

K1.1



# ONTARIO ENERGY BOARD

FILE NO.: EB-2006-0021

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VOLUME: Receipt of Settlement  
Proposal

DATE: July 10, 2006

BEFORE:	Pamela Nowina	Presiding Member and Vice Chair
	Paul Vlahos	Member
	Ken Quesnelle	Member

Ontario Energy Board	
FILE No.	<u>EB-2007-0606/0615</u>
EXHIBIT No.	<u>K1.1</u>
DATE	<u>January 31, 2008</u>
<u>Excerpts, 2006 GND SM</u>	
<u>Generic Hearing</u>	
<small>08/99</small>	

1 substitute with an updated settlement proposal. But  
2 presently the copy before you does have some references to  
3 intervenors supporting or not supporting an issue which we  
4 determined was incorrect.

5 Similarly, the earlier version sent to you included  
6 the wrong docket number. That in fact has been corrected  
7 and the version in the Exhibit K1.1.

8 MS. NOWINA: So you will go through those corrections  
9 when you present the settlement agreement?

10 MR. O'LEARY: Yes, we will.

11 MS. NOWINA: Okay.

12 MR. O'LEARY: In terms of the process which the  
13 utilities would suggest to yourselves for consideration,  
14 Mr. Smith is going to speak to that matter.

15 **SUBMISSIONS BY SMITH:**

16 MR. SMITH: Madam Chair, no doubt this issue arose on  
17 the Board's reading of pages, I believe, 8 and 9 of the  
18 partial settlement documentation. The final paragraph on  
19 page 8 - it is tab 2 of Exhibit K1.1 and the first three  
20 paragraphs on page 9 - refer to a number of issues as not  
21 being severable.

22 I will just take you to tab 2, page 8 of Exhibit K1.1,  
23 which provides:

24 "It is acknowledged and agreed that issues 1.3,  
25 1.4, 1.7, 5.2, 6.1, 6.2, 6.3, 6.4, 10.2, 10.4,  
26 10.8, 13.1, 13.3 were negotiated by the parties  
27 as a package ..."

28 And, pausing there, members of the Board will have

1 noticed those are primarily the financial matters.

2            "... with tradeoffs and compromises between those  
3            issues to get an appropriate balance. None of  
4            the issues in the package is severable. If the  
5            Board does not by the end of the hearing of  
6            evidence in EB 2006-0021 accept all of the  
7            partially settled provisions of this settlement  
8            proposal, included in the package in their  
9            entirety there is no settlement on any issues  
10           included in the package unless the parties to the  
11           partially settled issues in the package agree  
12           that any portion of this settlement proposal may  
13           be severed and continue as a valid settlement.)"

14           Now, the language continues to further acknowledge  
15           that before the partially settled issues be considered, the  
16           Board has to render a decision on the completely settled  
17           issues; that being that if the Board were to decide that  
18           the completely settled items are in the public interest,  
19           then the partially settled package will be presented to the  
20           Board. If, on the other hand, the Board were to decide  
21           otherwise, then the partially settled package would not be  
22           presented to the Board and the conduct of the hearing may  
23           be somewhat different than we envision it now.

24           Language such as this regarding severability is not  
25           uncommon in settlement agreements. In fact, there is very  
26           good reason why it is included, and that is for precisely  
27           the reason identified at page 8 and 9, that these are  
28           compromises.

1           And particularly with respect to the financial  
2 matters, Madam Chair, there is an interrelationship, it is  
3 submitted, between the various items, such that a party may  
4 have made a concession on one aspect of the financial  
5 package in exchange for compromise on another aspect. It  
6 is unknown, of course, what particular parties' motivations  
7 are.

8           The totality of the package, however, is what the  
9 party has decided is appropriate or inappropriate, as the  
10 case may be, from their perspective.

11           With that in mind, and bearing in mind the obvious  
12 procedural conundrum that is raised by this, what the  
13 utilities propose and what I believe a number of other  
14 parties you will hear have agreed to, is the following:  
15 That is, the evidence -- assuming -- let me preface it by  
16 saying assuming the completely settled package is accepted  
17 by the Board, what would then occur is the parties would  
18 proceed with the hearing along the four broad issues that  
19 are identified by Mr. Bell in an e-mail that he  
20 distributed, the utilities would lead their entire case,  
21 the panels alternating between Enbridge and Union.

22           That evidence would be submitted and those people who  
23 are in support of the package would have a - I think it is  
24 fair to say - a limited right to supplement examination  
25 in-chief by the utilities. Thus, for example, if you were  
26 to take issue 1, plan development, I can advise that  
27 Enbridge will be going first on this issue.

28           My friend Mr. O'Leary would tender his panel, lead

1 some examination in-chief in order to clarify for the Board  
2 the matters that have been subject of the partial  
3 settlement or that are otherwise included in that issue. I  
4 may have some questions, although I would doubt it.

5         Intervenors who are in support of that partially  
6 settled items, and so the Board is aware on the financial  
7 matters it would be largely - I believe it is almost all of  
8 the ratepayer groups - would then nominate one or two,  
9 perhaps, representatives who would conduct limited or  
10 focussed either supplementary examination in-chief or  
11 cross-examination in order to amplify or make clear  
12 something that may have been missed in examination  
13 in-chief and which particularly relates to their interest.  
14 I would use, for example, if you were to look at the budget  
15 issue, there is a component for low-income. My friend  
16 Mr. Buonaguro may feel it necessary to ask a question or  
17 two so that it is on the record exactly what is being  
18 proposed with respect to low-income funding.

19         Those intervenors who are not party to the partially  
20 settled item would then have, of course, their right to  
21 conduct a full cross-examination on the issue.

22         Once all of the evidence in-chief from the utilities  
23 has been heard in that manner, again those intervenors who  
24 are otherwise not parties to partially settled items would  
25 tender, to the extent they have any, their own evidence.  
26 So the Green Energy Coalition would tender Mr. Neme.

27         We would then ask the Board -- the parties would then  
28 ask the Board, having heard the evidence -- having heard

1 all of the evidence from all of the parties, for a  
2 determination on the partially settled items. And there  
3 may be argument necessary in respect of that, but parties  
4 would make either argument or the Board would render a  
5 decision -- presumably the Board would want some argument  
6 on it -- would render a decision on the partially settled  
7 items, whether or not it is in the public interest for the  
8 Board to accept the package as it is defined in the  
9 agreement, in which case the next step would be argument on  
10 those issues which were not the subject of a settlement.

11 If I may, although this is a bit of a unique situation  
12 -- on review of the rules of practice and the settlement  
13 conference guidelines published by the Board, I believe  
14 what we have proposed is exactly what the Settlement  
15 Conference Guidelines contemplate.

16 In looking at both the rules which specifically  
17 provide that in certain instances, there may be a partial  
18 settlement and then the guidelines -- the guidelines deal  
19 with what the Board should do in a situation like this.

20 At page 8 of the guidelines, the Board -- the  
21 guidelines indicate:

22 "Where, despite any efforts to revise the  
23 settlement proposal, the Board is of the view  
24 that the quality and detail of the evidence in  
25 the proposal or the rationale for the settlement  
26 of issues will not allow the Board to make  
27 findings on one or more settled issues, or where  
28 the Board is of the view that the public interest

1 requires a hearing of certain issues, the Board  
2 will hear evidence on those issues, even if they  
3 were dealt with in the settlement proposal, as  
4 well as on any issues excluded from the  
5 settlement conference. The Board may give  
6 directions as to the issues on which it requires  
7 evidence at the hearing.

