. The Board in its decision in that 2006 case, it says that, We've considered the entire record and although we are not necessarily speaking to every issue raised in this decision, we considered the record, which is an obvious thing, because the Board is obligated to consider the record in any proceeding.

The Board issues rates, and those rates include the lease payment. So we have approval of the lease payment in 2006 by the Board.

Now we have the School Energy Coalition saying, Well, there were 90 applications all filed at the same time. Now, when I first read that, I wasn't sure if that was a function of, well, the School Energy Coalition was really busy, or perhaps the Board was really busy and neither of them had time to really scrutinize all of the applications before them.

Well, if the School Energy Coalition didn't have resources, tough luck. They could have hired resources. I don't buy for a second that the Board didn't scrutinize the applications in 2006.

That process, although there was some streamlining in the process in terms of the filing, there were filing guidelines that made it easier for LDCs who were really

coming for the first time for cost of service, so it made sense. But that didn't mean, though, that there was some sort of streamlining or arbitrary rate-making going on at the Board level. Those applications were reviewed.

The Schools was parts of that proceeding, which I find somewhat troubling by the argument being made; that had they had any concerns about the lease payment back in 2006, they could have raised those concerns. They could have filed interrogatories, made submissions. All of the procedural safeguards that are in place for any type of proceeding, they were there back in 2006. But the School Energy Coalition didn't.

Now, does that mean that the Board didn't review the lease payment as a part of its revenue requirement? No. Perhaps the Board didn't consider the argument that's being raised today, in 2009, as to perhaps, you know, it is the book value versus the market value or the appropriate cost.

Just because those arguments weren't raised doesn't mean that the Board didn't consider whether or not the lease payment was appropriately included in rates. Obviously it found that it was, in the absence of those arguments, by virtue of the fact that we've had rates for the last three years that include those amounts.

MR. KAISER: Here's the problem I have with this. I think I understand it. We do know that there is no finding by the Board on this issue. We don't know what was in the Board's mind, but the precedent that would result if we were to accept your argument is, even if an issue is not

examined, even if a cost is not examined, if it gets included in rates in one decision, it can't be challenged in the future.

That's how I interpret the consequence of your argument.

MR. TAYLOR: No. I raised this point in the motion last time, because the -- because the School Energy Coalition said this is a slippery slope here. What you're saying - just like you said - you can't revisit costs. What I said is --

MR. KAISER: That's why I think that is an important issue, is because in our proceedings, we are always looking for ways to make them more efficient, and less cumbersome. We sometimes develop procedures, as we did in 2006 -- which you have agreed to -- where, for practical reasons these applications were dealt with lightly with the knowledge, and it happens, that there will be a more thorough investigation in the future. I think that is probably a fair interpretation, at least my understanding of what the Board was trying to do given the circumstances which you acknowledge that these guys, 90 or however many, were coming in for the first time.

So if the rule that you are proposing was to become engrained and established, then we would not have any proceedings where anyone was dealt with lightly. Every case would go to every nook and cranny because you are estopped from raising an issue in the future if you don't raise it in that case. That is the concern I have with

your proposition.

MR. TAYLOR: Well, two things.

The first is when you say that the Board reviews matters lightly, to me that doesn't mean though it is not reviewing them. It still has an obligation obviously when setting final rates to review the entire record and consider all matters before it, number 1.

Number 2, I am not suggesting that all costs that are approved in one proceeding are fixed and can't be revisited in the future.

These are unique costs, because they come out of a contract. They're fixed. Nothing changes. The payments are the exact same from year to year. And that's why I made the analogy to the cost of capital. Just like those costs. We don't review those costs. We don't open up the debt instruments in the subsequent, the 2009 proceeding.

I would never argue that the Board would be estopped from revisiting your typical costs from one proceeding to the next, because certainly a number of things can change. But in this circumstance, we are stuck. We create an obligation at one point of time that lasts for an extended period of time.

MR. KAISER: Your argument is really a prudence argument, I think, which is to say if you are going to -- Board, if you are going to question the prudence of a contract, that prudence is determined at the time the contract was entered into. Not on the basis of subsequent events. This contract was entered into in 2002. It was

before the Board then. It was before the Board in 2006. Nobody up until knew has questioned the prudence of this contract.

MR. TAYLOR: That's right. The Board has approved the prudence of the contract by accepting it in rates, so therefore you don't reopen it unless you have the prima facie - as the original panel said - you have a prima facie reason to do so, that's right.

MR. KAISER: I think what was troubling to me in any event was that, the original panel perhaps inadvertently in the language left it as a much broader principle. The prudence doctrine relates to contracts, as you acknowledged, is a narrow but established doctrine.

MR. TAYLOR: Yes. So you know the way you have described it with prudence at the beginning of the contract, that is the same thing that I am saying.

The other issue that was raised by Schools was this shifting of onus and that's dangerous and the Board has an obligation. Under the Act, applicants bear the onus of establishing their costs.

Well, the Board has broad discretion as to what it wants to hear in a rate application. And we know, going back to like the seminal prudence test comes from -- I don't have it with me and I apologize, but it comes from the 2001 Enbridge decision where the test for prudence is set out. I know you are familiar with it, Mr. Chair, because it has come up in proceedings that I have argued before you.

I can get it for the Panel, if you want me to.

MR. KAISER: That would be helpful, if you could.

MR. TAYLOR: In that it says there is understanding that the utility makes prudent decisions and that's accepted by the Board, unless an intervenor can raise -- oh, that's the case right here.

Can I just have one moment, please.

MR. KAISER: We will take 15 minutes. You take your time.

MR. TAYLOR: Sure. I don't need 15 minutes, actually.

MR. KAISER: All right. Then take one minute. Boy, you really have a system.

[Documents delivered to Mr. Taylor]

MR. TAYLOR: The academy award goes to...

MR. KAISER: This is what happens, Mr. DeVellis, when you really have resources.

MR. DeVELLIS: I think so.

[Mr. Taylor passes documents to all parties present]

MR. TAYLOR: Okay. At 3.2.12 on page 62 of this decision, this is a Union decision from 2002, this sets out the test that the Board should apply when looking into prudence. You don't look in hindsight. You look at the decision made at the time.

But going down to 3.12.3, it says: "Where a party challenging the prudence of a decision made by the utility has an obligation" –- oh, sorry:

> "While a party challenging the prudence of a decision made by the utility has an obligation to

raise a reasonable ground for undertaking such a review, it does not need to establish a prima facie case that the utility's decision was imprudent. Rather, it must demonstrate that there is an issue to be determined on further enquiry by the Board. This is particularly true in the case of a regulated utility where the only party in possession of the relevant information about how and why the decision was in fact made."

Going down to 3.12.5 it says:

"Once a party has persuaded the Board that a prudence review is warranted or, as some have put it, the presumption of prudence has been overcome, the onus is then on ECG to demonstrate that the decision..."

-- that would be Enbridge Consumers Gas --

"...it made was prudent at the time."

So in other words, what you have here is there is a presumption of prudence. That presumption has to be overcome by an intervenor. Then when that happens, the onus shifts over to the applicant to demonstrate the prudence.

So this idea of onus being placed on the intervenors, being inappropriate in the context of the OEB Act, well this is something that has been done by the Board for years. This is the seminal test for prudence.

So I don't actually believe or agree that requiring an intervenor to demonstrate that there is a need to review a

particular cost, prior to the Board agreeing to review it, especially if it has been reviewed in the past, is contrary to the OEB Act.

So the key to the decision is this benchmarking -- is this part of the decision that deals with benchmarking, they set out the prima facie test. And the Schools has argued that, well even if you find that that is the test, there was a prima facie reason for revisiting this cost.

And that prima facie reason is that this cost is a significant portion, it makes up a significant portion of total revenue requirement.

