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MANITOBA PUBLIC UTILITIES BOARD

Re: Manitoba Hydro's Application to the
Public Utilities Board for Approval of
New Electricity Rates in Communities
Served by Diesel Generation

Before Board Panel:

- Graham Lane - Board Chairman
- Robert Mayer, Q.C. - Board Member
- Kathi Avery Kinev - Board Member

HELD AT:

Public Utilities Board
400, 330 Portage Avenue
Winnipeg, Manitoba
November 24, 2010
Pages 1077 to 1265

APPEARANCES

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1 --- Upon commencing at 9:10 a.m.

2

3 THE CHAIRPERSON: Okay. Good morning,
4 everyone. I understand that it would be best first to go
5 to Mr. Anderson, who has other pressing business, along
6 with this matter.

7 Mr. Anderson...?

8 MR. MICHAEL ANDERSON: Good morning, Mr.
9 Chair, and -- and thank you for allowing me to provide
10 some updates to the Board, and I have a request to make
11 following my updates.

12 I am pleased to advise that after engaging
13 in what amounted to a marathon conference call with three
14 (3) of our four (4) counsels, the fourth was at the
15 beginning of the conference call, we have received
16 authorization from all four (4) First Nations to enter
17 into the settlement agreement. So we completed that, as
18 well as our certificates of independent legal advice, and
19 under the terms of the agreement, those were the two (2)
20 conditions precedent for giving effect to any signature
21 that appears on the document.

22 Because I -- what might have been
23 something of a miscommunication between ourselves and
24 INAC regarding when the execution should take place, they
25 weren't signed yesterday. They're now -- we're now

1 busily in the process of recontacting everyone to ensure
2 they were executed. We expect that there would be a
3 signing ceremony, so that we receive our authorizations,
4 and then come in, all get together, and sign it. We've
5 all determined jointly between ourselves it would
6 preferable to execute the documents as soon as possible
7 today so that we can advise the Board that the deal is
8 done.

9 So the second part of that in terms of the
10 logistics, Mr. Chair, is that our legal counsel is in
11 Churchill at a meeting of the executive council, which I
12 advised Board -- the Board of earlier, and so therefore
13 is away from any facilities which leaves the task to me
14 to work with our staff in the office to make sure that
15 the documents are properly executed and received,
16 including things for example such as initialling every
17 page and so forth.

18 And with the Board's leave -- permission
19 I'd like to excuse myself shortly after my -- my comments
20 to do that. Having said that, I would also request leave
21 from the Board to provide on behalf of MKO a written
22 submission on Friday, if that would be acceptable. I
23 have canvassed counsel for the parties. Ms. Bowman has
24 no objection, Ms. Hart has advised me she has no
25 objection.

1 Ms. Fernandes has advised me that she has
2 no objections, and Mr. -- Mr. Peters, of course, had
3 advised me, of course, to bring it up with the Board.
4 And with concurrence apparently of all the parties to MKO
5 being given leave to submit a written submission on
6 Friday, certainly with the opportunity for parties to --
7 I would think to make any further comments should they
8 find anything in our submission out of the ordinary that
9 they wouldn't -- and I've assured parties, by the way, I
10 have no -- as Ms. Bowman put it, nothing out of left
11 field that is different than our earlier dism --
12 discussions or the cross-examination of the witnesses and
13 so forth in these proceedings.

14 So with that, Mr. Chair, if I could
15 request the Board's leave to submit a written submission
16 on Friday then I will content myself to ensure that the
17 settlement agreement is fully executed today, and then I
18 can return, hopefully, later this afternoon to advise the
19 Board of same.

20 THE CHAIRPERSON: That's fine, Mr.
21 Anderson. And we would like to see the -- I guess it'll
22 then be called "The Settlement Agreement."

23 MR. MICHAEL ANDERSON: And the
24 interesting thing, of course, is if we'll recall some of
25 my summation, and without going to it, in substance in --

1 in the 2008 proceedings we mentioned that there were
2 certain calculations that we could not do actually until
3 the settlement agreement was entered into: some interest
4 related calculations, and so forth.

5 So we're very much looking forward to
6 being able to ask those questions and to have those
7 calculations made. And having provided that one (1)
8 advance insight into our submission I'm hoping to make
9 reference to that after I refer to the conclusion and
10 execution of the agreement.

11 We're doing concurrent executions, and
12 that was a technical matter to ask whether Manitoba Hydro
13 had any objections to us having each of the First Nations
14 separately execute, bring all the documents together, on
15 the understanding that we would have a counterpart
16 execution, yes.

17

18 (BRIEF PAUSE)

19

20 MR. MICHAEL ANDERSON: We have no
21 objection to that. INAC advises they have no objection
22 to that. And I -- I'm sorry, Mr. Chair, that we seem to
23 be having a discussion amongst the parties about a
24 procedural matter on the record before the Board.
25 Perhaps I'll excuse myself from the record for a moment.

1

2 MR. ROBERT MAYER: Before everybody
3 leaves, if we -- if we can be advised that there's going
4 -- that a settlement agre -- that the agreement has in
5 fact been signed is there any reason then that we
6 couldn't permit the in camera material to go on the
7 record?

8 The -- once the agreement is signed I'm
9 assuming it's there for everybody to see. This Board is
10 not wildly excited about keeping stuff out of the public,
11 and that separate transcript is there -- would be there
12 any problem in releasing that?

13 THE CHAIRPERSON: Perhaps the parties
14 could address that when they're making their closing
15 statements unless you can answer the question right now.

16 Ms. Hart...?

17 MS. GLYNIS HART: I'm sorry. I think it
18 would be best if I checked with MKO and Manitoba Hydro on
19 this particular issue just before speaking to the matter.

20 THE CHAIRPERSON: Okay. We'll do that
21 after Mr. Peters makes his closing statements.

22 Mr. Peters...?

23

24 CLOSING COMMENTS BY BOARD COUNSEL:

25 MR. BOB PETERS: Yes. Thank you, Mr.

1 Chairman, Mr. Vice Chair, and Board member Dr. Kinew.
2 After that Michael has upstaged me again and it may be a
3 little anti-climactic for my comments, but I would
4 indicate, Mr. Chairman, one (1) of the procedural points
5 that I think you were trying to get at in your question
6 with Mr. Anderson, I believe you're asking that the Board
7 be provided a copy shortly or forthwith after execution.

8 And if my memory serves me and because Ms.
9 Ramage isn't in the room I'll pick on her, but I believe
10 Manitoba Hydro through Ms. Ramage has given the Board an
11 undertaking in past that once the document is executed it
12 will be filed with the Board. And my understanding is,
13 at that point in time, it no longer needs to be on blue
14 paper and treated as confidential. But I will defer to
15 Ms. Ramage when she returns later this morning and
16 certainly this afternoon.

17 Well, Board members, the diesel zone, as
18 it has been referred to in these proceedings, presents
19 unique challenges to this Board as this Board strives to
20 approve what it determines to be just and reasonable
21 rates for Manitoba Hydro's ratepayers in Barren Lands
22 First Nation and the adjacent community of Brochet,
23 Northlands, Denesuline First Nation, the Sayisi Dene
24 First Nation, and the Shamattawa First Nation.

25 As this Board indicated in Order 1 of 10,

1 the last time all the rates for the diesel zone were
2 revised was back in 2006. However, to the extent in the
3 intervening five (5) years that this Board has adjusted
4 grid rate, those grid rates have been incorporated as and
5 where applicable to the customers in the diesel zone,
6 specifically for the residential customers and the
7 general service customers for their first 2,000 kilowatt
8 hours per month consumption.

9 And I think we've heard from Hydro that
10 that represents 90 percent of the customers in the diesel
11 zone. In the book of documents that was filed as PUB
12 Exhibit 3 at Tab 5 I'll remind the Board that there's a
13 concordance of rates and a continuity schedule of rates
14 in the diesel zone since 2003.

15 The requi -- the rates that are now
16 requested by Manitoba Hydro are found in Tab 2 of the
17 book of document -- documents. And in my closing
18 comments as counsel to the Board in this application by
19 Manitoba Hydro I will take no position on the merits of
20 the application by Hydro or the positions and
21 recommendations by any of the Intervenors.

22 But rather to assist the Board and all
23 parties I'll draw your attention to the following
24 information on the record, and I'll provide as many
25 references as I can so when it comes time for Board

1 deliberations you will have ready access to the
2 references.

3 In Tab 4 of the book of documents,
4 Manitoba Hydro says it has five hundred and sixty (560)
5 residential customers. We see from the information MKO
6 provided, and it's been marked as MKO Exhibit 7, 8, 9,
7 and 10, and I believe it's based on 2001 census data, it
8 shows at least two thousand one hundred and twenty
9 (2,120) in total -- the total number of persons in the
10 four (4) First Nations in the diesel zone.

11 You also have evidence from INAC by way of
12 Exhibit 8, INAC Exhibit 8, that income assistance is
13 being provided to eight hundred and forty-six (846)
14 people, three hundred and eighty-two (382) of whom are
15 head of households. And the total number of
16 beneficiaries of INAC's income assistance is seventeen
17 hundred and ninety-eight (1,798).

18 In terms of other customer numbers, the
19 Tab 4 of the book of documents shows the general service
20 customers at a hundred and thirteen (113) accounts, the
21 provincial government at twenty-two (22) accounts, and
22 the Federal Government and First Nations education
23 accounts at forty-four (44), and recognize, as the
24 evidence has indicated, that one (1) customer may have
25 multiple accounts.

1 Manitoba Hydro's application, as seen in
2 Schedule 1 of the diesel cost of service study, which is
3 Attachment 1 to the application, provides in my round
4 numbers the following information to the Board. It
5 includes a total requested revenue requirement of \$8
6 million, and four point seven (4.7) of that \$8 million is
7 the full cost to serve the residential customers,
8 according to Schedule 4.1.

9 While the residential customers, the Board
10 knows, does -- do not pay their full cost, but rather
11 they pay 13.7 percent of the actual costs with the
12 balance going into the Government Surcharge Fund. The
13 \$2.7 million of full cost to serve the general service
14 customer only returns 53 percent of that amount through
15 rate revenue with the balance again going to the
16 government surcharge pool, and that pool, according to
17 Schedules 4.1 and 4.2, amounts to approximately \$3.6
18 million.

19 Well, one (1) of the issues raised by INAC
20 is what is a fair sharing and what is just and reasonable
21 as between the Federal Government, and the provincial
22 government, and Hydro, of the sharing of that \$3.6
23 million of what has been called a revenue shortfall.

24 There's a position taken that it should be
25 shared in accordance with the 2004 still tentative

1 settlement agreement, and there's some suggestion that it
2 should be shared on a different ratio based on forecast
3 consumption going forward.