8 "Where the Board does not accept a  
9 settlement agreement that the parties have  
10 specifically requested be accepted as a package,  
11 the Board will reject the settlement proposal as  
12 a whole and will proceed to a hearing of all the  
13 issues on the issues list."

14 So to further flesh out what we propose, I believe --  
15 others may have a timing difference -- but I believe that  
16 the parties will be able to have all of the evidence heard  
17 by some time in the middle of next week, maybe a little bit  
18 longer than that.

19 There would then be argument on the partially settled  
20 package. If the Board accepts the partially settled  
21 package, then everybody agrees we would proceed to final  
22 argument on matters that have not been settled and on which  
23 they have heard evidence. If, on the other hand, the Board  
24 determines it either needs additional evidence, as the  
25 settlement guidelines would provide, the Board can make a  
26 direction with respect to the hearing of additional  
27 evidence; or if the Board decides that the partially  
28 settled package is not in the public interest, the Board

1 can then direct a hearing on all of the issues, and it may  
2 be necessary at that point for parties to consider whether  
3 or not they want to call back witnesses to have evidence  
4 heard on issues that the Board has not -- has not agreed  
5 to. So people would, in effect, retreat to their partially  
6 settled -- to their prefiled evidence.

7 Now, that is what is contemplated by the settlement  
8 guidelines and, in my submission, it's consistent with the  
9 efficient running of this hearing. There will be, in my  
10 submission, time in the third week, which has been set  
11 aside in the event it is necessary, to hear more evidence.

12 The converse position, in other words, to have all of  
13 the evidence heard now, would require, in my submission,  
14 the parties to put forward all evidence, both partially  
15 settled and prefiled, and argument on their prefiled  
16 position, and argument on the partially settled, much of  
17 which may ultimately may not be necessary for this Board.  
18 That, in my submission, would be an entirely inefficient  
19 way to conduct this hearing.

20 Parties who are not parties to the partially settled  
21 issues are not prejudiced by what I am proposing, in that  
22 they will have all of the rights they would normally have  
23 to engage in cross-examination and to put forward whatever  
24 witnesses they have indicated that they intend to lead.

25 So in our submission, really what you have is you  
26 would have hopefully a relatively streamlined hearing on  
27 the evidence and argument on the appropriateness of the  
28 partially settled issues. Hopefully then a quick

1 proceeding to final argument. If not, there would be some  
2 follow-up time that may be necessary to be used with some  
3 additional evidence.

4 Mr. O'Leary makes a good point and reminds me that  
5 under the Board's settlement guidelines, it is actually not  
6 open to parties to lead a position which is contrary to  
7 their settled position, which of course would be necessary.  
8 The partially settled -- the partial settlement or the  
9 package represents, as I am sure you will hear throughout  
10 this hearing, a substantial compromise both by the  
11 utilities and fairly by the intervenors, who both parties  
12 have moved substantially off their prefiled position.

13 Any party that were to lead evidence that would be  
14 consistent with their prefiled position, to the extent it  
15 is inconsistent with the partial settlement, that is  
16 expressly forbidden by the guidelines.

17 So what we have proposed is, we think, the best  
18 possible resolution to -- I am sure you will hear  
19 submissions from other people, but I believe we have  
20 substantial buy-in from people on that proceeding and that  
21 way of proceeding. And subject to any questions you have,  
22 that is what we would propose.

23 MS. NOWINA: Let's ensure that the Panel understands  
24 what you are proposing before we ask for submissions from  
25 others.

26 So just to clarify for me, you anticipate that the  
27 Board would make a decision regarding the financial issues,  
28 the package issues, after we had heard arguments around

1 those issues, and then we would -- once we rendered that  
2 decision, we would move forward with the rest of the  
3 hearing.

4 Have you thought about the time lines that it might  
5 take the Board to make a decision on those issues?

6 MR. SMITH: Well, I suppose we have, in that our  
7 belief is that given the substantial settlement on a number  
8 of issues and the focussed nature of what the partially  
9 settled package will leave the Board with, that there, we  
10 hope, will be enough time or adequate time in which there  
11 could be a decision rendered by the Board such that  
12 sufficient time would be rendered for that evidence to be  
13 called within the time that's been allocated for this  
14 proceeding already. That is undoubtedly an ambitious goal,  
15 and it does impose on members of the Panel to an extent.  
16 However, in my submission, the alternatives are equally, if  
17 not more, undesirable.

18 MR. VLAHOS: Mr. Smith, what happens if X number of  
19 the issues on the package, after your presentation and the  
20 argument, the Board finds that twelve are fine, one is not?  
21 So what happens then? Take it or leave it; is that it?

22 MR. SMITH: It depends, Member Vlahos, on which issue  
23 it is, but if it is an item which is part of the financial  
24 package, that is specifically contemplated by the partial  
25 settlement.

26 MR. VLAHOS: I am talking about the package.

27 MR. SMITH: It is contemplated that unless the parties  
28 were to otherwise agree, that there would be no settlement

1 on the package. And the reason for that is what I  
2 indicated earlier, which is that the package represents  
3 substantial compromise by each party, and there is an  
4 interrelationship between these various financial issues.

5 Parties may have conceded on one point in exchange for  
6 a position they find more favourable on another point. So  
7 it would be manifestly unfair, in my submission, to those  
8 parties to the financial package if one item were accepted  
9 and another item excluded.

10 MR. VLAHOS: Which means we have to go back and all of  
11 those issues in the package would be subject to proper  
12 review and cross-examination, et cetera, et cetera. So  
13 we're talking about weeks down the road, then?

14 MR. SMITH: That may be the case. It would depend. I  
15 don't want to prejudge what might happen, but the parties  
16 have been able to reach a substantial compromise on the  
17 financial package.

18 The partial settlement does provide that they are not  
19 severable. It also provides unless the parties otherwise  
20 agree, the parties -- one alternative is the parties do  
21 otherwise agree to something that would then be resubmitted  
22 to the Board.

23 But it is possible that the parties would then have to  
24 file additional evidence. There would, in effect, not be a  
25 settlement.

26 MS. NOWINA: Thank you.

27 MR. SMITH: If I may, just further to the question you  
28 had asked, Madam Chair, I hope I didn't but I may have left

1 a much more efficient process and you encourage the parties  
2 to work together to find a solution.

3 So those are our submissions.

4 MS. NOWINA: Thank you, Mr. Shepherd.

5 Anyone else supporting the position before we go to  
6 those who do not?

7 **SUBMISSION BY MR. DeROSE:**

8 MR. DeROSE: Madam Chair, just to indicate one -- just  
9 to ensure that the Board does not take the silence of those  
10 parties as indifference, the parties to this financial  
11 package have worked closely together.

12 We have worked with Mr. Shepherd, and we stand by his  
13 comments. We stand by the utilities' comments in terms of  
14 the efficiency and fairness. I just want the Board to be  
15 clear that -- I think I can speak on behalf of all of those  
16 parties that have signed on to the financial package.  
17 Those that don't say anything, it is not indifference but  
18 it is perhaps a signal of how we are going to conduct  
19 ourselves over the next two weeks, that we will remain  
20 silent, if we can. Thank you.