Well, that information was before the original Board panel. That is not new. Obviously the original Board panel didn't agree that that was a prima facie reason for opening up that lease payment cost.

We've got to remember that, again, this is a motion to review and vary. We can't just say we disagree with the original panel. We've got to find that the original panel made a mistake of fact or something new has come up. This isn't new, that this was a significant portion of the total revenue requirement.

So I would argue, and I say this with all due respect, that even if you disagree -- and you find that well just because if is a significant portion that is a prima facie reason -- that's not a good enough reason for you to vary the original panel's decision, because you don't do that in a review and variance decision. You have to respect the original panel's decision unless, of course, there is a

mistake that was made that would turn the decision.

So for all of those reasons, I think that the mistakes that have been identified by the School Energy Coalition in its notice of motion, I don't think there were any mistakes. Like I said, if you do find there was a mistake in regard to the emphasis placed on the MAAD application regarding the examination of the lease and the rate impacts -- or any impact it would have on customers from a rate perspective, even if you think that was a mistake, nothing turned on that. That related to the issue estoppel argument.

And for a review and variance, any mistake, you can't just say, Hey we found a mistake, and then overturn the decision based on some other reason, or if the mistake was really irrelevant to the ultimate outcome of the original decision.

So, anyway, for all of those reasons, we submit that the original panel's decision should stand. It is right, no mistakes. They applied age-old principles that have been applied by the Board, just like the cost of debt with a long-term contract, just like the shifting of onus in the prudence test.

We have looked at the MAAD application and it said there would be no rate impacts. Well, that's true, because they didn't apply to amend rates. They decided they were going to keep rates, but did that mean they were going to leave rates as they were forever? No. They were going to come back some time in the future and amend those rates,

and it was Canadian Niagara Power's intention to amend those rates to put the lease payments in.

Unfortunately, it didn't happen until 2006, because Bill 210 came along and froze their rates. So they had to sit on the sidelines with the rate order that they had obtained through the MAAD application until 2006. Like I said, in 2006, the matter was determined on a final basis.

MR. KAISER: I only have one question, Mr. Taylor. Let's suppose that we accept that the issue is whether this contract is prudent, and these are the tests that the Board would apply in determining whether a contract is prudent.

My question would be: Why aren't the parties able to argue that and test the prudence in the course of the case? Why should they be barred at the outset from obtaining the documents which they say are necessary to argue the issue?

We are not here today deciding the prudence of this contract.

MR. TAYLOR: No.

MR. KAISER: We are just here to determine whether this applicant is entitled to certain documents which they say will be necessary for them to make this argument in the case.

MR. TAYLOR: Because that ship has passed. It passed in 2006 when we put the lease payments in the application.

MR. KAISER: So it goes back to this form of estoppel agreement that you get one kick at the can on prudence, and that's at the beginning or the first time it comes up, and,

if you miss that, you are barred?

MR. TAYLOR: No, not if there's a prima facie reason for reopening that cost.

MR. KAISER: Well, would a prima facie reason be that the Board never dealt with it, or you assume if there was a rate case, it must have been dealt with even though there is no mention of it in the decision?

MR. TAYLOR: Absolutely, yes, to the latter. I don't see how the Board could say it didn't deal with it. To do so would be an admission of arbitrary rate-making.

I refuse to accept that that is what the Board does.

MR. KAISER: All right. Well, we have your position. Mr. DeVellis?

FURTHER SUBMISSIONS BY MR. DEVELLIS:

MR. DeVELLIS: Thank you.

I would just like to start with the prudence issue, just because that is the last thing that my friend referred to. Firstly, I would like to point out the standard practice is to provide cases in advance, not in the course of one's submissions.

But, in any event, the prudency issue assumes, for one thing, that the issue of this lease came up in the context of a cost of service rate regime, which was not the case when this lease was approved.

I took you to the application. What the focus of the leave application was, was: Is this transaction fair to PC Hydro? There was no indication at that time -- the Board was in a PBR rate-making formula. There was no indication

at that time when or if a cost would be directly passed on to ratepayers in a form of a cost of service review. That didn't happen until 2006.

So there is no indication of that the Board in 2002 was looking at the rate implications of this lease.

MR. KAISER: I think Mr. Taylor concedes that.

MR. DeVELLIS: Fair enough.

But if we go to the decision that Mr. Taylor referred you to, what it says in 3.1. -- sorry, 3.12.3 is:

> "While a party challenging the prudence of a decision made by the utility has an obligation to raise reasonable grounds for undertaking such a review, it does not need to establish a prima facie case that a utility's decision was imprudent."

And the reason for that, it says:

> "This is particularly true in the case of a regulated utility where it is the only party in possession of all of the relevant information about how and why the decision was in fact made."

I think this goes to your question, Mr. Chairman, to Mr. Taylor's: Why can't we decide this at the end of the proceeding? How are we supposed to establish -- even if there is a prima facie test, which we don't say there is, but how are we supposed to establish what the prima facie -- or the prima facie case without access to the documents?

The applicant is the only party with access to the

documents. If we can't even ask questions, we can't even get documents to substantiate our case, how are we even supposed to provide a prima facie case?

We can't go in and subpoena documents, just go in and forcefully take the documents to put them before you to say, Look, here is a prima facie case. We can only do that through the interrogatory process, and that is the stage we are at now. The arguments that Mr. Taylor is making are arguments that need to be made at the end of the proceeding, after the Board has looked at all of the evidence, not at the outset in a summary fashion, without even looking at evidence and barring parties from even asking the questions.

And when my friend was discussing the 2006 decision, and, Mr. Chairman, you put to him the issue of, Well, this is a slippery slope and it would mean that issues could never be relitigated or revisited once they're included in a cost of service, even if they're not specifically looked at in a previous case.

The distinction that I think that Mr. Taylor made was, Well, this is a contract and it was already in place.

I think what really he is getting at there is this issue of a detrimental reliance; that is, that the company somehow relied on the Board's decision in 2006 to its detriment, and it bound itself in this contract, but that is not the case.

The contract was already in place in 2006. The only thing that happened was, on the basis of that decision, it

continued and the costs were then passed on in rates. The contract was already in place. The company had already committed to that contract.

So there is no reliance on that decision, and there is no unfairness to the company in looking at this for the first time in this proceeding and asking whether the amount of the lease payments should be passed on to ratepayers, whether they represent just and reasonable rates. And, in our submission, what that means is, Are the lease payments based on a net book value, a fair return on net book value, versus some other return on the fair market value, which appears to be the case based on the documents that I pointed to you earlier?

So we don't think the distinction that Mr. Taylor makes really is relevant. It might be relevant if they were able to point to some evidence that they relied on the Board's decision somehow, and I think what Mr. Taylor says, well, they relied on it in terms of making their budgets. And, yes, they relied on it for making their budgets for 2006 and 2007 and 2008, but now we are looking at a forward test year application in which the issue is: What is the budget for 2009, and then during the IRM period?

So now we are looking at all of the budgets fresh. And I don't think that the Board should consider itself estopped from looking at a significant cost item on the basis that it was previously included in the application, when it wasn't specifically examined by any of the parties and it wasn't specifically mentioned by the Board in the

2006 decision.

I think Mr. Taylor is essentially repeating his issue estoppel argument from the previous motion.

MS. CHAPLIN: Mr. DeVellis.

MR. DeVELLIS: Yes.

MS. CHAPLIN: Perhaps I misunderstood Mr. Taylor, but my understanding of what he was saying in the end was that it was not around the estoppel. It was that the Board, in the motion decision, decided that it was not going to hear the issue because in its conclusion, Schools had not raised sufficient grounds for that issue to be reopened. Not that it was prevented from doing that. But that it had turned its mind to the reasons that Schools had given and had concluded it was not necessary. That is how I understand Mr. Taylor's reading of the decision to be.

So perhaps if you don't agree with that, maybe you can help me with that.