4 Another question the Board will have to
5 answer is whether it's just and reasonable that the
6 customers, and the parties responsible for customers in
7 the diesel zone, will not pay the \$1 million for the
8 revenue to cost coverage subsidies that Manitoba Hydro
9 incorporates in their rate design. Rather, that's an
10 amount that flows to grid customers.

11 In terms of another topic, Hydro no longer
12 wants to use a full cost rate for residential or general
13 service consumption greater than 2,000 kilowatt hours per
14 month. Rather, Hydro has introduced for the first time
15 in the diesel zone, and in these proceedings, a new tail
16 block rate of forty-five (45) cents a kilowatt hour, as
17 opposed to the fifty-nine (59) cents, which would be the
18 full cost predecessor. Is that just and reasonable?

19 Turning to the province of Manitoba, and
20 its accounts, is it just and reasonable to move the
21 province of Manitoba accounts from the government over to
22 general service class? By so doing, the province of
23 Manitoba accounts have been exempted from the full cost
24 rates, which is a savings of about a hundred and thirty-
25 five thousand dollars (\$135,000), according to Schedule

1 4.4.

2 And those provincial government accounts
3 also then become exempt by a -- by way of the government
4 surcharge that is incorporated into the government rate,
5 and that savings to the province is approximately six
6 hundred and twenty-one thousand dollars (\$621,000),
7 according to schedule 4.5.

8 Combined, those amounts of about seven
9 hundred and fifty thousand dollars (\$750,000) will flow
10 to the grid customer, according to Manitoba Hydro's
11 Application. Is that just and reasonable?

12 There was another component to the
13 transferring of those provincial government monies to the
14 grid customers that INAC's witness yesterday explained to
15 the Board has a multiplier effect, which has a perhaps
16 unintended consequence of reducing the multiplier
17 available for the diesel zone rates.

18 The other INAC witness, Mr. Hildebrand,
19 he's made six (6) recommendations in his written
20 evidence, whether any or all of those are adopted and
21 endorsed by INAC, or any other party to these
22 proceedings, will be evident when, firstly, Ms. Hart and
23 Ms. Thompson provide their closing submissions on behalf
24 of INAC, and whether other parties have comments in
25 relation to them as well.

1 But one (1) of Mr. Hildebrand's
2 recommendations, you'll recall, was to remove the
3 interest costs, which were about two hundred and twenty-
4 three thousand dollars (\$223,000), according to tab 10 of
5 the book of documents, and also remove about three
6 hundred and sixty thousand dollars (\$360,000) of
7 depreciation expense, also seen in tab 10 of the book of
8 documents, totalling five hundred and eight thousand
9 dollars (\$580,000). That amount has been included in the
10 overall revenue requirement sought to be recovered by
11 Hydro through rates.

12 And while interest and depreciation are
13 new expenses, post 2004, proposed to be recovered in
14 rates, Manitoba Hydro has not included any percentage for
15 accumulated operating deficit as had been done in prior
16 diesel Rate Applications. Tab 13 of the book of
17 documents contains Hydro's calculations of the post 2004
18 operating deficit of about \$7 million.

19 And I almost managed to make it through my
20 remarks without reference to the tentative settlement
21 agreement, but in light of the recent developments, we'll
22 leave that to Manitoba Hydro, MKO, and INAC to inform the
23 Board further as that progresses, and if I understood Mr.
24 Anderson correctly, perhaps additional information will
25 be forthcoming later today.

1 Likewise, the Board voiced its concern in
2 Order 1 of 10 in respect of unfunded capital since 2004.
3 Manitoba Hydro's written submission, and Mr. Mills'
4 testimony of yesterday, may lead Hydro and/or INAC to
5 indicate whether real progress has been made.

6 While as the Board can see, it's
7 relatively easy for me to sit here and ask the questions,
8 and perhaps the parties have submissions that will assist
9 the Board on these issues, but I believe, Mr. Chairman
10 and Board members, we all recognize the answer to these
11 questions, and others, is a difficult task that will lie
12 ahead for the Board.

13 So, subject to any questions that you may
14 have for me, I'll conclude my closing comments by just
15 reminding the Board and the parties that we have asked
16 Ms. Lavigne to incorporate into the written transcript
17 from today the written submissions that the Board has
18 received from the Province of Manitoba, from CAC/MSOS,
19 and from Manitoba Hydro.

20

21 (WRITTEN SUBMISSIONS BY MANITOBA JUSTICE)

22

23 RE: Manitoba Hydro's Application to the Public
24 Utilities Board for approval of new electricity rates in
25 communities served by diesel generation

1 You advised that, at the recent hearing
2 into electricity rates for diesel communities, the Public
3 Utilities Board invited the Government of Manitoba to
4 make submissions in respect of the constitutional
5 responsibility of governments to fund First Nations'
6 electricity costs.

7 The Government of Manitoba respectfully
8 declines the invitation to participate in the hearing.
9 Government policy is that the approval of just and
10 reasonable rates charged by Manitoba Hydro to its
11 customers should be left to the expertise and statutory
12 mandate of the Board.

13 However, to assist the Board with its
14 specific question, the Government of Manitoba can advise
15 that it does not have a constitutional or legal
16 obligation to pay for the electricity costs of First
17 Nations or other power customers. The expenditure of
18 public funds by governments is purely a matter of policy.

19

20 Your truly,
21 Michael Conner
22 Crown Counsel

23

24 (WRITTEN SUBMISSIONS OF CAC/MSOS)

25

1 Manitoba Hydro Rates in Remote Diesel Communities

2 I am writing to provide the Board with CAC
3 Manitoba and MSOS' submissions with
4 respect to the constitutional
5 responsibility, if any, of the federal and
6 provincial governments for the cost of
7 diesel electricity service to the four (4)
8 diesel First Nations.

9

10 Manitoba Hydro Act

11 Section 15.2 of the Manitoba Hydro Act
12 provides that "No person other than the corporation shall
13 engage in the retail supply of power in Manitoba."

14 Retail supply of power is defined in s. 2
15 as:

16 an arrangement, transaction or series
17 of transactions which, in form or in
18 substance, constitute the sale or
19 supply of power to the end-user of the
20 power.

21 Section 22 of the Act provides the corporation with
22 exclusive authority over matters to which the Act applies
23 in all locations:

24 Notwithstanding any provision to the
25 contrary in the Act of the Legislature

1 or in any regulation, rule or by-law
2 made under any such Act, the
3 corporation has the sole and exclusive
4 jurisdiction, right and authority, over
5 and with regard to all matters to which
6 this Act applies and in any place,
7 locality, area or territory in which
8 the corporation supplies power to the
9 actual user thereof or in which it is
10 engaged or intends to be engaged in a
11 program of construction with a view to
12 supplying power therein.

13 Sections 15.2 and 22 of the Manitoba Hydro
14 Act appear to grant exclusive jurisdiction over the
15 provision of Hydro in Manitoba, including in remote First
16 Nation communities.

17 Sections 91 and 92 of the Constitution Act, 1867

18 Sections 91 and 92 of the Constitution
19 Act, 1867 allocate matters of exclusive legislative
20 authority between the federal and provincial governments.

21
22 Section 91(24) grants exclusive authority
23 over "Indians and lands reserved for Indians" to the
24 federal parliament.

25 The provincial legislatures have authority

1 over the generation and distribution of electricity (with
2 the exception of nuclear-generated electricity), pursuant
3 to s. 92(10) (local works and undertakings). This was
4 confirmed in 1982 with the addition of s. 92A(c), which
5 authorizes the provinces to legislate in respect of
6 "development, conservation and management of sites and
7 facilities in the province for the generation and
8 production of electrical energy." Arguable, provincial
9 authority over electrical energy could also flow from
10 s.92(11) (companies with provincial objects).

11 The question raised by the Board is
12 whether s. 91 or 92 of the Constitution Act, 1867 impose
13 obligations on either level of government to cover the
14 cost of electric services in the diesel communities.

15 CAC Manitoba and MSOS did not find any
16 case law to support the existence of such an obligation.
17 Sections 92 and 91 appear to be limited to the division
18 of legislative power. Read in isolation, the fact that a
19 particular matter falls to one level of government
20 pursuant to s. 91 or 92 does not necessarily impose an
21 obligation to cover costs associated with the matter.

22 However, just as the division of powers
23 does not appear to impose spending obligations, it does
24 not necessarily prohibit spending by either level of
25 government in an area that falls to the other level of

1 government, as the division of powers is usually viewed
2 as distinct from the spending power. While not
3 explicitly recognized in the Constitution, the spending
4 power of the federal Parliament has been inferred from
5 three (3) sources: the powers to levy taxes (s. (91(3))
6 (and thus to spend taxes), to legislate in relation to
7 "public property: (s. 91(1A)), and to appropriate federal
8 funds (s. 106). (Ymha Jewish Community Centre of Winnipeg
9 Inc. v. Brown, [1989] 1 S.C.R., 1532, attached at Tab 1).
10 As summarized in Open Federalism and the Spending Power
11 (Adam, Marc-Antoine, 34 Queen's L.J. 175., attached at
12 Tab 2.), the spending power has long been used to justify
13 federal spending in areas of provincial jurisdiction. It
14 distinguishes spending from regulating, with only the
15 latter being subject to the division of powers. Some
16 academics have challenged the traditional conception of
17 the federal spending power, and suggest that it lacks a
18 principled underpinning. Marc-Antoine Adam has proposed
19 that it should instead rest on provincial consent,
20 through a delegation pursuant to s. 94 of the
21 Constitution Act, 1867 (Ibid).

22 Regardless of the precise basis and limits
23 of the federal spending power, it is unlikely to be
24 problematic in this case, where the issue is the cost of
25 diesel service to remove First Nations, which fit easily

1 within the ambit of Parliament.

2 As indicated above, the spending power is
3 more commonly used to justify federal spending in areas
4 of provincial jurisdiction. However, in *Lovelace v.*
5 *Ontario* ([2000] s S.C.R. 950, attached at Tab 3), the
6 Supreme Court of Canada acknowledged the existence of a
7 provincial spending power when it found that the province
8 had not infringed the federal government's authority over
9 Indians and lands reserved for Indians, as the province
10 was simply exercising its spending power.

11 Given that s. 91 and 92 neither confer or
12 deny a spending power, it does not follow that because
13 electric service to the four communities falls within a
14 provincial head of power that the province then has the
15 exclusive financial responsibility to cover the costs of
16 the services.