21 MS. NOWINA: Thank you, Mr. DeRose. I appreciate  
22 that.

23 Who would like to make submissions against the  
24 proposal?

25 **SUBMISSIONS BY MR. POCH:**

26 MR. POCH: Madam Chair, I think I am first up.

27 First of all, I should just say with respect to the  
28 two examples that were given of partial settlements in the

1 past, the way the Board proceeded in that case was they  
2 heard all of the evidence, parties decided whether to hedge  
3 their bet in putting in their cross and their evidence or  
4 not, as they saw fit from an advocacy perspective, and the  
5 Board went to its deliberations and gave its decision, full  
6 stop. There was no provision for another round of evidence  
7 if the Board accepted or didn't accept.

8 But I appreciate this is a somewhat different  
9 circumstance, so it may or may not be a precedent, but  
10 there is no precedent for what is being proposed here by  
11 the parties to the partial settlement. That much I think  
12 we can agree with.

13 Our position is that a partial settlement amounts to  
14 no more than a statement of compromise. It is a deal  
15 between those parties. It does not and should not change  
16 the process before the Board, encumber the Board or  
17 pressure the Board in any way. To do so prejudices the  
18 parties that aren't a party to that settlement agreement.

19 Those parties make the deal, and they hope that the  
20 fact that it is known to the Board that a number of parties  
21 coalesced in a position and obviously reached a compromise  
22 to achieve that makes the Board feel that it is likely to  
23 be more workable or satisfied, more diverse interests. I  
24 am making the argument for them. That's why they do it.

25 And if they want to tell each other, And you have to  
26 stick by the deal, come hell or high water, that is up to  
27 them to propose that constraint on each other. If they  
28 want to say to each other, Let's all agree we are going to

1 advocate this and the deal shall say we reserve the right  
2 to put forward our positions in the alternative, that is  
3 fine, too, and that would be in the settlement agreement  
4 and would be allowed within the rules, the Board's rules,  
5 because it is in conformity with the settlement agreement.

6 That's our position on what it means to have a common  
7 settlement. Indeed, you will see there is an agreement  
8 that has been filed before you alerting you to a common  
9 position made by all of the parties apart from the  
10 utilities in this case.

11 Now, the issue doesn't -- there is no severability  
12 problem there, because we have all agreed in that agreement  
13 each of these items are independent of one another.

14 So -- and no one is asking the Board to make any pre-  
15 determination on those issues. We simply don't have a  
16 hearing on those issues. At the end of the day, you will  
17 make your decision. We're saying this should be treated no  
18 different. Just because the parties want to place this  
19 non-severability clause in should not change the process.  
20 There is good reasons that it shouldn't.

21 What, in effect, is being done here is the Board is  
22 being told, Change the process. Reach a decision on the  
23 package and understand if you reject that, you're going to  
24 be greatly inconvenienced. There is going to be great  
25 delay. We're all going to have to come back again. We're  
26 going to have to go through the whole issues list again.  
27 You're going to hear from Mr. Poch cross-examining on the  
28 same issues again. And that's the bargain that you as the

1 Board face.

2 Now, I am sure - and we heard about the concern with  
3 respect to time lines that arises in that scenario - it  
4 would also put pressure on the Board to make a fast  
5 decision, if you decide, in either scenario on that first  
6 round, because it is holding up the next phase, should  
7 there be one, or a determination if there should be one.

8 I am sure the Board would make, if put in that  
9 position, would make every effort to try to be fair and not  
10 let it affect their judgment. But with great respect, it  
11 is hard to conceive that it would not affect your judgment  
12 consciously or at least unconsciously, faced with that  
13 cost, if you don't take the package.

14 That, of course, means procedurally the deck is being  
15 stacked against those who are not a party to the agreement,  
16 and therefore is unfair.

17 Even if the Board, you are superhuman and you can  
18 compartmentalize the implications of not accepting that  
19 partial settlement completely at every level - and I am  
20 sure you would try - you're still going to have an  
21 appearance of unfairness in that situation, because I think  
22 any impartial observer, certainly one who finds their  
23 position rejected by the Board, is going to look and say,  
24 Well, of course they took the deal. And I think that puts  
25 the Board in a position of appearance of unfairness, which  
26 is not in the interests of the Board in the long term.

27 I would just go back to make another point about the  
28 argument issue. This is a generic case which is intended

1 to set some rules that will govern for at least three  
2 years, perhaps longer, one hopes, some principles, some  
3 basic approaches that will have some durability. It is a  
4 case that the Board, one would suspect, would want to take  
5 time and publish a well-thought out and clearly enunciated  
6 decision on -- of course, all of the Board's decisions are  
7 in that category, but, in particular, in a generic case,  
8 one would think that you have the time to do it right.

9 The process that my friends propose to you pressures  
10 -- creates further pressures on the Board to rush a  
11 decision and perhaps to rush parties in their arguments,  
12 and that would be unfortunate, in our view.

13 It is telling that the issue -- the document K1.2,  
14 which the utilities filed this morning, which is their  
15 summary of the issues settled with the utilities, I  
16 believe, if I have read this right, wherever there is a  
17 matter that is dealt with in the agreement between the  
18 parties other than utilities, the utilities are  
19 characterized here as "not settled." They said it is not  
20 settled.

21 So, apparently, if you have a deal with the utilities  
22 as a sub-group, that's a settlement that gets special  
23 procedural treatment, but if you have a deal that doesn't  
24 include the utilities in this case - and it is not an  
25 application in the ordinary course - that is not a  
26 settlement. It doesn't get any special treatment. You  
27 will see we have to have documents filed separately by the  
28 utilities. I'm not sure what purpose that document serves.

1           So in short, Madam Chair, Members of the Panel, we  
2 feel that the procedure being proposed would be most  
3 prejudicial to our position as a centre from that group.  
4 We feel that the -- it is not a great inconvenience for  
5 those parties to put in their case in its totality. They  
6 can make the advocacy decision whether they want to stick  
7 to their deal and take it -- you know, put all of their  
8 chips on a square, or they can agree amongst themselves  
9 they're free to hedge their bet and make their case for  
10 that and say, If the Board doesn't accept that, here's the  
11 position which, as a stand-alone item, makes some sense to  
12 us. But, presumably, these parties are going to be  
13 advocating the same principles, although they may be  
14 arguing it a different way or compromise on money items.  
15 Those are my submissions, unless you have any questions.

16           **QUESTIONS FROM THE BOARD:**

17           MR. QUESNELLE: Mr. Poch, I am interested in your  
18 comment of the appearance of unfairness if we were to  
19 accept the proposal going forward. Are you in agreement or  
20 disagreement with the characterization that what is being  
21 proposed is within the framework and what was envisioned in  
22 the settlement guidelines?

23           MR. POCH: I do not believe it is within that  
24 framework as it is currently drafted. It would be open to  
25 those parties to consider whether to re-draft the preamble.  
26 But I don't believe that the guidelines -- my read of them  
27 is they don't contemplate a situation such as this.  
28 They're simply not contemplated and we're on new ground

1 proposal which responds to that. And, in my submission,  
2 there is simply no threat that the Board's decision will  
3 be, in any way, compromised any more than the public is  
4 threatened when the Board is faced with a complete  
5 settlement and has to render a decision, as in this case,  
6 before hearing any evidence.