MR. DeVELLIS: Well, and that's the prima facie case. This is where we say the Board erred in placing an onus on intervenors, on us, to demonstrate why the issue should even be heard. That's why we say the Board erred in that finding, that the --

MS. CHAPLIN: You're saying the Board -- does the Board not have the ability to determine what issues it will hear and not hear in the interests of, I mean, we have issues proceedings frequently. There wasn't a specific one in this, the original motion essentially turned into I guess an issues proceeding.

I, again, interpret Mr. Taylor's reasoning to be that the Board turned its mind to Schools' argument it is a significant part of the revenue requirement, the 2006 cases were done in a very streamlined fashion. The issue, although identified in the application, was not specifically referred to in the findings.

So I think the Board heard all of those reasons and yet still concluded that it was not going to hear the -- in Mr. Taylor's interpretation, it was not going to hear the issue in this case. I am trying to find out, why is that an error in your view?

MR. DeVELLIS: It is an error, as I said, because – yes, the Board of course has the ability to say, to determine what issues it will or won't hear, but those determinations are reviewable and that is what we are doing.

The reason for the Board's decision not to hear this -- essentially not to hear this issue was that we hadn't established a prima facie case.

I don't think that that is what, A, the legislation tells you you have to do, and what even the case that Mr. Taylor refers you to tells you.

There is a very good reason for that, and that is because we don't have access to the applicant's documents. Only the applicant has access to it. There is a significant asymmetry in information.

If parties, either Board Staff or intervenors, are required to establish a prima facie case for why a revenue

item, a significant revenue item should even be heard, then that would preclude a lot of examination of applicant's costs, cost of service.

So, yes, we do believe the Board erred on that and also, in making that decision though the Board was relying on the 2006 decision and the reason for saying that we had to provide a prima facie case was -- I will take you to the decision at tab 2 of our motion record.

Where the Board mentions this prima facie issue is in the second, well, the first full paragraph on paragraph 4. And that is right after its discussion of the 2006 decision, that is the impact of the 2006 decision.

What it says there is: "CNP's argument -- this is the last part of that paragraph:

> "CNP's argument in this motion that the 2006 rates did not -- did reflect the cost and revenue consequences of the lease arrangement, and that it had organized its affairs on the strength of that decision, has merit."

So in our view, the reason the Board imposes this prima facie requirement on us is, was its finding that CNP had somehow relied on the 2006 decision, that it would be prejudiced, in essence, that it would be prejudiced if the issue were now to be revisited.

So we say that is an error because, A, there was no evidence whatsoever provided by the applicant that it had relied on the 2006 decision to its detriment. By that I mean that it somehow bound itself as a result of the 2006

decision.

That was not -- there is no evidence of that, and I don't believe that is the case. It simply continued in a contract that was already in place.

Secondly, that would be a finding, that is an argument that could be made at the end of the hearing. That is not something that, in our view, should be decided at the outset. If that is an argument CNP wants to make, it should be something that is decided at the end of the hearing after weighing all of the evidence; that is, Well, we relied on this decision in this way, so we would be harmed in this way. Here is the evidence.

And the other, the counter evidence to that would be, well, yes, but this issue, if this cost was passed on to ratepayers, it would be detrimental to ratepayers by X dollars. So the Board can weigh whether the harm to the company is greater or less than the harm to ratepayers by simply passing this cost on.

But we don't have that opportunity if the Board decides at the outset based on a submission by my friend at the hearing, that the company organized its affairs on the basis of the 2006 motion.

MS. CHAPLIN: Sorry, Mr. DeVellis. I think you have covered that point before.

MR. DeVELLIS: Yes.

MS. CHAPLIN: But would I be correct that really where you -- that you disagree with the Board in that statement, but where you feel the Board has erred is in fact in the

next paragraph, where I think you were saying the Board set out the test, and I guess it is the second sentence:

> "...but payment amounts and, in particular, fixed payment amounts associated with the lease of the entire asset base of a utility is not an ordinary issue that should be revisited without a compelling prima facie reason for doing so."

Am I correct that what you are focussing in on is, in fact, that and the Board erred in saying that was the test that Schools had to meet in order to have this issue be a live issue?

MR. DeVELLIS: Yes. That's correct. For the reasons that I have identified, that is that the Act places the onus on the applicant to prove that its costs are just and reasonable.

MS. CHAPLIN: You are saying for this -- regardless of whether this is the annual purchase of pencils or, in this case, a long-term fixed price arrangement, the test for whether or not something should be considered an issue and perhaps reconsidered in a subsequent case, should be the same? It is just whether or not there's some reasonable ground?

MR. DeVELLIS: Well, I mean, I think there may be an argument on this basis if, for example, the company had not entered into the contract in 2006 and on the basis of the 2006 decision, say they got the decision and the day after they signed the contract, on the basis of the 2006 decision, then I could understand the applicant's argument

but that is not what happened in this case.

The contract was already in place but it has never been subject of a cost-of-service review.

So my point is that there is no hard harm, there is no prejudice to the company in the sense they relied on the decision.

So, yes, in that case I say that, yes, the Board should hear all of the evidence because there is no harm to the company. Even if there is harm to the company, it is something that should be decided at the end of the case not at the outset without even hearing evidence.

MS. CHAPLIN: Thank you.

MR. TAYLOR: Can I respond to make a brief response?

MR. KAISER: Go ahead.

FURTHER SUBMISSIONS BY MR. TAYLOR:

MR. TAYLOR: What Schools is saying is that they need the information in order to make the prima facie case that the issue should be revisited.

I go back to the long-term debt instrument example. You have got your long-term debt instrument before the Board and that's available and if somebody wanted to say hey, wait a second, this isn't a fixed-term contract, you can get out of this thing, and go and negotiate a better rate for yourself at today's lower rates, then, sure that would be a good reason for opening the long-term debt contract.

The lease agreement is in evidence in this proceeding. So a prima facie case, sure it could be made.

They can look at the lease agreement and say, wait a second, the payments perhaps those payments can be reduced for some reason or perhaps you can get out of this agreement, or whatever based on the terms of that contract. That is how a prima facie can be made as to whether or not the issue should be reopened.

We keep getting back to this issue of whether or not we're prejudiced and there is reliance. I keep saying that prejudice is not relevant for the purpose of this motion.

It was simply a matter of whether or not it would be unfair, because obviously the Board -- every administrative tribunal is striving for some sort of regulatory certainty, so that the organizations who are before it can understand what challenges they face, what is expected of them going forward in the future, not necessarily as a matter of proving detriment or detrimental reliance, but you know what they're making budgets.

Like I said earlier, sure they're making budgets five years out and that is the case of every LDC. So they want to know what the costs are that they can expect.

The example that Mr. DeVellis gave about, Well, if they had gotten their rates, and then entered into the contract, there would be detrimental reliance, that is not a good example, because you will never get a rate decision that includes rates that have costs that aren't actually realized. The Board would never say, Okay, we're going to grant you rates even though you haven't entered into this contract yet. That is not realistic, at all.

Those are my short submissions in reply.

MR. KAISER: Mr. Taylor, can I ask you to look back at the decision that you gave us, and particularly the last paragraph on page 62?

It says:

> "While a party challenging the prudence of a decision made by the utility has an obligation to raise reasonable grounds for undertaking such a review, it does not need to establish a prima facie case that the utility's decision was imprudent. Rather, it must demonstrate that there is an issue to be determined on further enquiry by the Board. This is particularly true in the case of a regulated utility where it is the only party in possession of all of the relevant information about how and why this decision was made."

Now, what Schools is doing, admittedly, is questioning the prudence of this contract and not whether it should be set aside, but whether for regulatory purposes the proper costs flowing from the contract should be different from those the utility is charging under its existing term.