17 Section 36(1)(c) of the Constitution Act, 1982

18 Section 36(1)(c) of the Constitution Act,
19 1982 provides:

20 36(1) Without altering the legislative
21 authority of Parliament or of the
22 provincial legislatures, or the rights
23 of any of them with respect to the
24 exercise of their legislative
25 authority, Parliament and the

1 legislatures, together with the
2 government of Canada and the provincial
3 governments are committed to...

4 (c) providing essential public
5 services of reasonable quality to all
6 Canadians.

7 Whether s. 36(1)(c) gives rise to
8 enforceable rights is the subject of both judicial and
9 academic debate. The matter has not been determined by
10 the Supreme Court of Canada.

11 The question was considered in Manitoba
12 Keewatinowi Okimakanak Inc. v. Manitoba Hydro-Electric
13 Board (91 D.L.R. (4th) 554, attached at Tab 4). Before
14 this Board, the then eleven (11) diesel communities
15 sought a substantial reduction in rates in light of the
16 inadequate services they received, until such services
17 were improved. Manitoba Hydro acknowledged that the
18 delivery of power was consistent with the objectives of
19 s. 36(1)(c), but argued that the provision did not
20 mandate any specific level of service by Hydro.

21 Scott, CJM (in chambers), considering
22 MKO's application for leave to appeal, stated:

23 "Suffice it to say I am satisfied that
24 in the general sense, a reasonable
25 argument might be advanced that the

1 section could possibly have been
2 intended to create enforceable rights.
3 However, it is not necessary to decide
4 this point in light of the disposition
5 I am about to make."

6 In dismissing the application for leave to
7 appeal, Scott D.J.M., noted that the Board's jurisdiction
8 is expressly limited to fixing rates. Counsel for the
9 First Nation communities conceded that there was no
10 direct nexus between s. 36(1)(c) and the setting of
11 rates, but argued that the issue was essential in order
12 to place the matter in the proper context for the current
13 and future applications.

14 In rejecting this argument, Scott D.J.M.
15 concluded that even if s. 36(1) did create enforceable
16 rights, the Board had no jurisdiction to order Manitoba
17 Hydro to improve the level or quality of service because
18 this would require an expenditure of monies for capital
19 projects. He stated at paragraph 12 that "it is not the
20 business of the courts to deal with academic rights" and
21 that there was no useful purpose to deciding the matter
22 when the Board did not possess the power to grant any
23 effective relief.

24 In spite of the outcome, the case is
25 important for several reasons. First, it is a statement

1 by our Court of Appeal, albeit in obiter, that there is a
2 reasonable argument that s. 36(1)(c) creates justiciable
3 rights. Second, it suggests that should there be a
4 direct nexus between s. 36(1)(c) and the setting of
5 rates, the Board would presumably be entitled to consider
6 that issue. The MKO case was decided in the context of a
7 request for capital improvements (or reduced rates in the
8 absence of those improvements), which is clearly beyond
9 the Board's jurisdiction. The lack of a nexus between s.
10 36(1)(c) and rates was admitted rather than argued.
11 Should there be different circumstances, supportive of
12 the existence of such a nexus, MKO should not preclude
13 the Board from considering the issue. In fact, it is
14 arguable that the issue of whether s. 36(1)(c) creates an
15 obligation on government to pay for the costs of
16 electrical service is directly relevant to determining
17 the rates to be paid by various customer classes, and
18 could, therefore, provide just such a nexus.

19 That being said, other courts have been
20 reluctant to find that s. 36(1) creates justiciable
21 rights. *Canadian Bar Association v. British Columbia*
22 (2008 BCCA 92, attached at Tab 5) was a challenge to
23 under-funding of legal aid. Dismissing the claim, the
24 British Columbia Court of Appeal held at paragraph 53,
25 that:

1 I accept that "a reasonable argument
2 might be advanced under the section
3 could possibly have been intended to
4 create enforceable rights" (Manitoba
5 Keewatinowi Okimakanak at para. 10),
6 but more than that is required of a
7 statement of claim. Material facts
8 must be pleaded to create an informed
9 environment for consideration of that
10 question. The statement of claim in
11 this case does not accomplish that end.
12 On these pleadings, this claim is not
13 justiciable -- there is no reasonable
14 claim to try. [emphasis added].

15 Like our own Court of Appeal in the MKO
16 case, the BC Court of Appeal restricted its decision to
17 the specific facts (or in the case, pleadings) of the
18 case, and left the door open for future courts to decide,
19 in an appropriate case, whether or not s. 36(1)(c) is in
20 fact justiciable.

21 By contrast, the Nova Scotia Court of
22 Appeal in Cape Breton (Regional Municipality) v. Nova
23 Scotia (Attorney General), concluded that while s. 36
24 might be justiciable, it could not be enforced by the
25 appellant municipality. In Cape Breton, the municipality

1 sought a declaration that the province had used
2 equalization payments in a manner inconsistent with s.
3 36(1)(c) by failing to ensure comparable levels of public
4 services in exchange for reasonably comparable levels of
5 taxation. The claim was struck out by the Nova Scotia
6 Supreme Court on the basis that no justiciable
7 constitutional issue was raised. The Court of Appeal, on
8 the other hand, viewed the issue differently, and
9 concluded that

10 ... In an appropriate context, s. 36
11 might represent justiciable commitment,
12 but only among the federal and
13 provincial governments who were privy
14 to the agreement that is represented by
15 s. 36. It is not actionable by an
16 individual or municipality such as
17 CBRM... [paragraph 86].

18 This is a much more definitive statement
19 that is found either the MKO or Canadian Bar Association
20 cases. Of course, it is not binding on courts in
21 Manitoba, but it would be carefully considered.

22 There is also academic debate regarding
23 whether s. 36 gives rise to enforceable rights. This
24 debate was summarized in the lower court decision in Cape
25 Breton. Some scholars, such as Professor Peter Hogg,

1 suggest that s. 36 obligations are "likely too vague, too
2 political to be justiciable". (Constitutional Law of
3 Canada, (5th ed.), cited in Cape Breton (Regional
4 Municipality) v. Nova Scotia (Attorney General), 2008
5 NSSC 111, attached at Tab 7.). Hogg describes the
6 provisions as more of an aspirational statement rather
7 than an enforceable obligation.

8 Other scholars, such as Professor Lorne
9 Sossin, argue that the provision does create enforceable
10 obligations. He states:

11 "The argument that s. 36 was intended
12 to create justiciable obligations on
13 the federal and provincial governments
14 is reinforced by the inclusion of the
15 term "commitment" to describe the
16 protections contained therein. A
17 commitment suggests the creation of an
18 enforceable obligation, at least to
19 employ one's best efforts in securing
20 that to which one is committed.
21 However, it falls short of creating any
22 mandatory obligation to provide a
23 particular level of funding or type of
24 benefit." (Boundaries of Judicial
25 Review: the Law of Justiciability in

1 Canada (Scarborough, Ont: Carswell,
2 1999) cited in Cape Breton (Regional
3 Municipality) v. Nova Scotia (Attorney
4 General) 2008 NSSC 111, at Tab 7.)

5 Therefore, although a coercive remedy may
6 not be available in an action based on s. 36, the court
7 could make a declaration of right.

8 The case law on justiciability of s.
9 36(1)(c) is inconclusive. CAC Manitoba and MSOS continue
10 to believe that s. 36(1)(c) may well impose enforceable
11 obligations on both levels of governments. It is less
12 clear whether the Board has the jurisdiction to use this
13 section to impose responsibility for the costs of diesel
14 service. It would require a nexus between the
15 obligations imposed by s. 36(1)(c) and rates.

16 CAC Manitoba and MSOS suggest that s.
17 36(1)(c) would likely be most applicable in a claim by
18 the diesel First Nations in the event that funding from
19 the federal government did not sufficiently cover the
20 costs of diesel electric service. That being said, CAC
21 Manitoba and MSOS submit that the door has not been
22 closed on the justiciability of s. 36(1)(c), or its
23 applicability to rate setting, assuming that an
24 appropriate nexus was found to exist between the section
25 and the setting of rates. Given that the federal

1 government's responsibilities (if any) pursuant to s.
2 36(1)(c) could be directly relevant to the setting of
3 appropriate rates for various classes of customers in the
4 diesel zone, it is arguable that such a nexus exists in
5 the present application.

6

7 Contractual obligations

8 Years ago, the government of Canada and
9 Manitoba Hydro entered into contracts with respect to the
10 provision of electrical service to a number of remote
11 communities, including the diesel communities. CAC
12 Manitoba and MSOS understand that amongst other things,
13 those contracts dealt with responsibility for costs of
14 diesel service. CAC Manitoba and MSOS also understand
15 that Canada takes the position that the contracts have
16 ended.

17 CAC Manitoba and MSOS do not have access
18 to the contracts. Without reviewing the contracts, as
19 well as any subsequent events which might affect their
20 validity, CAC Manitoba and MSOS are unable to express an
21 opinion on what obligations, if any, are imposed on
22 either Manitoba Hydro or either level of government as a
23 result of those contracts.

24

25 Conclusion

1 Based on their review of the law CAC
2 Manitoba and MSOS are of the view that read in isolation,
3 there is no obligation on either level of government to
4 pay the costs of diesel electric service, as a result of
5 sections 91 and 92 of the Constitution Act, 1867. They
6 are unable to express an opinion on the existence of any
7 contractual obligations, in the absence of the contracts
8 themselves, and any facts relevant to the continuing
9 validity of those contracts. The justiciability of s.
10 36(1)(c) has not been conclusively decided. CAD Manitoba
11 and MSOS remain of the view that s. 36(1)(c) could
12 properly be considered by the Board, in the event of an
13 appropriate nexus between the section and the setting of
14 rates, and raise the question of whether such a nexus
15 exists in the present application. They will continue to
16 consider this issue, and may offer further comments at
17 the upcoming hearing, or at future hearings. Finally,
18 CAC Manitoba and MSOS also suggest that s. 36(1)(c) might
19 well form the basis of a claim by the diesel First
20 Nations, in the event that the funding received from the
21 federal government was not adequate for their actual
22 costs or diesel electric service.

23 That is not, however, the end of the
24 matter. Even in the absence of a constitutional
25 obligation to fund the costs of diesel electric service

1 (subject to arguments under s. 36(1)(c),) CAC Manitoba
2 and MSOS remain firmly of the view that there are
3 compelling policy reasons for continuing to impose
4 responsibility for the costs of diesel electric service
5 on both levels of government.

6 The federal government, through INAC, is
7 the primary funder of the diesel First Nations. It funds
8 a large number of the First Nations' costs, and it does
9 so for a variety of reasons, including obligations under
10 the Indian Act, the treaties, its fiduciary
11 responsibilities, and for policy reasons. When one
12 considers funding provided to diesel First Nations by
13 other federal departments, the magnitude of the federal
14 Crown's funding role in the diesel First Nations is even
15 larger. This funding is not provided out of kindness or
16 charity, but because the federal Crown has recognized
17 both obligations and compelling policy considerations
18 that justify funding of this nature and magnitude.