7 So, in my submission, the arguments advanced by my  
8 friends are without merit and ought to be rejected.

9 MS. NOWINA: Thank you.

10 **QUESTIONS FROM THE BOARD:**

11 MR. VLAHOS: Mr. Smith, your case is that no party  
12 will enter into a partial settlement. The risk associated  
13 with that you spoke of now and also in your opening remark.  
14 Partial settlements have been arriving here before the  
15 Board for years, so the Board has not accepted those  
16 partial settlement proposals, they still arrive. So I am  
17 just trying to understand the basis of your concern.

18 MR. SMITH: I agree with you entirely, Mr. Vlahos. In  
19 that partial settlements on issues -- I return to the Union  
20 DSM example that I listed before in RP-2003-0063. That was  
21 an instance of a full-blown rate case involving a revenue  
22 requirement of several billion dollars. Many issues.

23 There was a partial settlement which excluded one  
24 party, Pollution Probe, on a small \$4 million issue, which  
25 at that time which is what DSM was. And absolutely,  
26 partial settlements on issues like that do arise routinely  
27 before the Board, and that is an acceptable litigation  
28 risk.

1           What we have here, however, is, in effect, the crux of  
2 the case from a financial perspective has been compromised.  
3 And the parties have worked very hard over the last two and  
4 a half weeks, three weeks to reach a deal. Many of them  
5 have. The risk of the main issues being rejected in favour  
6 of a position the parties have expressly rejected -- in  
7 other words, the utilities have not reached an agreement at  
8 all in respect of the position that my friends from the GEC  
9 are putting forward.

10           Mr. Poch would have that if the settlement is not  
11 adopted, his proposal be adopted. That is an un -- well,  
12 it is a substantial risk, where you have compromised on a  
13 main issue.

14           If this were a small issue, I wouldn't be troubled.  
15 If this were a minor issue, and for that reason, the issues  
16 that are not part of the money package are indeed severable  
17 because the parties have recognized that those -- you may  
18 win on some, you may lose on some, but you can compromise  
19 on them. But where you are compromising on the main issue,  
20 it is simply too much to expect parties to abandon their  
21 prefiled position and abandon the right to advance what  
22 they think is potentially a better or correct solution in  
23 favour of the either/or alternative the Board accepts the  
24 package or rejects the package, in my submission. I  
25 believe Mr. Shepherd is absolutely right. In the long run,  
26 this Board will never see a partial settlement on a major  
27 issue.

28           MR. SHEPHERD: Madam Chair, I don't wish to reply, but

1 I do wish to raise a point of order. May I?

2 MS. NOWINA: Point of order.

3 MR. SHEPHERD: I'm sorry. In the event that the Board  
4 wishes to go in the direction that Mr. Poch has suggested,  
5 that is, parties make their election, we are in sort of in  
6 limbo right now where the partial settlement has sort of  
7 been filed but we haven't really spoken to it yet, just  
8 spoken about the procedure.

9 I think I and perhaps other parties would like the  
10 opportunity, if you go in that direction, to consider the  
11 extent, if any, to which we want to be parties to the  
12 partial settlement, in the event you decide we have to make  
13 our election.

14 MS. NOWINA: Before we hear the partial settlement?

15 MR. SHEPHERD: That's right.

16 MR. SMITH: The point being, I think it is fair to  
17 say, there will be parties who reconsider whether or not  
18 they can live with that risk, including the utilities.

19 MS. NOWINA: I gathered that, Mr. Smith. All right.  
20 There is one other preliminary matter and that had to do  
21 with the TRC value. Mr. Millar, you were going to start us  
22 off.

23 MR. MILLAR: Yes, Madam Chair. You may recall  
24 Mr. Poch, in fact, started this off by sending in a letter  
25 seeking clarification on the issues list regarding 3.2.  
26 Just to refresh the Board's memory, 3.2 I don't have in  
27 front of me, but it says should there be a common TRC  
28 guide, I believe, words to that effect.

1 as we can on that narrower issue following the proceeding.

2 So those are the two preliminary matters. If I could  
3 just take a minute to confer with my colleagues here. I  
4 want to stop and see if we can make a decision on it.

5 [Board members confer]

6 MS. NOWINA: We are going to take a half-hour break to  
7 make a decision regarding the issue of these financial  
8 issues and the partial decision. So we will adjourn for a  
9 half hour. We will return at 3 o'clock to give you that  
10 decision.

11 --- Recess taken at 2:30 p.m.

12 --- Upon resuming at 3:07 p.m.

13 MS. NOWINA: Please be seated.

14 A comment about these little microphones. Try to keep  
15 your papers away from them because it makes a very loud  
16 noise. Try not to block them, and maybe we will be able to  
17 hear better if we do that.

18 **DECISION:**

19 Regarding the partial decision of the financial  
20 matters. The Board appreciates the efforts that everyone  
21 has gone -- has put into making this proposal. It is a  
22 novel proposal and one that we had to put much thought to.

23 However, given the importance of this generic  
24 proceeding, and having weighed the risk and benefits  
25 regarding the timeliness of the proceeding and the fairness  
26 of the proceeding, we do not accept Mr. Smith's proposal.  
27 The partially heard -- the partially-agreed-to issues will  
28 be fully heard before the Panel renders any decision. We

1 want to make it clear this is not a statement regarding the  
2 merits of the partial settlement agreement itself; that we  
3 certainly want to hear the merits of that settlement  
4 agreement. It is simply a procedural decision.

5 So given that, the next thing on our agenda is to go  
6 on to presentation of the completely settled matters.

7 MR. SMITH: Madam Chair, if I may ask a question of  
8 clarification.

9 MS. NOWINA: Certainly.

10 MR. SMITH: When the Board indicates that the  
11 partially settled issues will be fully heard, is it the  
12 expectation of the Board that the utilities will lead the  
13 entire case they would have led had there been no  
14 settlement?

15 MS. NOWINA: I will leave that to not only the  
16 utilities but also the intervenors to determine how they  
17 want to present their case.

18 MR. SMITH: I asked that question because we would  
19 need relief from the Rules of Practice to do that, which  
20 provide that we could not lead evidence nor cross-examine  
21 witnesses in respect of matters where we have reached  
22 partial settlement.

23 MS. NOWINA: Mr. Smith, we often have partial  
24 settlements. In the areas where there is not this proposal  
25 that the settlement cannot be severed, we would be -- you  
26 would be leading evidence. We often have partially settled  
27 issues.

28 MR. SMITH: I don't disagree with that. For example,

1 if I return to the example I used before, the Union DSM  
2 partial settlement where there was a settlement amongst a  
3 broad number of parties but not with Pollution Probe.  
4 Union tendered its witness panel and that panel was cross-  
5 examined by Pollution Probe, who was not a party to the  
6 partial settlement. The Board's Rules of Practice provide  
7 explicitly for that right of cross-examination.

8         However, what it would not have been open to Union,  
9 nor to the other parties who were parties to the partial  
10 settlement to do, would be to lead evidence contrary to the  
11 partial settlement.

12         In other words, for example, to take this case. The  
13 SSM setting mechanism or the target or the budget, Union's  
14 prefiled position with respect to target is that there  
15 ought not to be a target for a variety of reasons.

16         If it were the Board's inclination that parties would  
17 lead -- would have all evidence heard, then I would lead  
18 evidence in-chief, explaining at a high level what Union's  
19 prefiled position is, and then lead evidence in respect of  
20 the partial settlement.