We are not here, today, nor was the panel on March 3rd or 23rd or whenever it was, dealing with the issue of prudence. They weren't making a determination. They were simply dealing with whether this applicant was entitled to documents it said was necessary to examine that issue.

So it seems to me strange that we would have a higher

test to require production of documents on a relevant issue, assuming - and this is important - that the documents are relevant to that issue and probative, than what the Board has said with respect to the obligation.

I mean, what this section deals with is: When and how will the Board entertain an examination of prudence of a contract? It says specifically the applicant doesn't have to establish a prima facie case. It has to convince the Board that there is an issue to be determined on further enquiry.

So whatever this decision of March 23rd says, I am relying on this proposition now, and so they want to come in the hearing next week and argue about the prudence of the contract and that panel can determine whether it is an appropriate issue, or not, and use this test or some other test. But why wouldn't we at this time at least give them access to the documents that they think are necessary to make that argument?

MR. TAYLOR: The difference is, this is looking at the prudence of regular costs that have not been approved by the Board or dealt with by the Board, whereas, again, what the original panel was doing in its decision on March 23rd was specifically dealing with costs that had been reviewed by the Board, long-term contract costs. And that is why there is a difference.

I actually think that although the words "prima facie" --

MR. KAISER: Your proposition at this prudence review

has been had or should have been had, and your time limit has expired?

MR. TAYLOR: It was done. It was done.

MR. KAISER: All right.

MR. TAYLOR: But also in regards to the words "prima facie" here, the Board says in this decision, the Enbridge decision, that they don't have to establish a prima facie case the utility's decision was imprudent.

Well, that is different from what the original panel was saying in this case. That is actually -- they're saying you don't have to show that it was imprudent, that it was a wrong decision. I don't think the decision on March 23rd was suggesting that Schools would have to show that it was imprudent to enter into this contract.

I think that what -- by saying there is a prima facie reason to open it corresponds with the next part of 3.12.3 where it just says:

> "Rather, must demonstrate there is an issue to be determined on further enquiry."

Like I said, that issue could be by looking at the lease agreement and pointing to a certain provision and saying something is -- you know, there is an opportunity here for change, or perhaps there are provisions in here that could be beneficial to the ratepayer that should be exercised by the applicant.

MR. KAISER: All that is saying is that you can't have a prudence review of a contract unless the relief is within the contract.

The contract is the contract. They want to say the costs are excessive. The contract is imprudent for regulatory purposes. The allowed costs should be less.

You say they can't make that argument, because the contract can't be amended, or something?

MR. TAYLOR: Well, no. They can't make that argument unless they can make a prima facie case to do so.

MR. KAISER: But isn't it a bit circular? They say, We need the documents to make our case. None of this deals with the threshold issue, just production of documents, and we're imposing a test here where it seems to me we are closing off the avenue for a determination of this issue and not even giving them access to documents they say are necessary to convince the Board that prudence is an issue.

MR. TAYLOR: Well, that's right, because it is a matter that has been already decided by the Board so --

MR. KAISER: It comes back to the already decided proposition?

MR. TAYLOR: That's right. That's why I said I think the 2006 decision is key.

MR. KAISER: Do you have anything further, Mr. DeVellis?

MR. DeVELLIS: Yes. I mean, I think as you pointed out, Mr. Chairman --

MR. KAISER: I think we understand. You don't need to -- what we may do, gentlemen, if it is acceptable, deal with this issue first, and then depending on how that comes out, deal with any of the specific requests. We haven't

turned our mind to the second issue, because we don't know whether it is -- whether we have to.

MR. DeVELLIS: Right.

MR. KAISER: If that is acceptable, I think we have heard from you. We could deal with this threshold issue first and come back in, say, half an hour and tell you if we need to proceed.

MS. COCHRANE: Mr. Chair, Board Staff did want to make some submissions, and there is actually a Court of Appeal decision that I believe emanates from this Enbridge case which may be helpful to you, because it deals with what I think is an important issue about the prudence presumption and how a party challenging that can make its prima facie case.

I would appreciate if we could take a brief break so I can get copies of this case to distribute and make my submissions briefly.

MR. KAISER: Is 20 minutes enough?

MS. COCHRANE: That's fine.

MR. KAISER: Come back in 20 minutes.

--- Recess taken at 10:45 a.m.

--- On resuming at 11:20 a.m.

MR. KAISER: Please be seated.

Ms. Cochrane.

MS. COCHRANE: Actually, Mr. Chair, Mr. MacIntosh had wanted to make some submissions, as well and would like to do that first.

MR. KAISER: Yes, certainly, Mr. MacIntosh.

MR. MacINTOSH: Thank you, Mr. Chair.

SUBMISSIONS BY MR. MACINTOSH:

MR. MacINTOSH: Mr. Chair, I won't repeat the submissions of Mr. DeVellis. However, in support of Schools, Energy Probe wishes to make three points.

The first one being that in order to determine just and reasonable rates, it is necessary for the Board to determine the components of those rates. And to that end, the production of documents is required, as requested by Schools.

Secondly, the Board does have broad powers to reconsider cost and revenue issues underpinning rates.

Finally, it is Energy Probe's position that everything in a cost-of-service rates rebasing case is an issue.

The prima facie reason for revisiting the lease is that this is a cost of service rates rebasing proceeding.

Thank you, Mr. Chair. Those are my submissions.

MR. KAISER: Thank you.

SUBMISSIONS BY MS. COCHRANE:

MS. COCHRANE: Mr. Chair, Mr. Harmer is passing up a case that I mentioned before we took a break. I apologize to all parties for springing this at the last minute. I wasn't going to introduce it except that Mr. Taylor had referred to the Board's decision in the Enbridge case and the decision I passed up to you is the appeal decision of that case.

The original Board decision was appealed to the divisional court and then it was further appealed to the

Court of Appeal. The Court of Appeal upheld the Board's original findings. So it is not like there is any shocking contradictory points I am going to be making.

What is important about the Court of Appeal's discussion in the case is that it – well, it is the Court of Appeal and they're a little bit more important than, have more authority than we do here. They really set out nicely the prudence enquiry. And what is important to note - I am looking at paragraph 11 on page 5 of that decision - in the second sentence, the Court says: The prudence enquiry described by the Board has two stages.

At the first stage, the decision of Enbridge is presumed to have been prudently -- to be made prudently, unless those challenging the decision demonstrate reasonable grounds to question the prudence of the decision. At the second stage of the enquiry, reached only if the presumption of prudence is overcome, Enbridge must show that its business decision was reasonable under the circumstances that were known to or ought to have been known to Enbridge at the time it made its decision.

What I would like to distinguish for the Panel is this two levels of the prudence review, one I will call sort of the ground level, or the 20-foot view and the other being the 20,000-foot view.

The ground level review, in my view, is about the evidentiary record, and the onus of proof. And how the presumption of prudence is to be challenged and therefore open the door to further enquiry about reasonableness of

costs.

The other type of review, the 20,000 foot one is for the panel that's ultimately hearing the rate case and is ultimately going to possibly decide whether or not the lease, entering into the lease was a prudent decision but for the purpose of this Panel today we need to consider, in my view, whether CNPI has demonstrated a prudence presumption and whether SEC has challenged that presumption so as to open the doors to further enquiry and to be -- to be entitled to the questions posed in its interrogatories in order to expand the scope of that enquiry.

Just a word about the Enbridge case. That was -- very, very, very briefly, it was about certain transportation costs that were entered, that were incurred that were higher than others. In one case they used a certain pipeline arrangement as opposed to another one.

Now, and the one that was being disputed, there were significantly additional costs, which were not known at the time the contract was entered into, but Enbridge became aware of it later on with the benefit of hindsight.

What the court says at paragraph 13, this is sort of half -- more than halfway into that paragraph, it says:

> "Consequently, the OEB could have used the fact of the increased transportation costs incurred by Enbridge to decide whether the presumption of prudence was rebutted."