19 Electricity is, in this day and age, an
20 essential service. It is clear that the customers in the
21 diesel zone are able to pay the full cost incurred to
22 serve them. There is no reason to suggest that this
23 important social need should not be funded by Canada, and
24 every reason to conclude that it should.

25 This view is reinforced when these policy

1 considerations are viewed in the context of the federal
2 government's legislative authority of "Indians and lands
3 reserved for Indians" pursuant to s. 91(24), and the
4 statements in s. 36(1)(c) of the Constitution Act, 1982,
5 whether justiciable or merely aspirational.

6 All of these factors taken together lead
7 CAC Manitoba and MSOS inevitable to the conclusion that
8 the federal government has an important role to play in
9 subsidizing the high cost of diesel service, or the cost
10 of implementing alternatives to diesel service.

11 CAC Manitoba and MSOS also recognize that
12 the federal Crown is not alone in this responsibility.
13 The members of the diesel First Nations are citizens of
14 the Province of Manitoba, and as such, CAC Manitoba and
15 MSOS submit that there are strong policy reasons for
16 requiring the Province to share in the costs of diesel
17 service. Many of the factors that support a finding of
18 responsibility by the federal Crown are equally or almost
19 equally applicable to the Province.

20 Finally, CAC Manitoba and MSOS have always
21 acknowledged that the grid customers bear some
22 responsibility for subsidizing the costs of diesel
23 service.

24 In conclusion, CAC Manitoba and MSOS are
25 firmly of the view that there are compelling policy

1 reasons to require both levels of government to share in
2 those costs. CAC Manitoba and MSOS expect to make
3 further submissions on this point when the hearing
4 resumes.

5 CAC Manitoba and MSOS thank the Board for
6 the opportunity to make written submissions on this
7 issue. If the Board has any questions about the above
8 submissions, please do not hesitate to let me know, and I
9 will be happy to answer them.

10

11 (WRITTEN SUBMISSIONS OF MANITOBA HYDRO)

12

13 Introduction

14 Manitoba Hydro filed an Application on
15 April 29, 2010 for an interim ex parte order to approve
16 rates to be charged for electric service in four remote
17 communities served by diesel generation effective
18 September 1, 2010. The hearing began September 28, 29
19 and 30, 2010 and is to resume November 22, 23 and 24,
20 2010.

21 On September 30, 2010 the Chairman of the
22 Public Utilities Board requested that Manitoba Hydro and
23 Registered Intervenors provide written submissions, one
24 (1) week prior to reconvening the diesel hearing, on a
25 number of issues affecting electricity rates and the

1 communities. Several topics were listed by the Chairman
2 for comments. These are listed in the Table of Contents
3 and each is addressed herein as Manitoba Hydro's written
4 submission.

5

6 1. Application as It Stands

7 The parties were asked to address separate
8 topics and issues outlined by the Board. The first topic
9 to be addressed was on the Application as it stands
10 (Transcript page 733, line 8-9).

11 Manitoba Hydro believes that its
12 application, as it stands, represents the best approach
13 to setting rates in today's situation for the following
14 reasons:

- 15 1) The proposed rates provide the
16 appropriate balance, under the
17 circumstances, between partial cost
18 recovery and customer sensitivity.
- 19 2) Manitoba Hydro does not agree with the
20 statement that: "...the accumulated
21 operating deficit post-2004, which grows
22 at an alarming rate" (Transcript page
23 734). Manitoba Hydro's Application does
24 not attempt to accumulate and/or recover
25 post-2004 deficits. The Application is

1 structured to recover the appropriate
2 amount of annual operating costs and is
3 not backward looking (except for capital
4 cost recovery only).

5 3) Reclassifying provincial government
6 accounts into the General Service class
7 affords these customers the same treatment
8 provided to First Nation General Service
9 accounts in 2004 and segregates accounts
10 funded by the federal government into one
11 (1) rate class (See Transcript page 115).
12 This reclassification is accomplished with
13 no impacts to the Diesel classes of
14 service, including federal government and
15 First Nation Education accounts.

16 4) In addition to supporting retention of
17 the tail block price below average cost,
18 and the cost of transferring provincial
19 accounts to General Service class, the
20 rates in Manitoba Hydro's Application
21 incorporate the usual Subsidy to maintain
22 Residential class Revenue Cost Coverage at
23 82 percent and General Service Revenue
24 Cost Coverage at 89 percent. The
25 remaining costs associated with providing

1 access to grid rates for Residential and
2 General Service customers are incorporated
3 into the Surcharge applied to federal
4 government and First Nation Education
5 accounts.

6 5) While there are some outstanding
7 issues with respect to the funding of
8 capital expenditures, Manitoba Hydro is
9 resolving those issues with the affected
10 First Nations and INAC. In the overall
11 context of providing safe, reliable and
12 affordable energy to the First Nation
13 communities, the issue of capital funding
14 is a relatively minor issue and should not
15 be overemphasized.

16

17 2. Alternative Approaches

18 I. The parties were asked to address the
19 issues of:

- 20 - capital costs between 2004 and
- 21 present
- 22 - future capital expenditures funding
- 23 post-2010

24 (Transcript page 734, lines 3-11).

25 Manitoba Hydro is continuing to pursue the

1 avenues for capital cost recovery which
2 are set forth in the Minutes of
3 Settlement. Manitoba Hydro meets with the
4 First Nations on a regular basis to
5 discuss community issues. In addition,
6 Manitoba Hydro continues to meet with MKO
7 (as representative of the four (4) diesel
8 First Nations) and/or INAC in order to
9 discuss contributions for capital costs
10 incurred since April 1, 2004. Based on
11 recent developments Manitoba Hydro is
12 optimistic that contributions will be
13 secured and a productive process for
14 reviewing and funding future capital
15 expenditures will be put in place. (See
16 Item #4).

17 Manitoba Hydro has recently provided INAC
18 and the First Nations a revised statement
19 of the capital expenditures that are
20 currently incorporated into the Rate
21 Application before the PUB as well as
22 expenditures which are expected to be
23 incurred in 2010/11. Manitoba Hydro has
24 requested expedited consideration of a
25 contribution recognizing the energy usage

1 of the First Nations members and
2 facilities within the Diesel communities.
3 Manitoba Hydro believes that this request
4 is being given serious consideration. If a
5 positive response is received before
6 November 22, 2010 regarding a possible
7 contribution in respect of the capital
8 expended since April 1, 2004, Manitoba
9 Hydro will advise the PUB and provide rate
10 and other schedules which reflect this.
11 On a go-forward basis, Manitoba Hydro
12 intends to provide the parties with a five
13 (5) year capital plan on an annual basis.
14 The capital plan will be updated during
15 the year as conditions warrant. Manitoba
16 Hydro will further communicate with the
17 First Nations and INAC in an attempt to
18 gain mutual understanding of the five (5)
19 year capital plan, including any changes
20 thereto, together with an agreement for
21 funding.

22 - accumulated operating deficit post-
23 2004

24

25 Manitoba Hydro is not considering

1 recovering the accumulated operating
2 deficit post-2004 in rates in the current
3 application. As stated by Mr. Warden in
4 his direct evidence, Manitoba Hydro will
5 track deficits and surpluses with the
6 objective of minimizing net deficits over
7 the longer term (Transcript pages 114-
8 115). Manitoba Hydro does not consider
9 this to be a major issue.

10 ii. The parties were also asked to
11 address various alternative approaches
12 (Transcript page 734, lines 12-25 and page
13 735, lines 1-8).

14 a) Put all costs back into rates with
15 no diesel costs of service outside the
16 rate-setting process.

17 As stated previously, Manitoba Hydro does
18 not intend to incorporate any of the
19 accumulated post-2004 operating deficit
20 into the current or future applications.
21 Should agreement be reached on post-2004
22 capital costs, an adjustment to the
23 application would be made to remove the
24 related interest and depreciation. This
25 adjustment; however, would be relatively

1 minor. (Please see Manitoba Hydro's
2 comments with respect to issue ii.b).

3 b) Assume INAC pays its capital share
4 pursuant to the Tentative Settlement
5 Agreement ("T.S.A."), and delete
6 depreciations and interests costs on
7 post-T.S.A. capital expenditures.

8 Please see response to INAC/MH SUPP-

9 1(a).

10 The full cost rate would be reduced by
11 approximately 4.3 cents per kWh.

12 c) Do not transfer Provincial accounts
13 to General Service customer class,
14 leave status quo with respect to
15 Provincial Accounts.

16 Residential, General Service and Federal
17 Government customers in the Diesel Zone
18 are not impacted by Manitoba Hydro's
19 proposed treatment of provincial accounts
20 (e.g., highways and schools). In
21 proposing the change to the treatment of
22 provincial accounts, Manitoba Hydro's
23 application holds all other accounts in
24 the Diesel Zone harmless from the impact
25 of the change. It is recognized that the

1 reduced revenues from provincial accounts
2 will be made up by grid customers.
3 The proposed treatment of provincial
4 accounts is the same as that afforded to
5 FN band accounts (except Education) as a
6 result implementing the terms of the
7 T.S.A. in 2004. At this time all FN band
8 accounts (except Education) were moved
9 from the Government to the General Service
10 rate. Unlike the current proposal, the
11 remaining Government accounts (or accounts
12 funded by government) were not held
13 harmless from that change; as a result,
14 their share of the surcharge increased.
15 Schedules 3 and 4 of MH's Rebuttal
16 evidence depicts the discontinuity between
17 the proportion of usage for which the
18 FNs/INAC along with other Government
19 accounts have responsibility, and the
20 proportion of the surcharge of the various
21 parties are assigned in the rate
22 structure. It is clear from these
23 schedules that as long as a single
24 surcharge is applied to FN Education,
25 other Federal Government and Provincial

1 Government accounts equally, the FNs/INAC
2 are under-contributing while the
3 provincial accounts are over contributing.
4 Manitoba Hydro's proposal to change the
5 rate classification of the provincial
6 accounts simply results in providing them
7 the same status that the FN accounts,
8 other than Education, have enjoyed since
9 2004.

10 d) Take the tail block rate on
11 consumption of 2,000 kWh for non-
12 residential customer classes to fifty-
13 nine (59) cents to reduce the burden on
14 grid customers' rates.