21         My friends who are parties to the partial settlement,  
22 under the Board's guidelines and rules it would not be open  
23 to them to cross examine the panel at all, other than in  
24 support of the partial settlement. And that, of course, is  
25 the trouble we were trying to resolve. So I just want to  
26 understand procedurally how you would like us to proceed,  
27 in light of those guidelines.

28         MR. KLIPPENSTEIN: Madam Chair, if I may make an

1 observation.

2 **SUBMISSIONS BY MR. KLIPPENSTEIN:**

3 MR. KLIPPENSTEIN: I am not sure that that issue  
4 delving into the details of the implications of the Board's  
5 ruling needs to be dealt with today. I wonder if it is  
6 possible that further consultation between counsel and  
7 Board Counsel might be productive.

8 MR. SMITH: It has to be dealt with, because I have to  
9 prepare the witness panels and be prepared to lead  
10 evidence.

11 **SUBMISSIONS BY MR. O'LEARY:**

12 MR. O'LEARY: Madam Chair, if I could add, since we're  
13 the first panel up, and I was going to use an example of  
14 the SSM amount, and that's not the first panel admittedly,  
15 but the question becomes, in terms of the evidence in-chief  
16 and the extent of the cross-examination by parties that are  
17 in support of the partial settlement is: Are you asking  
18 the utilities to present evidence both in support of the  
19 partial settlement and also in support of what is in their  
20 prefiled evidence?

21 In the case of the SSM, the utilities proposed a curve  
22 that would result in significantly higher payouts at  
23 different levels. And that is where, as  
24 Mr. Smith identified, we run into conflict with the rules  
25 for settlement proposals, which do not allow a party to, in  
26 effect, resile from what they're proposing.

27 So if what you are suggesting, Madam Chair, is that  
28 you would like to hear both sides of the story, that is, in

1 effect, what we would be doing and we would need your leave  
2 for that. And perhaps some additional time, then, to  
3 prepare, as we had not anticipated that, at least in our  
4 panel, we would need to go beyond supporting the partial  
5 settlement and we would not, then, be going further and  
6 trying to explain a position in our prefiled evidence,  
7 which, in fact, for the purposes of the settlement proposal  
8 we thought would be no longer relevant.

9 MS. NOWINA: I understand your problem.

10 Mr. Millar, do you have any comment?

11 **SUBMISSIONS BY MR. MILLAR:**

12 MR. MILLAR: Well, Madam Chair, I wonder -- I think  
13 the Board's ruling has perhaps calmed into question the  
14 extent to which parties still wish to stick with the  
15 partial settlement. There had been some discussion that  
16 some parties may withdraw. I, quite frankly, don't know  
17 what the lay of the land is. It is possible that the  
18 entire partial settlement will simply collapse and we would  
19 be going with simply the completely settled items and then  
20 we would go on to a hearing like everything else.  
21 If that is the case, that might make -- I don't know if it  
22 makes things better, but it makes it simpler in the fact  
23 that at least we would know who is arguing what. It would  
24 simply be on the basis of their prefiled evidence, and the  
25 partial settlement would essentially vanish. But I am not  
26 sure if there is still an intention amongst the parties to  
27 still present a common front on those issues. So maybe it  
28 would be helpful if we knew what parties wished to do.

1 MS. NOWINA: Maybe I can clarify the Board's decision  
2 for a moment and see if we can -- if it is helpful or help  
3 us find a solution, in any case.

4 The Board is not saying that they will not agree to  
5 the partial settlement in its entirety, as parties have  
6 requested. What we are saying is that we don't want to  
7 stop halfway through the proceeding to render a decision  
8 and then resume the proceeding, if that decision does not  
9 make the one that would end it at that point. That is what  
10 we don't want.

11 MR. SMITH: That aspect of it, I fully understand. I  
12 may have been -- Madam Chair, I may not have fully  
13 articulated, until I suppose now, the concern that we had  
14 in that the -- what we would have been proposing or what we  
15 did propose under what I had tried to sketch out earlier  
16 was a procedure whereby the evidence which would be led by  
17 the utilities and those in favour of the partial settlement  
18 would be streamlined to be consistent with the partial  
19 settlement, and thus, from Union's perspective and a number  
20 of other parties' perspective and Enbridge's perspective, a  
21 number of witnesses would not be called.

22 The issue that has arisen by virtue of the decision  
23 is: Is that the way we can conduct the hearing, or do  
24 parties hedge their bets by calling all of the evidence,  
25 including that evidence which would otherwise be irrelevant  
26 having regard to the partial settlement and, indeed, be  
27 expressly precluded by the Board's guidelines from doing  
28 so? And that is the problem I tried, I think

1 unsuccessfully, to explain.

2           So what we had initially proposed was simply Union  
3 would set a panel. There would be some examination to  
4 illuminate the partial settlement, but there would not be a  
5 full explanation of the prefiled position, nor could there  
6 be.

7           MR. VLAHOS: Mr. Schmidt, is it the word "fully" that  
8 bothers you, that the chair did in her ruling say about  
9 fully air? Which part of it is bothersome, the "fully  
10 aired" or the fact that you will come to the proceeding to  
11 be heard?

12           MR. SMITH: Well, it is both aspects, because it is  
13 the "fully heard" is what I wanted to understand in terms  
14 of is it the expectation of the Board that all parties will  
15 put in their entire case, including whatever they have  
16 agreed to, which I think will be extremely confusing for  
17 everybody and take a lot of time.

18           Then the second aspect is the trouble or the mischief  
19 I tried to identify of the Board not rendering a decision  
20 or giving an indication as parties will be at the  
21 litigation risk of having put in a limited amount of  
22 evidence in support of the partial settlement and there  
23 will be a selection, from the Board's perspective, between  
24 that limited evidence in support of the partial settlement  
25 and the proposal put forward by those parties who are not  
26 party to the partial settlement.

27           In other words, to just give an example, because I  
28 think it might help: In the utilities' case, with respect

1 to the target-setting mechanism, or SSM, the prefiled  
2 position is that there should not be a target and the SSM  
3 curve is substantially different than that which has been  
4 agreed to.

5 We would not lead evidence on that prefiled position.  
6 Under my proposal, we would have put in a limited amount of  
7 evidence on that.

8 The concern we have with the Board's decision is a  
9 response will come back from my friends who are not parties  
10 to the package. The Board will then be left to decide  
11 between what the parties have agreed to partially and GEC's  
12 position, the concern being that if you don't like the  
13 partial package, your choice is either GEC's perspective --  
14 position or nothing, because the utilities have not then  
15 put forward, and no party would have put forward, really,  
16 their initial best case, if I can describe it that way. In  
17 other words, we will never have tendered what we believe is  
18 the appropriate target-setting mechanism, i.e., no target,  
19 and the appropriate SSM curve. That evidence will simply  
20 not be before the Board.

21 And that is the real concern, and that is why I tried  
22 to indicate, Member Vlahos, why the litigation risk is so  
23 significant, because you won't have evidence and you will  
24 be hoping that the Board is persuaded by the partial  
25 package, but if they're not, the default is not someone  
26 else's prefiled position; it is the parties who have not  
27 agreed.

28 MS. NOWINA: With our leave, you can produce all of

1 that evidence.