And I suggest to the Panel -- and it is only a suggestion and a respectful one at that, is in the present

case arguably SEC has made a prima facie challenge to the prudence presumption of the lease agreement by showing that there are increased costs.

At the time the lease was entered into, when the value of the asset was 8.9 million, the lease cost represented 17 ^percent of those costs. In 2009, when the value of the asset is only $5 million, the lease cost is 26 percent.

So arguably, and again Staff does not take a position on the issue, arguably SEC has challenged the prudence presumption in order to open the enquiry into the reasonableness of lease costs in this application.

I pause now to point out two key matters. Firstly, in no way am I making submissions or suggesting that the ultimate prudence of the decision to enter into the lease agreement is rebutted or even challenged on the evidence at this point. I am only trying to assist the Panel by framing the question and pointing out that there is a two-tiered prudence enquiry and the one the Panel should be considering today is the one at the ground level, determining what is within the scope of the enquiry.

At the stage of deciding whether -- at this stage, in order to decide whether the lease is a live issue. The higher level prudence review is too be decided by another panel and another day.

The second point I need to make is a key distinction between the Enbridge case. The contract that was challenged in the Enbridge case and the costs which were denied in respect of that contract, are quite different

from the costs of the lease agreement which had been approved by the Board in 2002.

I would suggest that because the Board had approved this lease agreement, there is a higher prudence presumption than would be the case if a decision to enter into a contract had just been made by management of its own accord.

It may even be arguable -- and this certainly seems to be CNPI’s position that the lease agreement stands up to the ultimate prudence review because it has been approved by the Board. What they're saying is, as I understand it, is that the Board has approved this lease agreement, so we're not even -- nobody is even entitled to the first level of enquiry, because it has already passed that second level of prudence review.

Now, just a couple of submissions. So that's my submissions with respect to the prudence review test and rebutting the prudence presumption.

Just a couple of submissions on the 2002 decision, because I think it is quite important. SEC has argued, you know the leave decision proceeded on a narrow statutory test and section 82 of the Act, and I don't want to cover too much ground that Mr. Taylor has already covered, but Staff agrees with his analysis of the ^“Leave” decision. It was not this narrow section 82 decision.

The application was made under section 86 of the Act. And paragraph number 1 of the order portion of the decision -- it doesn't specifically refer to section 86 of the Act,

but it is an order approving and granting leave to Port Colborne Hydro to lease two CNPI electricity distribution assets of Port Colborne.

Now, that kind of order can only be made under section 86 of the Act, even though that paragraph doesn't specifically say section 86.

Furthermore, as Mr. Taylor pointed out, the leave decision does explicitly state that lease is being approved in the public interest. So again, it is not based on a narrow statutory grounds of section 82.

The leave decision specifically referred to the lease costs and was part of the record. The lease agreement was before the Board, as were Port Colborne Hydro's financial statements showing the value of the asset as 8.9 million.

So the Board is aware of the terms of the lease, the costs, the value of the asset. It knows that the value of that asset is going down, because there is a buyout option at the end of the lease term whereby they can acquire the assets for 6.9 million. So we know the value of the asset isn't going up. They know it is going down.

So there was a lot of information the Board had before it and it approved that lease. So it is a fairly strong decision in that regard, in my submission.

Now, what this Panel has to decide is a very difficult question between the SEC's approach, which says, you know, that 2002 decision is just irrelevant and, you know, and CNPI's position, which is that this cannot be touched. Board Staff would -- does not side with either, except to

say that these are important competing interests that are at stake.

One is the predictability and reliability of Board orders, and generally we are of the view that they should not be disturbed except in cases where a party has shown that there is a good reason to probe a little bit more deeply into the issue.

But neither does Staff take the position that once a cost has been approved in a non-cost of service proceeding, such as a MAAD application, that it can never again be examined in a ^cost of service proceeding.

The Panel needs to ask itself whether it would be in the public interest to say that, you know, this decision, in 2002, basically froze the lease costs and those can never again be examined, regardless of what the circumstances are and how the costs play out over the lease term, and, you know, the value of the asset and what impact it has on rates.

So, as I've said, there are two very strongly competing interests, and the Board -- the Panel is going to need to balance those two.

Those are all of my submissions with respect to that topic.

MR. KAISER: Thank you. Yes, Mr. Taylor.

FURTHER SUBMISSIONS BY MR. TAYLOR:

MR. TAYLOR: May I make one comment?

Counsel suggested that perhaps a prima facie case was made by Schools. The quote that was relied on was:

> "Consequently, the OEB could use the fact of increased transportation costs incurred by Enbridge to decide whether the presumption of prudence was rebutted."

But, in this case, I just want to point out the costs were not increased. They were fixed all the way through. That is a significant difference between this circumstance and the one before you right now. The only thing that changed was the value of the assets. Obviously they're going to depreciate over time. That's beyond the control of the applicant.

MR. KAISER: Anything further, Mr. DeVellis?

FURTHER SUBMISSIONS BY MR. DEVELLIS:

MR. DeVELLIS: Thank you, Mr. Chairman, just briefly.

They have to do with, I guess, the scope of the review in the 2002 -- the leave decision. I think Mr. Taylor and Ms. Cochrane both said that it proceeded on -- as a broader ground than just the section 82.3 review.

But if you look at the decision, tab 2 of our motion record, it is true that it says at the outset the application was brought under section 86.1 of the Act, but then at the bottom of page 3, the Board says:

> "The Board determines that based on the evidence, the impact of the proposal would not adversely affect the development and maintenance of a competitive electricity market."

Then after, subsequent to that paragraph, is where the Board refers to the fact that the transaction is in the

public interest. But, in our view, that is within the context of the previous paragraph, and that is that it would not impact the development of a competitive electricity market.

We also see that in the Board's order at section -- at paragraph 4 of the Board's order, page 4. The Board again says:

> "The acquisition by Canadian Niagara Power of an interest in an electricity distribution system in Ontario is approved pursuant to subsection 82.3 of the Ontario Energy Board Act."

That is the only subsection, the only portion of the Act, that is actually referred to in the Board's order. We can only assume that that is the only section that the Board relied on, because that is the only section that they referred to. They didn't refer to any other section, and the language in the body of the decision certainly indicates that they are only considering section 82.3, and that is the impact on the competitive electricity market.

MR. TAYLOR: If you accept that argument, then we don't have leave to lease these assets, and I guess they should all be removed from the rate application. We never got it.

MR. DeVELLIS: Well, I mean, the question here is: What was the scope of the review in 2002? We're saying that is the scope of the review for the purposes of our determination.

I guess what Mr. Taylor is saying is, you know, there

was an opportunity to review that decision. Well, nobody did, and the transaction went ahead. And that's fine, but the question is: To what extent should this Board rely on that finding?

Based on the scope of the review in that case, I don't think the Board should say, Well, you know, the Board found that the rates were acceptable, because they didn't. There was no evidence that the rates -- that the Board considered the rates at all.

That leads to my other point, and that is this whole prudence issue. I think, with respect, that we have sort of gotten sidetracked by the consideration of this prudency issue, because, I mean, for example, the issue in the Enbridge case was the Alliance/Vector contract.

I wasn't involved in that case, but I am a little bit familiar with it. The prudency in that context is, well, a utility in the context of a ^cost of service regime enters into a contract with a third party. I think in this case it is actually an affiliate, but -- the extent to which the utility's decisions can be second guessed after the fact. But that is not -- what we're dealing with here is not the same issue.

First of all, it was not a cost of service regime, and there was no evidence in the record in the leave decision that the company considered whether these costs are properly passed on to ratepayers, or not.

What we're dealing with is really a binary issue, and that is: Is this lease based on the net book value of the

assets or not? So it's not really a prudency issue. The issue is: Are they properly calculated? Are the lease payments properly calculated for the purpose of a cost of service review, which is what we're doing here?