15 As shown in Manitoba Hydro's Application,
16 Schedules 4.1, 4.2 and 4.5, the implied
17 subsidy in the proposed tail rates for
18 Residential and General Service classes is
19 three hundred and twenty-two thousand,
20 five hundred and three dollars (\$322,503).
21 As discussed in Manitoba Hydro's response
22 to PUB-7(a), the proposed tail block is
23 intended to mitigate impacts on
24 Residential and General Service customers
25 that may have been significant had the

1 full cost of fifty-nine point zero four
2 (59.04) cents been applied.

3 e) Grid rates for all customers except
4 for the Federal Government and First
5 Nation Education Accounts to meet all
6 deficits through premium or surcharge.
7 - i.e. Federal Government and First
8 Nation Education Accounts pick up
9 resultant deficits.

10 - consider need for capacity increases
11 Manitoba Hydro does not believe it is
12 appropriate to apply grid rates to usage
13 by Residential and General Service
14 customers. Beyond a reasonable level of
15 usage, it is appropriate to apply a rate
16 that comes close to recovering full cost,
17 and which sends an appropriate price
18 signal to the consumer.

19 Manitoba Hydro has provided its response
20 to Undertaking #3 which indicates the
21 impact on rates, revenues, Government
22 Surcharge and Manitoba Hydro subsidies of
23 providing grid rates to all Residential
24 and General Service usage forecast in
25 2010/11. This is a reasonable

1 the arrival of grid service in the North
2 Central communities, usage would increase
3 approximately four (4) fold, with a
4 concomitant increase in capacity
5 requirements and subsidies. (See Manitoba
6 Hydro's response to PUB-29(a) in the
7 current proceeding.)

8 Manitoba Hydro also does not believe it is
9 appropriate that, were grid rates allowed
10 for all usage, that Federal Government and
11 First Nation Education accounts meet all
12 deficits through a surcharge.

13 Manitoba Hydro believes that the Federal
14 Government generally, and INAC in
15 particular, should support the reasonable
16 energy requirements of the First Nations
17 accounts. It is appropriate, however,
18 that price signals be put in place to
19 promote the efficient usage of energy.

20 f) Other options?

21 Manitoba Hydro believes that the rates
22 proposed in its application reflect the
23 most appropriate balance between the
24 objectives of partial cost recovery and
25 customer sensitivity. Manitoba Hydro has

1 considered other options, but has
2 determined that those options do not
3 warrant the consideration of the Public
4 Utilities Board at this time.

5 iii. Prospects and Implications for all
6 Parties (financial, social, environmental
7 aspects) based on each alternative; take
8 into account the prospects of population
9 increase, ongoing and improved DSM, health
10 and welfare of the community and other
11 provincial and federal costs associated
12 with the communities (Transcript page 735,
13 lines 17-25).

14 Manitoba Hydro's mandate is restricted to
15 matters associated with the supply and use
16 of power. (See for example Manitoba Hydro
17 Act s. 2, The purposes and objects of this
18 Act are to provide for the continuance of
19 a supply of power adequate for the needs
20 of the Province, and to engage in and to
21 promote economy and efficiency in the
22 development, generation, transmission,
23 distribution, supply and end-use of
24 power...)

25 As such, Manitoba Hydro maintains

1 expertise in areas such as the
2 construction and operation of the diesel
3 power system that minimizing environmental
4 impacts associated with the operation of a
5 diesel system. Manitoba Hydro's mandate
6 also extends to the optimization of the
7 use of available power, which is carried
8 out through means such as Demand Side
9 Management ("DSM") PROGRAMS.
10 Questions of long-term health and socio-
11 economic development in the Diesel
12 communities go beyond Manitoba Hydro's
13 mandate and expertise. Manitoba Hydro
14 would expect that government departments
15 mandated with the primary responsibility
16 for such areas would be in the best
17 position to identify concerns related to
18 how the operation of the power system
19 impacts matters falling within their
20 jurisdiction or ascertain opportunities,
21 if any, for improvements in health and
22 welfare of socio-economic conditions,
23 which might be facilitated by changes to
24 the power system.
25 By way of example, in the North Central

1 Project, government contracted fo fund 90
2 percent of the cost of extending grid
3 service to thirteen (13) former diesel
4 communities. In turn, major new
5 infrastructure was planned and built in
6 these communities. Manitoba Hydro was not
7 involved in the decision to implement
8 these plans, however, upon resources being
9 made available by government, Manitoba
10 Hydro took the steps necessary to upgrade
11 service to a level which allowed these
12 projects to proceed.

13 In regard to the implications of
14 additional DSM programming in the
15 communities, Manitoba Hydro believes there
16 are limited additional opportunities
17 outside those which are available through
18 the First Nations Power Smart Program.
19 Manitoba Hydro will continue to work with
20 the communities to ensure that a plan is
21 developed to take advantage of all
22 residential and commercial opportunities.
23 In addition, education workshops are being
24 offered to the communities to ensure that
25 these savings are sustained and that any

1 additional behaviour-based savings can be
2 realized. It is expected that through
3 this initiative, financial, social and
4 environmental conditions in the community
5 will improve.

6

7 3. Obligations Pursuant to Statutes

8 The parties were asked to address various
9 obligations that arise pursuant to various statutes:
10 (Transcript page 733, lines 10-19).

11 I) Manitoba Hydro Act - Obligation to
12 Serve

13 ii) The Constitution Act and Indian Act

14 a) Costs in general incurred by First
15 Nations and Non-First Nations members;
16 legal obligations to fund First Nations
17 electricity costs; ethical obligations
18 to fund First Nations electrical costs;
19 and

20 b) Duty to Consult

21 I) Obligation Pursuant to The Manitoba
22 Hydro Act - Obligation to Serve.

23 The obligation typically refers to an
24 explicit duty to supply customers who
25 request service by virtue of a provision

1 contained in governing legislation.
2 Manitoba Hydro has consistently maintained
3 that its mandate is to provide for the
4 continuance of a supply of power adequate
5 for the needs of the Province. While
6 there is no explicit provision in the
7 Manitoba Hydro Act (the "Act") placing a
8 specific or mandatory duty on the
9 Corporation to supply power, Manitoba
10 Hydro believes that its obligation can be
11 inferred through its constating
12 legislation and the common law.
13 Manitoba Hydro's obligations are set forth

14 as follows:

15 s.2 The purpose and objects of this
16 Act are to provide for the continuance
17 of a supply of power adequate for the
18 needs of the Province and to engage in
19 and to promote economy and efficiency
20 in the development, generation,
21 transmission and distribution, supply
22 and end-use of power.

23 s. 15(1.1) In addition to the other
24 powers set forth in this Act and
25 subject to the limitations set forth in

1 this Act, the Corporation has the
2 capacity, rights, powers and privileges
3 of a natural person to carry out its
4 purpose and objects and to carry on
5 related business ventures, on such
6 terms and conditions as the Board deems
7 proper.

8 Section 2 deals with the purpose of the
9 legislation (as opposed to the purposes of
10 the Corporation) and references the supply
11 of power to the Province. Section 15(1.1)
12 gives Manitoba Hydro the powers of a
13 natural person including the ability to
14 carry out its purposes and objects on such
15 terms and conditions as it sees fit.

16 Manitoba Hydro infers that the purposes of
17 its Act are in place to support the
18 Corporation's purposes and thus are the
19 same. That Manitoba Hydro has been
20 authorized to determine the terms and
21 conditions under which it will carry out
22 its purposes demonstrates that its supply
23 obligations are not absolute.

24 It is clear that a utility's duty to
25 supply is not an unfettered obligation and

1 is accompanied by a corresponding duty on
2 the part of the customer to pay for the
3 service provided. For example, s. 39(1)
4 of the Act:

5 39(1) The prices payable for power
6 supplied by the Corporation shall be
7 such so as to return to it in full the
8 cost to the Corporation of supplying
9 the power, including...

10 Similarly, there exists no absolute duty
11 to supply with respect to utilities (such
12 as Centra Gas) governed under The Public
13 Utilities Board Act. For example, PUB
14 approved service extension policies
15 require evidence that the extension will
16 furnish sufficient revenues to justify the
17 extension.

18 The courts have also supported the notion
19 that the duty to supply is not an absolute
20 duty. *City of Levis v. Begin* [1926] 1
21 D.L.R., 610 (S.C.C.), dealt with a
22 situation where a utility had no existing
23 facilities to supply a particular customer
24 with water and the cost of building the
25 required facilities far exceeded the

1 expected revenue from that customer in the
2 foreseeable future. The Supreme Court of
3 Canada held that there was no obligation
4 on the utility to extend its system
5 indiscriminately throughout its entire
6 territory and no absolute duty on a
7 utility at common law to supply. In
8 coming to this conclusion, the court
9 looked at the City's enabling legislation
10 and, in particular, the fact that it had
11 discretionary powers akin to the ability
12 to fix terms and conditions of supply.
13 In the case of the Diesel communities, the
14 question of whether there exists a duty to
15 supply is complicated by the fact that
16 reserve lands fall under federal and not
17 provincial jurisdiction. For example,
18 where there is a duty to supply, there
19 must also exist corresponding rights to
20 access lands in order to fulfill that duty
21 (for example see sections 18
22 (expropriation), 23 (right to use public
23 places and 24 (power of entry) of The
24 Manitoba Hydro Act.). The Manitoba Hydro
25 Act is a law of general application and,

1 as such, applies to reserve land except
2 such provision which conflict with federal
3 legislation. Section 28 of the Indian Act
4 requires the Corporation to obtain
5 permission from Canada and the First
6 Nations in order to access reserve lands.
7 Manitoba Hydro does not have the right to
8 expropriate, use public places on reserve
9 or enter on to reserve property without
10 permission. In these circumstances,
11 Manitoba Hydro's duty to supply the Diesel
12 First Nations might be termed a qualified
13 duty to supply which, as is the case with
14 all customers, is subject to a
15 corresponding duty on the part of the
16 customer to pay the costs of providing
17 such a service.

18 ii) The Constitution Act and Indian Act
19 a) Costs in general incurred by First
20 Nations and Non-First Nations members;
21 legal obligation to fund First Nations
22 electricity costs; ethical obligations
23 to fund First Nations electrical costs:
24 Constitutional obligations arise from
25 the Constitution Act.