2 MR. SMITH: Well, with your leave, all parties could  
3 put in, indeed, all of their evidence. It would lead, in  
4 my submission, to a very cumbersome process, because  
5 parties would then be -- the utility, for example, and the  
6 target-setting mechanism would presumably be saying, We  
7 don't believe a target should be appropriate. However, in  
8 the interests of compromise, if you are inclined to set a  
9 target, here's what the target ought to look like. And  
10 every party who is a party --

11 MR. VLAHOS: Excuse me. Are we re-arguing the first  
12 issue now? The chair's ruling was quite clear and she did  
13 indicated that the matters will come for a hearing. That  
14 is different parlance. Any partially settled issue is an  
15 issue for the hearing. So it is your test; it is your case  
16 to meet.

17 So as to how you are going to do it, how the other  
18 parties are going to meet that test, that is up to the  
19 parties, up to you and the other parties collectively to  
20 decide.

21 MR. SMITH: I don't disagree.

22 MR. VLAHOS: So to the extent you can be of assistance  
23 to each other and the Board and say, Look, here, instead of  
24 25 issues, we have 30 issues on the table. Then which ones  
25 do we think should go to cross-examination or would  
26 arguments simply suffice? Okay. Those are decisions that  
27 the expectations based on one panel's perspective, is that  
28 the parties will come together and see how we can run an

1 efficient hearing go forward.

2 So I am just not sure what you are asking this Panel  
3 to do, again.

4 MR. SMITH: I just wanted to make sure that the  
5 import, in terms of the Board settlement guidelines, is  
6 clear. I expect we will have to ask for leave.

7 MR. VLAHOS: I think you have just asked it and you  
8 received a decision yourself and every other party.

9 MS. NOWINA: Mr. Millar, I have no problem giving  
10 leave. I am just interested in whether this is -- it this  
11 is not a complete settlement agreement. It is a partial  
12 settlement, whatever that means.

13 MR. MILLAR: Yes, Madam Chair. You can certainly  
14 grant that leave. If I recall the settlement agreement  
15 correctly, it states that no party will argue against -- I  
16 am not sure if that is binding as between the parties. And  
17 Mr. Shepherd is nodding, so he may have a comment on this.  
18 It may actually require more than Panel -- the Panel's  
19 permission to do this. I think there is an agreement  
20 amongst the parties on this issue as well.

21 So that is an issue that may have to be considered,  
22 but from the Panel's perspective, you do have the ability  
23 to vary the rules as you see fit in any proceeding.

24 **SUBMISSIONS BY MR. O'LEARY:**

25 MR. O'LEARY: Madam Chair, if I might just add to what  
26 Mr. Millar indicated. It is my recollection that in  
27 circumstances where a party wishes to withdraw from a  
28 settlement agreement, they give the other parties to the

1 proceeding notice, as well as the Board, and that it is  
2 appropriate to entertain submissions on the appropriateness  
3 of the withdrawal.

4 I am not demanding that, but it is certainly something  
5 that the utilities and the parties to the partial  
6 settlement will need to discuss as to how they wish to  
7 proceed, in light of your ruling.

8 MS. NOWINA: Mr. O'Leary, would you interpret it as a  
9 withdrawing from the agreement if parties presented the  
10 position of the agreement and said, But if the Board should  
11 not decide fully on these -- on all of these related  
12 issues, that our backup position is? Would you consider  
13 that a breach of them supporting the agreement?

14 MR. O'LEARY: I presume that there could be sufficient  
15 qualified language in a response, but on a practical level,  
16 if you are adducing evidence, you are supporting two  
17 positions which can't be reconciled. My view would be that  
18 it does amount to a withdrawal from something you agreed to  
19 earlier.

20 MR. SHEPHERD: Madam Chair, I wonder if I could add?

21 MS. NOWINA: Certainly.

22 **SUBMISSIONS BY MR. SHEPHERD:**

23 MR. SHEPHERD: We asked the question before the break  
24 whether we would have an opportunity to reconsider. I can  
25 tell you if we do have the opportunity to withdraw -- am I  
26 not on?

27 MS. NOWINA: Can you find your speaker?

28 MR. SHEPHERD: I can tell you, with respect to the

1 money package, what the School Energy Coalition proposes to  
2 do is withdraw from that agreement. We would -- then the  
3 approach we would take to the hearing is this: We will put  
4 forward our case in cross-examination and in direct  
5 evidence. Then in argument, we will argue for what we  
6 think is the right answer, which is the case that we were  
7 going to put in the first place, and the partial settlement  
8 in the alternative, rather than the other way around.

9 I think we don't actually have a choice in that  
10 respect, given what the rules say and given the practical  
11 realities of how hearings work.

12 Although that adds some inefficiency, I think at the  
13 end of the day the Board will still get the clear message,  
14 which is what matters.

15 MS. NOWINA: Thank you, Mr. Shepherd.

16 MR. SHEPHERD: Sorry, one other thing. That is with  
17 respect to the 14.

18 With respect to the other partially settled issues, in  
19 both tabs 2 and 3, I would request the Board's indulgence  
20 for me to have an opportunity to go through and look at  
21 them and see which ones of those, if any, we have to  
22 reconsider whether we're a party to or not.

23 MS. NOWINA: I don't understand what the connection is  
24 between those and how we proceed with the related issues.

25 MR. SHEPHERD: Well, your ruling with respect to  
26 partially settled issues is one that has implications for  
27 all partially settled issues, not just the money package.  
28 While I think that we probably can stay with all of the

1 ones we have already signed on to, it may be that there are  
2 some that are sufficiently significant that we want to say  
3 the same thing; that is, we will withdraw and make it an  
4 alternative argument at the end of the day. I haven't had  
5 a chance to go through them all to see whether there are  
6 any to which that applies.

7 MS. NOWINA: You are confusing me, Mr. Shepherd. Our  
8 decision was related only to those money matters.

9 Our understanding of the agreement was that all other  
10 matters were -- stood as they were individually.

11 MR. SHEPHERD: They stand alone, that's right, except  
12 it is clear, I think, that at the end of the first phase of  
13 the hearing, or what I thought was going to be the first  
14 phase of the hearing, there is going to be argument and  
15 there is going to be no other evidence. It is done.

16 So to the extent, for example, that some of those  
17 other issues are informed by the decision on the money  
18 package, we may wish to say, Well, without that package,  
19 the better result is something else.

20 MS. NOWINA: Shouldn't they have been part of your  
21 non-severable package, then?

22 MR. SHEPHERD: If there had been sufficient time, I  
23 suspect that that would be the case. We were in a rush.

24 MR. VLAHOS: Mr. Shepherd, just to follow up. So you  
25 will come, I guess, to the Board for dispensation as the  
26 guidelines provide for once you make decisions how to you  
27 approach your issues; right?

28 MR. SHEPHERD: No. Sorry, Mr. Vlahos. All I was

1 saying is if I could beg the court's indulgence -- the  
2 Board's indulgence overnight to look at those issues.

3 MR. VLAHOS: I understand that. But once you make a  
4 decision which way you want to go, then I heard Mr. Smith  
5 and Mr. O'Leary say you have to approach the Board to seek  
6 relief from the Board in order to pursue a different route  
7 than was contemplated if the Board accepted the settlement.

8 MR. SHEPHERD: I think we're taking the position that  
9 before the Board's ruling, we asked for the opportunity to  
10 withdraw from issues that as a result of the Board's ruling  
11 we didn't -- no longer wanted to agree to.