So I don't think that the prudence test is really directly applicable to this situation.

But, in any event, I think even if you do agree that the prudence test is applicable, I believe we did meet -- what the actual prudency test is, is that we have to raise a reasonable ground that the issue should be revisited, and I think that in that case we did raise a reasonable ground, and that's where -- I guess I disagree with Mr. Taylor on that point, as well.

Well, A, you have already heard our submissions with respect to the Board's findings that we have to raise a prima facie case. That's incorrect. We don't have to raise a prima facie case. What the case law says is we have to raise reasonable grounds.

What Mr. Taylor also argues, well, the Board already heard our arguments on that point, i.e., you know, that it's a significant portion of the revenue requirement, that there is an indication that the lease payments are above reasonable rate of return, that they're based on fair market value instead of net book value, and that because the Board already heard that, you can't review that finding.

I think that is incorrect. I think this is a motion to review. We argued in our notice of motion that the

Board's -- A, the test that the Board applied was incorrect, but also that the finding on the test was incorrect. And so we certainly think that this Board can review those findings.

So those are all of my reply submissions.

MS. CHAPLIN: Mr. DeVellis, I would like to take you back briefly to this 2002 decision, and I am not sure if I misunderstood you or if the way I am looking at this is not the way you are looking at it.

My understanding is in fact there were two matters before the Board. One was for approval of leave to enter into the lease, and the second was the notice of proposal from Canadian Niagara, and that deals with the idea of a generator and a distributor being involved.

If I look at page 3 and page 4, there are two paragraphs, and my understanding is you are linking those. And I read them as being completely separate. The first paragraph is related to the proposal, and that's the notice of proposal and that's where the test is related to impact on a competitive market.

The next paragraph, which is the last paragraph, does not deal with the proposal part of the application, but deals with the leave for approval of the lease.

And the finding is in the public interest. So I see those as being two distinct findings on two distinct questions. Do you not see it that way?

MR. DeVELLIS: Well, I hadn't seen it that way, but --

MS. CHAPLIN: I would put it to you that that is what

the words are saying.

MR. DeVELLIS: That's possible but my point was if you look at the Board's order, the section that is referenced is section 82, there is no other reference to any statutory test.

MS. CHAPLIN: It was very clear, Mr. DeVellis, the matter that was before the Board. It is in the style of cause at the front is the application. There were two matters before the Board. One is the notice of proposal and that is under section 81, and the other was the application for the leave for the lease and that was under section 86.

It seems clear to me there were two questions before the Board. It answered those two questions, and regardless of whether or not the order section refers to that section, it can't refer to anything else.

I mean, that section 1 of the Board's Order relates directly to the section 86 application. It has nothing to do with the section 81 notice of proposal.

MR. DeVELLIS: Well, that's fair enough. I may have misread that particular paragraph. But I think that my earlier submission is still valid and that is if you look at the totality of the evidence --

MS. CHAPLIN: I take your other points. I just wanted to clear up that fairly technical issue.

MR. DeVELLIS: Right, okay. That's fine, thank you.

MS. CHAPLIN: Thank you.

MR. KAISER: Anything further, gentlemen?

MR. TAYLOR: No.

[Board Panel confers]

MR. KAISER: We will take ten minutes.

--- Recess taken at 11:45 a.m.

--- Upon resuming at 11:54 a.m.

DECISION:

MR. KAISER: Please be seated.

The Board heard submissions this morning on a Motion brought by the School Energy Coalition appealing a decision this Board rendered on March 12th, with written reasons delivered on March 23rd.

That decision related to an earlier motion by this applicant to require Canadian Niagara Power Inc. to produce certain documents related to its application for just and reasonable rates commencing May 1st, 2009. That application is proceeding on Monday.

The questions raised by Schools in various interrogatories relate to a lease that the utility has entered into with respect to certain assets. Included as part of the applicant's cost of service is some 1.5 million in annual lease payments to Port Colborne Hydro.

The question before us today, is first, whether the reasonableness of those lease costs or the prudence of that contract is an issue in this proceeding, and, secondly, if so, should the utility be required to produce certain documents that Schools says are relevant to that issue?

Some background will be useful.

The lease in question relates to all of the assets

used to provide electricity distribution in the City of Port Colborne. They were leased to the utility, Canadian Niagara Power, in 2002 when Canadian Niagara took over the electricity distribution franchise of the City of Port Colborne.

Given that this was a transfer of electricity distribution franchise, leave of the Board was required and an application was made. The Board granted its approval in April of 2002. That leave decision figures in the appeal we are presently considering.

One of the issues with respect to the leave application in 2002 that is relevant to the issue before us is whether the lease was considered in that 2002 leave decision. It would appear, from the record we have reviewed, and the submissions heard today, that one of the bases on which the Board granted that leave was an undertaking by the company purchasing the utility, Canadian Niagara, that there would be no rate increase resulting from the acquisition, and no rate increase without the subsequent approval of the Board.

Usually in those cases the Board applies what is called the no-harm test, and one of the important aspects of that test is whether there will be any rate increase resulting from the acquisition. With that undertaking, it is apparent that the Board ceased any further examination of rates and approved the transfer of the franchise on the usual grounds.

There was no subsequent increase in rates by this

utility until a cost of service application in 2006.

The reason I raise these earlier decisions - and I will come to the 2006 decision in a minute - is that the main reason the prior Panel dismissed the application by Schools for production of documents was that the issue regarding the reasonableness of the lease costs, or prudence of the contract, if you will, was considered in the two previous decisions, the 2002 leave decision and the 2006 rate decision.

I have dealt with the 2002 leave decision.

With respect to the 2006 decision, it is significant to this Panel that this was a decision based on a historic test year. And in those cases, as is the practice, the Board accepts the costs brought forward from prior years - they would have been 2004 costs in this case - without any detailed examination.

The particular sections of the decision that are in controversy (I am not going to read them but will attach them as an appendix to the decision) appear at the bottom of page 3 and the top of page 4 of the Decision.

In particular the Board concluded:

> "The Board has broad powers to reconsider costs and revenue issues underpinning rates. But payment amounts and, in particular, fixed payment amounts associated with the lease of the entire asset base of the utility are not an ordinary issue that should be revisited without a compelling prima facie reason for doing so."

It was on this basis, that the prior Panel refused the request for the production of documents that related to this issue.

The Board has been referred to a number of authorities, one of which was advanced by Canadian Niagara. I am referring to the decision of December 13th, 2002, by this Board in the application by Enbridge Gas. That decision also went to the Court of Appeal. That was the April 7th, 2006 decision of that Court. This decision dealt with the prudence of the Vector/Reliance pipeline expenditures by Enbridge (RP-2001-0032).

This Panel believes there is helpful language in the Board's prior decision that bears on this decision. At paragraph 3.12.3, which is page 62 of that decision, the Board stated as follows:

> "While a party challenging the prudence of a decision made by the utility has an obligation to raise reasonable grounds for undertaking such a review, it does not need to establish a prima facie case that the utility's decision was imprudent. Rather, it must demonstrate that there is an issue to be determined on further enquiry by the Board. This is particularly true in the case of a regulated utility where it is the only party in possession of all relevant information about how and why the decision was in fact made."

The Board is of the view that these principles should

apply to the case at hand. The applicant, Schools, says that the lease costs should be an issue. They point out that they are very significant costs. They represent 26 percent of the revenue requirement.

Board counsel made submissions, on the basis of similar figures.

The position of the utility is that this should not be an issue in this case. They basically say, that is because the matter has been dealt with previously and should not be revisited.

The word "revisited" is the word used in the Panel's decision at page 4 when they say "issues should not be revisited without a compelling prima facie reason for doing so".