1 Section 91(24) of the Constitution
2 Act, 1867 indicates that:
3 s. 91 It shall be lawful for the
4 Queen, by and with the Advice and
5 Consent of the Senate and House of
6 Commons, to make Laws for the Peace,
7 Order and good Government of Canada, in
8 relation to all matters not coming with
9 the Classes of Subject and by this Act
10 assigned exclusively to the
11 Legislatures of the Provinces, and for
12 greater certainty, but not so as to
13 restrict the Generality of the
14 foregoing Terms of this Section, it is
15 hereby declared that (notwithstanding
16 anything in this Act) the exclusive
17 Legislative Authority of the Parliament
18 of Canada extends to all Matters coming
19 within the Classes of Subjects next
20 hereinafter enumerated; that is to say
21 (24) Indians and Lands reserved for
22 Indians.
23 The Federal Government, pursuant to
24 section 91.24, was provided with the
25 obligation for "Indians and lands

1 reserved for Indians"./ There are two
2 (2) separate powers given to the
3 Federal Government. The first is a
4 power over "Indians". This power is
5 for Indians whether or not they reside
6 on, or have any connections with, lands
7 reserved for Indians. The second power
8 is exercised in respect of Indians and
9 non-Indians so long as the law is
10 related to lands reserved for Indians
11 (pg. 602 - Constitutional Law of
12 Canada, Peter Hogg, 2005). Exclusive
13 federal jurisdiction under Section
14 91(24) means that provinces cannot
15 legislate or infringe upon those
16 matters.
17 The Constitution Act, 1982 of Canada
18 brought in a limitation on the power of
19 the federal government (which also
20 applies to provincial Legislatures).
21 Section 35 states:
22 s. 35(1) The existing aboriginal and
23 treaty rights of the aboriginal peoples
24 of Canada are hereby recognized and
25 affirmed.

1 Before section 35 of the Constitution
2 Act, 1982, the Federal Government did
3 not have to justify any infringements
4 of Aboriginal or treaty rights. This
5 is where the fiduciary relationship
6 between the Crown and Aboriginal people
7 is grounded.

8 The case of *Bear Island Foundation v*
9 *Ontario* (1999), [1999] O.J. No. 4290
10 held that:

11 The fiduciary duty of the Crown to
12 aboriginal people is fundamentally a
13 duty of the federal Crown. It is the
14 federal government that has legislative
15 responsibility for Indians and lands
16 reserved for Indians under s. 91(24) of
17 the Constitution Act 1867. As the
18 Supreme Court said in *Mitchell v. Sandy*
19 *Bay Indian Band* - The provincial crown
20 bears no responsibility to provide for
21 the welfare and protection of native
22 peoples (para 34).

23 In *Perry v Ontario*, this court
24 recognized that the province may have a
25 fiduciary duty to Aboriginal peoples

1 who have an Aboriginal or treaty right
2 to hunt and fish and whose exercise of
3 that right is affected by Provincial
4 regulation... In such a case, the
5 province's duty is "a restraint against
6 regulations improperly affecting the
7 aboriginal [or treaty] rights." Breach
8 of the duty may render the provincial
9 regulation unenforceable against
10 aboriginal people exercising these
11 rights. But the fiduciary duty owed by
12 the provincial Crown is a "shield and
13 not a sword".
14 The Federal Government's website (under
15 INAC), states that the "health and
16 well-being of Aboriginal people is the
17 responsibility of the federal
18 government". Further it is stated that
19 INAC "develops policies to help First
20 Nations gain autonomy over the
21 management and control of their oil and
22 gas resources. They are committed to
23 engaging Aboriginal peoples and
24 northern communities to strategies to
25 develop knowledge, capacity and tools

1 to improve access to renewable energy
2 sources; especially in remote
3 communities".
4 Although at common law, there has been
5 no legal obligation found for the
6 Federal Government to fund electricity
7 costs unless pursuant to specific
8 statute or treaty obligations, Manitoba
9 Hydro would suggest that there is a
10 fiduciary duty and obligation on the
11 part of the Federal Government to
12 assist in the funding of First Nations
13 electric costs and providing capital
14 contributions with respect to projects.

15
16 Manitoba Hydro notes that prior to 2004
17 and the implementation of principles
18 based on the T.S.A., it considered INAC
19 contractually responsible for the costs
20 associated with the provision of diesel
21 electric service in the four diesel
22 communities. Any acknowledgement on
23 the part of Manitoba Hydro that INAC is
24 no longer the customer is contingent on
25 execution of the T.S.A. (and the

1 commitments contained therein) and is
2 made on a without prejudice basis until
3 such signing.

4 b) Duty to Consult

5 The duty to consult forms part of the
6 larger fiduciary relationship between the
7 Federal Government and Aboriginal people
8 and arises from the rights referred to in
9 section 35 of the Constitution Act, 1982.

10 s. 35(1) The existing aboriginal and
11 treaty rights of the aboriginal peoples
12 of Canada are hereby recognized and
13 affirmed.

14 (2) In this Act, "aboriginal peoples
15 of Canada" includes the Indian, Inuit
16 and Metis people of Canada.

17 (3) For greater certainty, in
18 subsection (1) "treaty rights" includes
19 rights that now exist by way of land
20 claims agreement or may be so acquired.

21
22 (4) Notwithstanding any other
23 provision of this Act, the aboriginal
24 and treaty rights referred to in
25 subsection (1) are guaranteed equally

1 to both male and female persons.
2 In order for there to be a duty to
3 consult, there must be the potential
4 existence of an Aboriginal right or title
5 which will be adversely affected by
6 contemplated conduct. The leading case
7 dealing with the duty to consult is Haida
8 Nation v British Columbia (Minister of
9 Forests) [2004] e S.C.R. 511. In Haida
10 the Supreme Court of Canada indicated
11 that:

12 The government's duty to consult with
13 Aboriginal peoples and accommodate
14 their interests is grounded in the
15 honour of the Crown. The honour of the
16 Crown is always at stake in its dealing
17 with Aboriginal peoples. (para 16)
18 The foundation of the duty in the
19 Crown's honour and goal of
20 reconciliation, suggest that the duty
21 arises when the Crown has knowledge,
22 real or constructive, of the potential
23 existence of the Aboriginal right or
24 title and contemplate conduct that
25 might adversely affect it. (para 35)

1 The current application before the Public
2 Utilities Board addresses issue regarding
3 the recovery and costs incurred by
4 Manitoba Hydro to provide diesel electric
5 service to the four diesel communities.
6 Manitoba Hydro's application does not deal
7 with any aboriginal rights or titles.
8 Manitoba Hydro has indicated that it will
9 keep the First Nations advised and that it
10 will continue to communicate and improve
11 communication with the First Nations.
12 This is, however, separate and distinct
13 from Manitoba Hydro having a duty to
14 consult Manitoba Hydro's communication
15 with the First Nation arises from its
16 desire to maintain a positive relationship
17 with the First Nations. Manitoba Hydro
18 has indicated on the record that better
19 communication is required and that
20 Manitoba Hydro is committed to enhancing
21 its communication and has set up a
22 committee to address this issue
23 (Transcript page 147, lines 10-22).
24 Further, with respect to the Minutes of
25 Settlement and Manitoba Hydro's agreement

1 within those Minutes to "consult" with the
2 First Nations was an agreement to develop
3 a process to advise and discuss questions
4 and concerns that are raised by the First
5 Nations and INAC with respect to future
6 capital costs (transcript pages 705-710).
7 These commitments and agreements, however,
8 do not translate into a mandatory duty to
9 consult with respect to expenditure of
10 costs to provide diesel service as
11 discussed in the context of the
12 Constitution Act. Manitoba Hydro will
13 continue to provide diesel service to the
14 four (4) First Nations communities at
15 rates that are just and reasonable
16 regardless of where the costs are
17 allocated. As indicated above, the true
18 "duty to consult" is part of the larger
19 fiduciary relationship between government
20 and Aboriginal peoples.

21

22 4. Communication Between Parties

23 The Board requested comments and ways and
24 means to improve communication between and amongst all
25 parties (Transcript page 735, lines 9-13).

1 As indicated in Section 2.I, Manitoba
2 Hydro intends to provide the parties with a five (5) year
3 capital plan on an annual basis. The capital plan will
4 be updated during the year as conditions warrant.
5 Manitoba Hydro will further communicate with the First
6 Nations and INAC in an attempt to gain a mutual
7 understanding of the five (5) year capital plan,
8 including any changes thereto, together with an agreement
9 for funding.

10

11 5. Additional Studies

12 The Board requested comments on whether
13 there was a need for additional studies with respect to
14 Economic, social and environmental matters (inclusive
15 possibly of forecast by independent experts) (Transcript
16 page 736, lines 1-4).

17 Manitoba Hydro currently engages in the
18 study of energy usage and the forecast of this usage in
19 the Diesel communities. As such, Manitoba Hydro does not
20 believe that additional studies in this area would be of
21 benefit.

22 Manitoba Hydro's position with respect to
23 its mandate regarding social and environmental matters is
24 set out in Item 2(iii) herein. Manitoba Hydro notes,
25 however, that through the provisions of the Affordable

1 Energy Fund, Manitoba Hydro provides funding that would
2 allow Lower Income Manitobans and First Nation
3 communities to upgrade the energy efficiency of their
4 homes where they otherwise may not have been able to
5 afford to do so.

6

7 6. Should PUB set Final Rates?

8 We would also like you to consider the
9 question as to whether PUB should set final rates and
10 review and possibly amend one (1) year hence, or earlier
11 if circumstances warrant such action. In regard to final
12 rates, will INAC and/or First Nations seek a return of
13 monies already paid if the rates are made final?

14 (Transcript page 736, lines 10-15).

15 The PUB approved diesel rate changes, on
16 an interim basis, in Order 17/04, Order 159/04 and Order
17 176/06. In its current Diesel Rate Application, Manitoba
18 Hydro also seeks rates be approved on an interim basis.
19 In addition, changes to the Cost of Service Study
20 ("COSS") were adopted on an interim basis pursuant to
21 Order 117/06.

22 The PUB should not issue its final order
23 with respect to these rate increases and change to the
24 COSS until such time as the T.S.A. has been executed.
25 The arrangement among the parties contemplates the PUB's

1 Final Order issuing after the signing of the agreement.
2 The Corporation and its ratepayers would be put at
3 significant financial risk if the PUB's final order
4 issued prior to execution of the T.S.A.

5 Under the terms of the T.S.A., Canada
6 agreed to fund the Diesel First Nations for the First
7 Nations' payment of Undepreciated Capital Costs in the
8 amount of \$19.87 million in Unpaid Surcharge Billings of
9 \$3.20 million. These funds were forwarded to Manitoba
10 Hydro in trust and on the condition that such funds would
11 be returned if:

- 12 1. The Minutes of Settlement are not
13 ratified by means of an executed
14 Settlement Agreement;
- 15 2. The terms of the Minutes of Settlement
16 relating to approval of an agreed upon
17 rate structure are not approved by the
18 PUB; and
- 19 3. The PUB does not approve the
20 allocation of net export and other
21 revenues so as to retire the accumulated
22 deficit over a ten (10) year period.

23 Based on its commitments under the T.S.A.,
24 Manitoba Hydro applied to the PUB for approval of a rate
25 structure which removed Undepreciated Capital from rates.