12 MS. NOWINA: In fairness, Mr. Shepherd, we were  
13 talking about those financial issues. We didn't imagine  
14 when you asked for that leave, that would involve other  
15 issues. Other issues haven't been discussed in this case.

16 MR. SHEPHERD: I understand.

17 MR. POCH: Madam Chair, I was going to say in the  
18 circumstances, these settlement are -- not having been  
19 accepted by the Board because they aren't -- I would  
20 suggest my friends are not bound to them with respect to  
21 the Board. They're only -- have an agreement amongst  
22 themselves and it is up to them to decide how to advocate  
23 their case. I think that would be the best way to proceed.

24 MR. VLAHOS: Mr. Poch, do they need dispensation from  
25 the Board? Is there anything in the rules or guidelines  
26 that they would have to seek the Board's relief to do that?  
27 And if that is the case, can we provide the full purview,  
28 if you like, so we don't have --

1 MR. POCH: I think if you imagined, for example, a  
2 universal settlement agreement that everyone was in on and  
3 the Board decided at the outset it rejected, surely my  
4 friends wouldn't be saying, Well, now we need permission  
5 to lead evidence contrary to that agreement. It is only an  
6 agreement in that category if the Board accepts it at the  
7 outset. Everyone is in the process, including the Board is  
8 relying on it. If they want to resile from it, in light of  
9 the facts it was in support of -- I don't think it matters  
10 in this case. It may be that the rules are written in such  
11 a way that as a formality they seek that and are required.  
12 I, of course, have no objection to the Board granting a  
13 dispensation if they feel a need to. All I am suggesting:  
14 It really puts this in the same category as a rejected  
15 settlement.

16 MR. DINGWALL: Mr. Vlahos, you asked for the specific  
17 section. I can quote that to you, if you like. It is  
18 40.02 of the settlement conference guidelines:

19 "Where evidence is introduced at the hearing that  
20 may affect the settlement proposal, any party  
21 may, with leave of the Board, withdraw from the  
22 proposal upon giving notice to the other parties  
23 of its intention to do so and its reasons."

24 Then rule 40.01 applies, which is the rule that opens  
25 up the possibility of testing evidence, calling additional  
26 evidence, cross-examining, et cetera.

27 So the precept within that is that if evidence is  
28 introduced at the hearing, that may affect the settlement

1 proposal. There may be some suggestion that that be  
2 incremental to what has been heard or put on the record  
3 before. That is a matter of interpretation.

4 MS. NOWINA: Thank you, Mr. Dingwall.

5 MR. SMITH: I agree with that. I don't know that  
6 parties actually can simply elect to unilaterally withdraw  
7 today. I think what has to happen is that the parties to  
8 the partial settlement will have to have a discussion  
9 following today's hearing and determine the way in which  
10 they are prepared to proceed going forward and seek  
11 appropriate instructions.

12 MS. NOWINA: I think that is clear and it is the  
13 settlement between the parties that has to be clarified and  
14 solidified.

15 I would like to express some consternation that the  
16 settlement proposal as worded was not dependent on the  
17 process that the Board used to hear the case. We are now  
18 hearing that the settlement proposal will fall apart  
19 because of the way we hear the case, which is surprising to  
20 us. But we will leave the parties to go back and look at  
21 those proposals. I suspect all that we can do now is hear  
22 this issue again tomorrow and see if you have another  
23 settlement proposal -- partial settlement proposal to  
24 present to us.

25 Can we go ahead and hear the completely settled issues  
26 today and deal with those?

27 **SUBMISSIONS BY MR. O'LEARY:**

28 MR. O'LEARY: Madam Chair, Mr. Smith and I drew straws



# ONTARIO ENERGY BOARD

**FILE NO.:** EB-2006-0021

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**VOLUME:** Volume 2

**DATE:** July 11, 2006

<b>BEFORE:</b>	Pamela Nowina	Presiding Member and Vice Chair
	Paul Vlahos	Member
	Ken Quesnelle	Member

1 Mr. Smith?

2 **SUBMISSIONS BY MR. SMITH:**

3 MR. SMITH: Madam Chair, the parties to the partial  
4 settlement with the utilities met last night. The parties  
5 had a full and frank discussion. Each reflected on terms  
6 of the agreement, and I am extremely pleased to advise the  
7 Board that all parties to the partial settlement remain  
8 committed to the settlement process and to the agreement  
9 which was filed with the Board yesterday in its entirety,  
10 subject to the minor changes that Mr. O'Leary alluded to to  
11 move matters primarily to completely settled, which of  
12 course is all for the good.

13 Now, pausing there, Mr. Poch described yesterday the  
14 agreement as, I believe, a statement of position, and the  
15 parties to the partial settlement do not see the agreement  
16 that way. This is, from their perspective, a binding  
17 agreement on them. No party is withdrawing from that  
18 agreement, and we intend to support it in the hearing, both  
19 in argument and in evidence.

20 Based on yesterday's discussion, I don't think there  
21 is a need for me to review line by line the agreement. It  
22 is apparent to me the Board has read the document.

23 I would take you to the document just briefly, if I  
24 may. It is at K1.1, tab 2.

25 As indicated in the introduction, the document  
26 contains the severability language that we discussed  
27 yesterday with respect to the package, which remains the  
28 case, and with respect to items outside the package, those

1 stand each on their own.

2 The agreement sets out the 18 issues which have been  
3 agreed to by the utilities and a substantial number of  
4 intervenors, including the 13 issues now forming part of  
5 the financial settlement referred to on page 8 in the last  
6 paragraph as the "package," which have been agreed to by  
7 the utilities and almost all of the ratepayer groups, the  
8 very parties who benefit from and pay for DSM programs.

9 With respect to each issue, which begins on page 11 of  
10 26, there is a description of the party settlement, the  
11 parties that agree with the settlement and those who  
12 disagree. There is also a reference or references to the  
13 evidence filed in respect of that issue.

14 Looking at page 11 of 26, this is just one of the  
15 issues that I would highlight, and, for the Board's  
16 information, I expect my friend Mr. Shepherd will take you  
17 through -- who is also with the School Energy Coalition, a  
18 party to the agreement -- will take you through a number of  
19 elements of the package to explain, for the Board's  
20 information at this stage, how those elements in the  
21 package hang together.

22 But I point out, just simply by way of example, 1.3.  
23 This is a financial matter and it deals with how the  
24 financial budget is to be determined. It sets out the  
25 budget for the first year of a multi-year plan for Enbridge  
26 Gas Distribution will be \$22 million, that being an  
27 increase of 16 percent from its 2006 budget; and the 2007  
28 budget for Union will be \$17 million, an increase of 22

1 percent from its 2006 budget.

2       You will see, as well, in the second paragraph that  
3 there are escalation factors applied to the budgets  
4 throughout the multi-year plan which are greater for Union  
5 than Enbridge, and that is in an effort to bring the two  
6 utilities together, in terms of their respective DSM  
7 spending. And, thus, Union, which is starting off with a  
8 slightly lower DSM spending, has a somewhat higher  
9 escalation factor. The intention over time is to bring the  
10 two utilities closer to parity.

11       Issue 1.4 on page 12 deals with the target-setting  
12 mechanism, which again applies a formula as the parties to  
13 the partial settlement understood the Board's desire, a  
14 formula for the setting of the budget -- sorry, of the  
15 target for the next three years and provides, for  
16 illustration purposes, how that target mechanism would  
17 apply going forward. And it really is a fairly  
18 straightforward mechanism which would apply the average of  
19 the actual performance by the utilities in the previous  
20 years, adjusted by an escalation factor to ensure that the  
21 target remains a stretch.