Schools, relying on the paragraph 3.12.3 that I have just referenced, in the Board's decision in Vector/Alliance say they don't have to establish a prima facie case. They only have to establish reasonable grounds.

This Panel agrees that this is the test.

With respect to the utility's position that the matter has been previously determined, I have mentioned that in the 2002 case there was very limited examination of the rates. The Board simply accepted the undertaking there would be no resulting rate increase by the acquiring entity. There is no finding with respect to this lease agreement in any shape or form.

With respect to the 2006 case, as indicated this was done on historical test year without any detailed

examination of rates. There is no finding of prudence or reasonableness of costs with respect to this particular contract.

Accordingly, we are unable to conclude that that matter has been dealt with previously by the Board. In our view, it is not sufficient to say there was merely an opportunity to raise it and, if it wasn't raised, the parties are estopped from raising it in future hearings.

Having decided that this issue is relevant or as the parties have described it, "live", in this proceeding, the next question concerns the production of documents.

This Panel is of the view that if an issue is relevant to the determination of a Board's decision (which we have found to be the case), then any documents relevant to that issue should be produced by the utility, provided that the utility has the documents and, of course, they are not privileged.

There is, however, in our view, no requirement for the utility to manufacture documents. So on that basis, we are prepared to hear submissions as to what particular documents that should be produced by Niagara Power.

Mr. DeVellis.

SUBMISSIONS BY MR. DEVELLIS:

MR. DeVELLIS: Yes, Mr. Chairman. I spoke to Mr. Taylor about this earlier. If I have mischaracterized our discussion, he will correct me. But we have decided if

the Board came back and found that the issue was relevant, that we would then discuss, privately, the specific documents that are outstanding with an attempt to arrive at a resolution at some or all of the questions that are outstanding. If we can't arrive at a resolution we would come back to you and argue about whatever questions or issues that remain outstanding.

If that is agreeable to the Board that is what we propose. We would take a short recess to discuss the questions and come back to you.

MR. KAISER: How long do you think you need? I mean, we could do it over the lunch hour, that is one option if you want to take that long a break. We are in your hands.

MR. TAYLOR: Why don't we take a half hour?

MR. KAISER: Can I just check with my colleagues on that?

Ms. Chaplin has an engagement. So we will take the lunch break and we will come back in an hour. Thank you, gentlemen.

--- Luncheon recess taken at 12:05 p.m.

--- Upon resuming at 1:10 p.m.

MR. KAISER: Please be seated.

Well, gentlemen, it's a beautiful Friday afternoon in this godforsaken country, so we hope you have come to an agreement.

MR. DeVELLIS: Yes. Thank you, Mr. Chairman. You will be pleased to know that we have agreed on all but -- I believe all but one of questions that are outstanding.

I will just briefly go through the list. In the list of questions -- unfortunately, they're in two different tabs, because one page got left of one of the tabs. So if you turn to tab 11 of our motion record.

MR. KAISER: What number interrogatory?

MR. DeVELLIS: It is listed as No. 12. It is just a page in.

MR. KAISER: Yes.

MR. DeVELLIS: It is actually Supplementary Interrogatory No. 12. They follow it up. It was a follow-up -- series of follow-up questions on our original Interrogatory No. 24. The reason for that is there was two documents submitted to us in response to that interrogatory, and so these questions arose out of that -- those documents.

So most of the outstanding issues are here, and there are a couple under a different tab which I will get to. Number 12(a) are ancillary agreements that were mentioned in the master implementation agreement, and we had asked for those and the applicant has now agreed to provide those.

Sub (b), there were certain appraisal reports mentioned in the master implementation agreement. That is the appraisal of the assets at the time of the lease, and the applicant has agreed to provide those, or to at least look for what they have.

Sub (c), as I said earlier, the issue that is outstanding there is the second part of that sentence; that

is, any additional facts provided to the tax department in the course of obtaining the advanced tax ruling.

What the applicant has told me is that what we were referring to there is the application to the Minister, and I believe that they will be -- they have agreed to provide that.

(d) I think is really the same thing, and that is the copy of the notification to the Minister. I think that they have said that is the same thing, but, in any event, they have agreed to answer that question.

(e) is the one that is outstanding. That is the closing agenda. I will get to that in a second, because that is the only one that I say we have a disagreement about.

(g), we asked to provide a copy of the RFP referred to in the confidentiality agreement. I believe the applicant's position is that was issued for Port Colborne Hydro, but -- they have agreed to ask them, but I think --

MR. TAYLOR: We can get that.

MR. DeVELLIS: They can get that. So they will provide that.

(h), we asked for basically an explanation as to how the rental amounts were determined. The applicant has agreed to answer that question.

Sub (i) through (l) were actually answered in the course of the previous motion, and so we will -- we have those answers and we can follow up in cross-examination, if need be.

There are four others, and they are found at tab 13 of our motion record, page 5. The first one is No. 25, SEC No. 25. There are five parts to this. The first -- (a) and (b) are financial statements pertaining to Port Colborne Hydro, and I believe the applicant says they can provide those.

With respect to (c), (d) and (e), the applicant is not sure whether that exists, but they will make enquiries to Port Colborne Hydro.

MR. TAYLOR: Sorry, if I could just interrupt, for (a) and (b) we will ask for those. We can't guarantee we will provide them, but we will do our best. Then for (c), (d) and (e), this information doesn't exist.

They're asking for rate base continuity charts and certain calculations for Port Colborne Hydro Inc., and they don't file ^cost of service applications, so they wouldn't have the information in this form. So they would actually have to produce rate application-like documents.

MR. DeVELLIS: With respect to both of those points, Port Colborne Hydro is, of course, an applicant in this proceeding, so I understand Mr. Taylor's point that they will ask for them. Obviously, Canadian Niagara Power can't control what PC Hydro does, but, in our view, if the issue is relevant, then PC Hydro, if they have it, is obligated to provide it, in that they are an applicant.

With respect to (c), (d) and (e), I take Mr. Taylor's point. That information may not exist. PC Hydro is, I guess, a regulated utility in name only, I guess at this

point, because they don't actually operate a distribution utility. So they may not have any of this information, but to the extent that it is available, I guess we would ask them to --

MR. TAYLOR: We will ask for it.

MR. KAISER: Just so we are clear, the parties are agreed that it is producible only in the event that they have it; agreed?

MR. DeVELLIS: I think that is right.

MR. KAISER: All right. Thank you.

MR. DeVELLIS: The next point is 26.

We actually provided the information to the applicant. We just asked them to confirm that was the case, and I believe Canadian Niagara Power will provide -- has agreed to provide an answer to that.

MR. TAYLOR: No. What we said was -- they have asked for the financial report or confirmation about a financial report belonging to the City of Port Colborne.

We really don't have a connection with the city. There is the connection, through the Procedural Order 1, with Port Colborne Hydro. So I think the best we can do is ask Port Colborne Hydro to make an enquiry of the city whether or not it has the most current financial report.

MR. KAISER: What is your relationship, if any, with Port Colborne Hydro? None, I take it?

MR. TAYLOR: None, except for the fact we lease their equipment.

MR. KAISER: Right. All right, thank you.

MR. DeVELLIS: That's fine.

Twenty-seven, we asked for various valuation reports or other documents setting out the value at any time from 2001 to date of the Port Colborne assets.

And I believe the applicant's position is they will -- they're not sure if any such document exists. I think there is an appraisal report that was done in 2001 or 2002 and they will look for that.

MR. TAYLOR: We will provide it -- look for it.

MR. KAISER: You are going to look, but you don't know at this point whether it exists?

MR. TAYLOR: I suspect it does exist. It is just a matter of whether they have it.

MR. DeVELLIS: Number 34 is the last one, and that is we had asked for recalculations of the applicant's rate base, and the applicant has agreed to provide that to us, as well.