1 This application resulted in Interim Order 159/04 which
2 served to remove capital from rates and reduced the full
3 cost rate from seventy-nine point ten (79.10) cents to
4 thirty-six point one three (36.13) cents and the
5 Government rate from two hundred thirty four point nine
6 (234.9) cents to one hundred and five point three six
7 (105.36) cents.

8 The proposal by HM to credit a portion of
9 net export revenue to the Diesel Class
10 needs to be examined further and
11 finalized, in conjunction with a rate
12 review of this class.

13 The overall impact of HM's Recommended
14 Methodology together with the final terms
15 and any tentative Settlement Agreement
16 needs to be further examined and reviewed
17 to allow the Board to reach a final
18 determination as to the appropriate
19 allocation of net export revenue to the
20 Diesel class.

21 The Board will direct that MH file as soon
22 as possible, and by no later than
23 September 30, 2006, a diesel class rate
24 application to facilitate a review and
25 possible revision of rates for this class.

1 In the interim, the Board will accept MH's
2 recommended methodology with respect to
3 the diesel customer class.

4 This said, the Board remains open to other
5 COSS methodologies for the diesel class
6 until such time as the Settlement
7 Agreement has been finalized, cost
8 information updated to reflect current
9 diesel rates and revenue, and a current
10 diesel rate application is before the
11 Board. (Order 117/06, p.67)

12 Pursuant to Directive 1 e) in Order
13 117/06, Manitoba Hydro has included the diesel customer
14 class in the COSS. Such inclusion was clearly subject to
15 final approval being made.

16 The arrangement among parties contemplates
17 that the PUB's final order will follow the signing of the
18 T.S.A. To reorder the required approvals at this stage
19 would put Manitoba Hydro and other ratepayers at
20 significant financial risk. If a final order is issued
21 prior to the T.S.A. being signed, Manitoba Hydro will be
22 placed in the untenable position of having met all of its
23 commitments on a final basis without being in a position
24 to enforce the commitments of the other parties. In the
25 unlikely event the agreement is not signed, MKO is

1 entitled to demand return of the funds paid in trust
2 (subject to the signing of the agreement) which in turn
3 are to be repaid to Canada. In these circumstances and
4 prior to the final order issuing, Manitoba Hydro would be
5 entitled to apply the pre-settlement rates emanating from
6 Order 117/04 retroactively and seek approval of necessary
7 upward adjustments thereto. Manitoba Hydro would not be
8 able to seek such relief if the PUB had already made its
9 orders final. In such circumstance, Manitoba Hydro would
10 have provided substantial rate relief, including the
11 provision of Net Export revenues, without having received
12 the benefit of the contributions upon which such rate
13 relief was based.

14

15 7. Other

16 a) Does moving the provincial accounts
17 from the government class to the General
18 Service Class amount to employing the
19 funds of the Corporation for the purposes
20 of the government or any agency of the
21 government as per section 43 of The
22 Manitoba Hydro Act (Transcript pages 222-
23 235).

24 Section 43(3) of the Manitoba Hydro Act
25 (the "Act" states:

1 S. 43(3) Except as specifically
2 provided in this Act, the funds of the
3 corporation shall not be employed for
4 the purposes of the government or any
5 agency of the government as that
6 expression is defined in The Civil
7 Service Act, other than the
8 corporation, and the funds of the
9 government shall not be employed for
10 the purposes of the corporation
11 except...

12 Section 43(3) of the Manitoba Hydro Act
13 was not intended to address customer
14 classification, cost allocation or rate
15 issues and does not serve to restrict the
16 transfer of provincial accounts from the
17 Government class to the General Service
18 class, nor does it have application to the
19 issues before the Public Utilities Board.
20 Section 43(4) of the Act expressly states
21 that s. 43(3) has no application to
22 payments for power supplied and hence no
23 application to rate or cost allocation
24 issues:

25 s. 43(4) Subsection (3) does not...

1 (c) apply to monies payable by the
2 government or any agency of the
3 government for power supplied to the
4 government or the agency, as the case
5 may be, by the corporation.

6 Further, in order to fall under section
7 43(3) of the Act, funds must be used for
8 the purpose of the government agency.
9 Purpose has been defined as the reason for
10 which "something is done" or "the intended
11 result". The uncontradicted evidence of
12 Manitoba Hydro's panel is that the
13 decision to transfer the Province from the
14 Government Account to the General Service
15 Account was made to segregate the federal
16 accounts into one account. (Transcript
17 pages 115 and 237)

18 Transferring the province to the General
19 Service account simply amounts to a change
20 in the rates charged for diesel power
21 being supplied. Manitoba Hydro has the
22 ability to set rates for service with the
23 approval of the Public Utilities Board.
24 Although under these circumstances, the
25 transfer proposed by Manitoba Hydro

1 amounts to a decrease in the rates being
2 charged for the service, the decrease of a
3 rate being charged does not amount to
4 funds being used for the purposes of the
5 Government. If this were the case, then
6 it could be argued that a decision made by
7 Manitoba Hydro which resulted in an
8 increase in rates for power supplied to
9 the Government would fall under the second
10 part of section 43(3) where the funds of
11 the Government cannot be used for the
12 purposes of the corporation. This is an
13 absurd suggestion as Manitoba Hydro's
14 regulations clearly state that the
15 corporation is to be paid for the power it
16 supplies at the rates approved by the
17 Public Utilities Board. This is clearly
18 supported by section 43(4)(c) which states
19 that section 43(3) does not apply when
20 dealing with power supplied to the
21 government or agency. The changes
22 proposed by Manitoba Hydro deal with the
23 rates for power supplied to all accounts.
24 There is no contravention of section 43(3)
25 of The Manitoba Hydro Act in the transfer

1 of the province from the Government
2 account to the General Service account and
3 this provision has no application to the
4 issues currently before PUB.

5
6 MR. BOB PETERS: With those comments, Mr.
7 Chairman, again, subject to your questions, I would
8 suggest it'd be appropriate to turn to my colleague, Ms.
9 Bowman, on behalf of CAC/MSOS to receive her closing
10 submissions, followed by turning to INAC's counsel, Ms.
11 Hart and Ms. Thompson. And should Mr. Anderson, as you
12 say, I doubt he will return in time to provide anything
13 in orally, but because he'll be providing things in
14 writing, the Board will have that by Friday. And then
15 we'll hear from Ms. Fernandes to conclude the submissions
16 today. Thank you.

17 THE CHAIRPERSON: Thank you, Mr. Peters.
18 Ms. Bowman...?

19

20 CLOSING COMMENTS BY CAC/MSOS:

21 MS. MYFANWY BOWMAN: Thank you, Mr.
22 Chairman, Mr. Vice-Chairman, and Board member, Avery
23 Kinew. I have a list of recommendations to assist the
24 Board just summarizing the recommendations that CAC/MSOS
25 are -- are planning to make this morning. Sadly, I still

1 have some submissions to go with them, but I will pass
2 that out now.

3

4

(BRIEF PAUSE)

5

6 MS. MYFANWY BOWMAN: While Mr. Singh is
7 distributing those I'll -- I'll get started if that's
8 acceptable to the Board, or shall I wait?

9

THE CHAIRPERSON: You can start.

10

MS. MYFANWY BOWMAN: Thank you. Mr.
11 Peters' words are apt. I -- I can tell the Board that my
12 clients really struggled with what recommendations to
13 make to you today and have gone back and forth on some of
14 their instructions as -- as recently as this morning. So
15 they -- they recognize that there's difficult issues
16 before you. And I -- I don't think that they envy you,
17 the job of trying to wrestle with all of this.

18

They are grateful to be here once again.
19 This Application was another interim ex parte application
20 and they would like to express their opposition to that
21 process. The -- hopefully now that the tentative
22 settlement agreement is -- is going to become the
23 settlement agreement, interim ex parte applications will
24 no longer be occurring.

25

But it's the view of CAC/MSOS that it's

1 important to have a public process. Whether or not an
2 oral hearing is required, tha -- that there should be a
3 public process. So they thank the Board for engaging in
4 the process that -- that has taken place thus far.

5 As I was preparing my comments for today I
6 we -- I went back to my notes from our -- our one (1) day
7 hearing in November of last year and I was -- I found
8 them surprisingly helpful. The priorities being advanced
9 by my clients then are the same priorities that they're
10 advancing to the Board today with one (1) minor addition
11 -- no, perhaps not minor, one (1) small addition.

12 And certainly in the process of -- of
13 developing their position they found those principles and
14 I found those principles to be of assistance, so -- so
15 they hope that they will be of assistance to the Board as
16 well. Manitoba Hydro has applied for a fairly
17 substantial rate increase, and there -- there's some
18 frustration because that Application has been delayed;
19 it's taken some time.

20 And during that time, the financial
21 situation in the diesel zone has deteriorated and rates
22 have not kept pace with the costs, so, once again, there
23 are deficits. Now, Manitoba Hydro has, I believe,
24 delayed in its Application, out of concern for the impact
25 of increased rates on customers, and certainly CAC/MSOS

1 have a great deal of sympathy for that view.

2 They appreciate that concern and they
3 share it. However, the -- the delay has complicated
4 issues somewhat in terms of -- of costs continuing to
5 rise and the gap between costs and revenues continuing to
6 -- to grow. They certainly appreciate that the rate
7 increases sought by Manitoba Hydro cause concern. Nobody
8 wants to see rate increases, and these -- some of these
9 rate increases are substantial.

10 While the -- the increases sought for
11 residential customers are relatively modest certainly by
12 comparison, it's -- it's still a matter of concern for
13 everyone here as -- as costs continue to climb. So what
14 the -- CAC/MSOS hope to offer the Board today is some
15 assistance in terms of -- of priorities or principles to
16 -- to look at as you sort through these issues and
17 hopefully -- and some recommendations, as well. The
18 priorities that they recommend to the Board are
19 affordability, appropri -- an appropriate contribution
20 from government, and -- and they mean both levels of
21 government, an appropriate contribution from the grid,
22 efficiency, protection of grid customers from escalating
23 costs, rate shock, and regulatory efficiency.

24 When we talk about affordability, it's the
25 view of CAC/MSOS at least that electricity is an

1 essential service. Rightly or wrongly in the diesel zone
2 it can mea -- mean heat in a cold climate and it
3 certainly means light and hot water and fri --
4 refrigeration, and cooking, and connection to the outside
5 world. That is an essential service.

6 It is unquestioned that the customers in
7 these communities already face a high cost of living,
8 much higher than the cost of living in the southern part
9 of the province. The evidence also establishes that many
10 of the customers in the diesel zone are low income.