22       Now, I won't go through the balance of it. 1.7, which  
23 begins on page 13, I had mentioned yesterday was in  
24 response to a question Mr. Millar had raised, and that  
25 deals with the question he had asked about the allocation  
26 of spending, and it confirms the parties' acceptance of the  
27 principle that DSM should be spent equitably, bearing in  
28 mind the principle of optimizing cost-effective DSM

1 opportunity, something I think all parties share a desire  
2 for.

3       Subject to any questions -- oh, sorry, there is one  
4 other matter I should probably draw to your attention,  
5 which is 5.2 on page 16 of 26, which deals with the  
6 appropriate incentive mechanism. You will see the parties  
7 to the partial settlement have agreed on the appropriate  
8 SSM target and the curve that would apply to earning of  
9 that incentive.

10       The incentive is to be \$4.75 million at 100 percent of  
11 target, and you will see that payout begins on the initial  
12 dollars or SSM earned at an increasing rate up to 100  
13 percent and beyond.

14       There is also, in order to provide all parties with  
15 certainty, there is a cap on the amount that the utilities  
16 can earn; that cap, of course, is subject to an inflation  
17 adjustment to reflect price reality, but there is certainty  
18 there.

19       There is a pictorial description representation of the  
20 graph on page 17, which shows the SSM curve for the  
21 utilities on a percentage basis, because that is how the  
22 incentive is earned.

23       Issue 6 is also partially settled. That deals with  
24 the DSMVA.

25       Issue 9, to the extent it hasn't already been settled,  
26 is covered.

27       Issue 10 would fall into the same category; that is,  
28 both completely settled and parts of which are partially

1 settled. Issue 10 deals with market transformation and  
2 lost opportunity programs, and there is an agreement  
3 amongst the parties to the partial settlement that the  
4 utilities will commit \$1 million each annually to the  
5 pursuit of market transformation programs.

6 There is equally, just for information you will see in  
7 the last sentence, page 21, first paragraph page 21 of 26,  
8 that \$1 million per utility is included in the budget  
9 number I referred to at issue 1.3.

10 There is a recognition in the second paragraph of  
11 issue 10.2 that Mr. O'Leary touched on yesterday that  
12 market transformation programs are somewhat unique and that  
13 this -- as I understand it, this has now been moved into  
14 the complete settlement, so it will not be in the final  
15 form. The parties agreement is set out there.

16 Finally, with respect to market transformation, there  
17 is an additional incentive which is specified at, I believe  
18 it is, 10.4, which is page 22 of 26. There is an  
19 additional incentive. Should the utilities achieve their  
20 market transformation goals, there is an additional  
21 incentive of half a million dollars per year for each of  
22 the utilities.

23 Finally, issue 13 is worth touching upon. This is a  
24 matter which is of some interest to all parties to the  
25 partial settlement and I expect might be the subject of  
26 some cross-examination by my friend Mr. Buonaguro from the  
27 Vulnerable Energy Consumers Coalition.

28 You will see there is a recognition in issue 13.1 that

1 low-income customers face barriers to access DSM programs  
2 which are unique to them, and the utilities and the parties  
3 accordingly recognize that a portion of the budget should  
4 be targeted towards low-income customer programs in the  
5 residential rate classes of both utilities, and the parties  
6 -- the utilities agree and the parties -- I suppose the  
7 parties agree that the utilities will spend, out of its DSM  
8 budget, a minimum of \$1.3 million or 14 percent of their  
9 residential DSM budgets, and that provides certainty to the  
10 low-income customers that if allocation of spending is  
11 shifted by the utilities from industrial to residential,  
12 that the \$1.3 million will become a larger number to  
13 reflect that increased focus on residential DSM spending.

14 Those would be my submissions in respect of the  
15 partial settlement. I expect my friend Mr. Shepherd, as I  
16 indicated before, might have a few submissions.

17 If I may, just to touch on a matter that was of  
18 discussion yesterday. In terms of the conduct of the  
19 hearing, the parties having renewed their commitment to the  
20 partial settlement, the conduct of the hearing will be as I  
21 described before. It will be focussed, I expect -- the  
22 utilities will call evidence in support of the partial  
23 settlement in the order that it was discussed yesterday.  
24 There may be some limited questions from one or two of the  
25 intervenors who have a particular interest in a subject  
26 matter. I expect the intervenors who are parties to the  
27 partial settlement will discuss who would be the  
28 appropriate representative to ask those questions.

1           The panel will then be tendered for full cross-  
2 examination by those parties who are not parties to the  
3 partial settlement, who will of course have the opportunity  
4 to lead evidence following the utilities' panels of their  
5 own.

6           By this way, it is my expectation that at least Union  
7 will not be calling some of the witnesses it might  
8 otherwise have called, as it will not be necessary. I  
9 believe that is equally true of Enbridge.

10          MS. NOWINA: Thank you, Mr. Smith.

11          Thank you to all parties for your efforts last night  
12 in that regard.

13          MR. O'LEARY: Madam Chair, we now have copies of the  
14 revised tab 1 and tab 2, if we could distribute those.

15          MS. NOWINA: Maybe we will wait and finish dealing  
16 with the partial settlement, as we started on that. Then  
17 we will come back to the complete settlement.

18          MR. SMITH: Thank you. Those would be my submissions.  
19 I will turn it over to Mr. Shepherd.

20          **SUBMISSIONS BY MR. SHEPHERD:**

21          MR. SHEPHERD: Madam Chair, yesterday's proceeding  
22 exposed something.

23          MR. QUESNELLE: I wonder if you could --

24          MR. SHEPHERD: Is that better?

25          MR. QUESNELLE: Yes.

26          MR. SHEPHERD: Yesterday's proceeding exposed what the  
27 many experienced counsel around the table probably should  
28 have spotted earlier in the ADR, and that is an anomaly in

1 the Board's settlement guidelines that may make it more  
2 difficult for parties to enter into partial settlements on  
3 major issues.

4 You saw the consternation in the room during the  
5 discussion yesterday, even though the Board in the end had  
6 to do what it had to do, and indeed, as we said yesterday,  
7 it was a difficult decision how to deal with the procedural  
8 issue. And the decision you made is a perfectly legitimate  
9 one.

10 We are concerned - we, the Schools, are concerned -  
11 and I think maybe other parties are - they can speak for  
12 themselves - that in the future it may make it more  
13 difficult to reach settlements because people won't get to  
14 the point of saying, Let's see if we can make this work,  
15 because they will be worried about the litigation risk.

16 So we're concerned the Board may wish to consider  
17 looking at that anomaly and seeing whether there is some  
18 way it can be fixed. We saw yesterday it is not easy to  
19 fix, but hopefully the Board, if it has more time, can have  
20 an opportunity to see what other solutions there are that  
21 we didn't put to you yesterday.

22 That's just a sidebar. We have decided to -- despite  
23 what we said yesterday, we have decided to stay with the  
24 partial settlement in part because the utilities and the  
25 other parties have said that they will stick with only  
26 presenting that case which reduces everybody's litigation  
27 risk, except with respect to the position of the  
28 environmental groups, but, as well, because this settlement