MR. KAISER: All right. Is that it, gentlemen?

MR. DeVELLIS: That is it for the ones that are resolved. There is one issue that is outstanding, and that is the closing agenda. That is number 12(e).

MR. KAISER: Why do you need that?

MR. DeVELLIS: This is simply a list of documents that were, I guess, involved in the lease transaction, and, in our view, this is something that can give us a clue as to any documents that exist that we don't necessarily know exist at this point.

In other words, we can scan the list and see, Well,

there's something that we hadn't thought about that may be relevant to this issue of, you know, whether the costs that are proposed to be included in the cost of service are reasonable or not.

Unfortunately, we can't tell you we need this document or that document, because we don't have the list. So all we're asking for is to see the list, and, from that, we can decide if there is anything else that is relevant.

I think the applicant's -- Mr. Taylor will make his own submissions, but, you know, the concern is, well, that would be a fishing expedition, because then we could basically ask for everything and, you know, it would never end.

I think that is a valid concern, but I think that is something that the Board Panel hearing the hearing can deal with, if need be. It would be sort of a materiality and proportionality test that would be applied.

MR. KAISER: Sorry, you are prepared, since this is your application, Mr. DeVellis, to defer that request to the sitting panel?

MR. DeVELLIS: Well, that was our proposal, I think, to have that argued before the panel, if need be.

MS. CHAPLIN: You mean requests for any subsequent requests for documents, you want this Panel to confirm that the list will at least be provided?

MR. DeVELLIS: Well, I mean my initial thought about this was that this Panel doesn't necessarily have to decide about the closing agenda.

MS. CHAPLIN: Oh, okay.

MR. DeVELLIS: Yes.

MR. KAISER: I take it you are saying that, because the relevance or lack of relevance of it might be more apparent when they heard some evidence as opposed to the three of us sitting here?

MR. DeVELLIS: That's right. It is difficult to sort of to lay a case for that without sort of an evidentiary foundation.

MR. KAISER: I'm a great believer if we don't have to decide anything we won't decide anything. If both of you are content to defer it.

MR. QUESNELLE: I am trying to imagine what will be involved in that case that would shed more light on the need for it.

MR. DeVELLIS: Well, that is a good question, and I guess it would be up to whoever is doing the cross-examination, thankfully it won't be me, of the panel, of the applicant's panel.

MR. KAISER: Does it exist, Mr. Taylor? The closing agenda.

MR. TAYLOR: It does, yes.

I think if I push you to making a decision, I am not going to like your decision, so no push back here.

MR. KAISER: I don't think it is going to do any great harm or spend a lot of time arguing about it. We're late. This case is starting on Monday.

MR. TAYLOR: Let's defer it.

MR. KAISER: We appreciate that. Is that satisfactory, Mr. DeVellis?

MR. DeVELLIS: Yes. Thank you.

MR. KAISER: All right. What I would request you, Mr. DeVellis, since we are turning this over to another panel -- Mr. Quesnelle will be on it, but would you mind reducing this all to writing, that is to say, identifying what is producible, what is not producible, what undertakings Niagara has made, and then run that by your friend and have him –- and file it, at least, at the opening day.

We can read this transcript, but it would just be of assistance to the panel that has to hear this, to know what the parties have agreed to with respect to production of documents.

MR. DeVELLIS: Yes, that's fine.

MR. TAYLOR: Sure.

MR. KAISER: All right. Is that it?

MR. DeVELLIS: I believe so.

MR. KAISER: Mr. MacIntosh, anything?

MR. MACINTOSH: No.

MR. KAISER: All right. Thank you. Thank you, gentlemen.

--- Whereupon hearing concluded at 1:25 p.m.

APPENDIX:

**DECISION WITH REASONS
ON THE MOTION**

(EB-2008-0222, -0223, -0224)

DATED MARCH 23, 2009

**EXCERPTED
pages 3 and 4**

According to SEC, the information was requested to determine whether the Port Colborne lease is "in substance a sales agreement". SEC postulated that, in its view the fact that the transaction was not structured as a sale for tax reasons could result i higher rates for Port Colborne than would otherwise be the case. CNPI argued that t lease satisfied the criteria established by the accounting profession (CICA Handbook and the jurisprudence for distinguishing a true lease from a sale. With respect to the latter, CNPI filed an Advanced Tax Ruling from the Ministry of Finance (Ontario).

SEC accepted that the arrangement meets the legal tests of being a true lease but argued that this should not be determinative of the issue at hand and that it should nc prohibit the Board from treating the transactions for ratemaking purposes as if the transaction was in substance a sale.

The Port Colborne lease was approved by the Board in a 2001 application (RP-2001- 0041) by Port Colborne Hydro Inc. ("PCHI") under s.86(1) of the Act for leave to leas CNPI the electricity distribution assets within the city of Port Colborne. Furthermore, revenue and cost consequences were reflected in the Board's decision in setting 200 rates for Port Colborne in a cost of service proceeding (RP-2005-0020 / EB-2005-03

In the present motion, both SEC and CNPI relied on substantially the same case law argue whether or not issue estoppel[1] applied to the circumstances of this case. However, their conclusions were different and SEC argued that the specific rate impa of the lease transaction has never been considered by the Board and that issue estoppel therefore did not apply so as to preclude the Board from considering the rat impacts of the lease in the present rates application.

The Board agrees with SEC that the true lease characterization is not determinative just and reasonable rates. However, in approving the lease arrangement in 2001, th Board's decision makes it clear that the Board was aware of the cost arrangements c the lease. Although the 2001 proceeding was not a rates proceeding as such, the Board could have imposed conditions or commented on the proposed lease arrangement if it was concerned about potential rate impacts. The Board did not do

[1] Issue Estoppel precludes the re-litigation of an issue that has already been decided in a prior proceeding.

The proceeding for setting 2006 rates also did not raise concerns about rate impacts arising from the lease transaction. While rate impacts arising from the lease arrangement were not specifically dealt with by the parties to that proceeding (which, it should be noted included SEC), CNPI's argument in this motion that the 2006 rates did reflect the cost and revenue consequences of the lease arrangement and that it had organized its affairs on the strength of that decision has merit.

The Board has broad powers to reconsider cost and revenue issues underpinning rates. But payment amounts, and, in particular fixed payment amounts, associated with the lease of the entire asset base of a utility is not an ordinary issue that should be revisited without a compelling *prima facie* reason for doing so. SEC's suggestion of benchmarking the proposed revenue requirement with that of the alternative of a sale is problematic on a number of levels. First, it is not realistic in view of the presence of a true lease. Second, it would involve the use of a multiplicity of assumptions on every component of the fictional revenue requirement calculation in a sale scenario. Third, it has the potential risk of leading to benchmarking with other scenarios, such as Port Colborne as a stand alone utility. Fourth, it would, in effect, render the 2001 Board approval of the lease arrangement meaningless. Finally, comparison of outcomes of different scenarios at different points in time and for different test period intervals would devalue the consistency and predictability principles for which the Board strives.

In making its decision on March 12, 2009, the Board took into consideration that nothing had changed in the lease agreement since its inception and approval by the Board in 2001. The Board also considered that the lease expires in early 2012 and that under the terms of the lease, the assets will be in the possession of either CNPI or PCHI - a comparative review of rates close to the expiry of the lease term was not a prospect that the Board felt was, on balance, sensible in the circumstances of this case.

For the reasons set out above the Board did not on balance find it appropriate to make an order compelling CNPI to provide the material and calculations sought by SEC in respect of the lease.

ii) The allocation of expenditures and affiliate income

CNPI provided pre-filed evidence and responded to a number of interrogatories relating to the allocation of expenditures and affiliate income. SEC argued that it did not receive answers or full answers to certain of its interrogatories relating to the strategic plan of FortisOntario (the parent of CNPI), calculations determining the rate of return on the