11 This is a very rough calculation, but
12 taking the statisl -- statistical information that MKO
13 filed a couple of days ago I cross-referenced that with
14 the undertaking that we had from INAC with respect to the
15 number of employment income assistance recipients.

16 And the data comes from somewhat different
17 place, so it's not necessarily entirely comparable, but
18 just to give us a rough idea when I divide the number of
19 employment income assistance recipients by the total
20 population indicated in the census data filed by MKO, it
21 indicates that 85 percent of the residents of the diesel
22 zone are in receipt of employment income assistance
23 benefits.

24 That may not be exactly right, but it --
25 it's close enough that it gives the Board an idea. And

1 that does not include people who may be employed or -- or
2 otherwise not on assistance who are still low income.
3 Electricity has to be affordable to these vulnerable
4 consumers.

5 In addition to the Hydro bill that -- that
6 these customers receive, there are also indirect impacts
7 in terms of the effect of increased Hydro costs on the
8 cost of living, whether it's the price of milk or the
9 price of food, or -- or whatever. When -- when costs go
10 up consumers pay. The Board has the ability to consider
11 these social policy issues including the ability to pay.

12 The question becomes really to what extent
13 the -- the Board can and should do that. And I'm going
14 to come back to that issue, but first I want to go
15 through the list of priorities. The next priority that -
16 - that CAC/MSOS recommend to the Board is an appropriate
17 contribution from both the federal and provincial
18 governments.

19 I'm not going to repeat the written
20 submissions that we filed on this issue, but I will
21 summarize very briefly, diesel customers are citizens of
22 Manitoba and they are citizens of Canada. And CAC/MSOS
23 take the view that both levels of government have a
24 responsibility to assist with defraying the costs of
25 diesel service.

1 They recall that Manitoba Hydro began
2 serving these communities at the express request of
3 Canada, and that there were conditions and expectations
4 on their agreement to serve. Section 9124 of the
5 Constitution Act grants the federal government
6 legislative authority over Indians and lands reserved for
7 Indians.

8 By itself this does not impose an
9 obligation to pay for diesel electric service and -- and
10 CAC/MSOS are not suggesting it does. They are suggesting
11 that it's a relevant contextual issue -- or relevant
12 contextual factor. There's also the issue of section
13 36(1)(c) of the Constitution Act of 1984 which provides
14 that:

15 "Both levels of government are
16 committed to providing essential public
17 services of reasonable quality to all
18 Canadians."

19 From our review of the law, it does not
20 appear that the justiciability of section 36(1)(c) has
21 been determined. It's an open question. CAC/MSOS remain
22 of the view that -- that it may well be properly
23 considered by this Board if there is an appropriate nexus
24 between 36(1)(c) and the setting of rates.

25 They also suggest that 36 (1)(c) could

1 form the basis of a claim by the diesel First Nations in
2 the event that funding received from the federal
3 government was not adequate for their cost of diesel
4 electric service. And there would clearly be a nexus
5 there. Whether 36 (1)(c) is justiciable or not there are
6 compelling policy reasons for continuing to impose
7 responsibility for the cost of desl -- diesel electric
8 service on both levels of government.

9 The Federal Government, through INAC, is
10 the primary funder of diesel First Nations. It funds
11 many of the First Nations' costs, and -- and needs,
12 whether its water treatment, whether its employment and
13 income assistance, the various forms of assistance that
14 INAC provide, they run the gamut.

15 INAC provides that assistance for a
16 variety of reasons. CAC/MSOS inclu -- understand that
17 those reasons may include obligations under the Indy Ac -
18 - Indian Act, various treaties, fiduciary
19 responsibilities, and of course, INAC has been very clear
20 that policy choice enters into that as well.

21 If you add in the funding that the First
22 Nations receive from other federal departments, and Mr.
23 Mills, I believe, referenced that briefly yesterday, the
24 federal Crown's funding role in the diesel First Nations
25 is even larger.

1 CAC/MSOS suggests strongly that that
2 funding is not provided out of kindness, or charity. It
3 is provided because Canada has recognized both
4 obligations, and compelling policy considerations, that
5 justify funding of that nature, and magnitude.

6 And CAC/MSOS further suggest that diesel
7 electric service is not materially different than the
8 other types of -- of needs that the Federal government
9 funds. It is an essential service for which the
10 customers are unable to pay the full cost incurred to
11 serve them.

12 There is no reason to suggest that it
13 should not be funded by Canada, and there's every reason
14 to suggest that it could -- should be.

15 When you layer that with the Federal
16 government's legislative authority over Indians and Lands
17 Reserved for Indians, and its commitment to providing
18 essential ser -- public services of reasonable quality
19 under 36(1)(c), all of those factors together suggest
20 very strongly that the Federal government has an
21 important role to play in subsidizing the cost in the
22 diesel zone.

23 The federal Crown, however, is not alone
24 in this obligation. The members of the diesel First
25 Nations are citizens of the province of Manitoba, and

1 many of the factors that -- that apply to the federal
2 government and suggest a federal obligation, apply
3 similarly to the provincial government.

4 Certainly, the funding role is not the
5 same, but the province does have a role to play on First
6 Nations -- in First Nations, and certainly is involved in
7 a number of -- of aspects of First Nations.

8 These citizens are in need of an essential
9 public service, and are not able to pay for it. Manitoba
10 does not have legislative authority over Indians and
11 lands reserved for Indians. They do have legislative
12 authority, however, over Hydro, and they are, of course,
13 also committed under 36(1)(c) to providing essential
14 public services at a reasonable quality.

15 So CAC/MSOS remain of the view that
16 Manitoba also has an important role to play in funding
17 the costs to the diesel zone. Pri -- not the primary
18 role. The primary role is, they suggest, clearly the
19 Federal government, but Manitoba has a part to play.

20 There is also, they suggest, a need for
21 the grid to play a role. The cost of service in the
22 diesel communities is so high, the customers cannot be
23 expected, reasonably, to pay the entire cost, and the
24 grid accepts an obligation to assist with that cost.

25 Grid customers are already providing

1 substantial subsidies to the diesel zone, and they're
2 willing to continue to do that, at least my clients are.
3 I can't speak for the whole grid.

4 Grid customers do not believe, however,
5 that they should be solely responsible, or even primarily
6 responsible for underwriting this -- the cost of service.
7 They are concerned by what they see, to some extent, in
8 Manitoba Hydro's Application, and certainly in INAC's
9 response to the Application, which appears to shift much
10 of the government's responsibility, in varying ways, to
11 grid customers, so they're concerned and troubled by
12 that.

13 The next priority that they recommend to
14 the Board is efficiency, and it is, I believe, a priority
15 that is near and dear to the Board's heart. All
16 electricity customers, and diesel customers are no
17 exception, have an obligation to make wise energy
18 choices, and to be as efficient as possible in their use,
19 and the need is even stronger where that cost to serve is
20 so high.

21 The need for efficiency is -- is
22 bolstered, as well, by the environmental impacts of
23 diesel generation. I'm not to say that hydro generation
24 is with -- without impacts, because it isn't, but diesel
25 generation certainly, we know, is having an impact in

1 those communities.

2 We also have to remember, however, that
3 rates should encourage efficiency but not discourage
4 appropriate use. Rates should not be so high that
5 appropriate and useful consumption of electricity to
6 benefit the community is prevented.

7 There are special challenges for DSM
8 programming in the diesel zone because of poverty,
9 because of non-customer owned housing, because of
10 remoteness, and so on and so forth. And it's CAC/MSOS's
11 suggestion that more DSM is going -- is needed and it
12 needs to be tailored to the needs of the communities.

13 The next priority that they'd like to
14 recommend to you is protecting grid customers from
15 escalating costs, and this goes -- the flip side perhaps
16 of -- of the grid's obligation to contribute. Diesel
17 generation is the highest cost generation that Manitoba
18 Hydro runs as far as CAC/MS -- MSOS are aware.

19 Is it reasonable to visit the bulk of that
20 cost on grid customers? They suggest, no, it is not.
21 Costs continue to rise everywhere, including on the grid.
22 And grid customers, although they are a lar -- much
23 larger group than diesel customers, still struggle with
24 issues of affordability and accessibility. And the rates
25 -- and the rate structure need to be fair to them as

1 CAC/MSOS recommend to the Board, and -- and they have
2 applied in formulating a position, and that they hope
3 that the Board will take into account in considering the
4 issues before it.

5 Before I get into Manitoba Hydro's Rate
6 Application specifically and -- and the details of that,
7 we did some research on the issue of the Board's ability
8 to consider social policy issues, and I touched on that
9 just briefly a few minutes ago.

10 We wanted to look at this issue because of
11 the Board's interest in the transmission line. And
12 CAC/MSOS's understanding, at least, that -- that a
13 transmission can't be justified economically and it would
14 have to be justified for other social policy types of
15 reasons. And -- and they were interested in the Board's
16 -- to what extent the Board can do that and -- and
17 whether the Board can allow those social policy type
18 considerations to outweigh economics. So that was the
19 purpose behind the research, but when -- when we did it
20 we found that it's also relevant to ability to pay.

21 So I'm not going to spend a lot of time on
22 -- on this right now because it's -- I have a lot of
23 other things to say. But -- so our articling student did
24 a very thoughtful research memo. And when Mr. Williams
25 and I were discussing it yesterday he suggested that if

1 it would be of assistance to the Board, we would be happy
2 to share that research memo with the Board and with the
3 parties. It would -- it would need to be edited a little
4 bit before I could send it out, but I could do that
5 within the next couple of days probably. So if the Board
6 would like to see that, then I can certainly -- I'd be
7 happy to do that.

8 And it's, I can tell you, a very
9 thoughtful, I thought, well done memo, so...

10 THE CHAIRPERSON: That's fine, and share
11 it with the other parties too, please.

12 MS. MYFANWY BOWMAN: Of course. I -- I
13 will do my best to get to it tomorrow. If I can't get to
14 it tomorrow, I have a commitment out of the office on
15 Friday, so, in that case, it would have to wait until
16 next week, but I will -- I will get it out quickly.

17 So I'll -- I'll just summarize really
18 briefly because you will have the -- the research memo
19 before you. The Board is, of course, I'm sure, familiar
20 with the legal authorities in this area, the Dalhousie
21 Legal Aid Service versus Nova Scotia Power case, where
22 the Nova Scotia Court of Appeal conclude that the wording
23 of the Public Utilities Act there precluded the Board
24 from authorizing lower rates for low income customers.

25 The court there held that the Board's

1 regulatory power is a proxy for competition not an
2 instrument of social policy. And -- and that's sort of
3 the push/pull that -- that seems to be seen both in the
4 authorities and in the -- the academic writing in this
5 area.

6 The -- the purpose of regulation is to try
7 to replicate as closely as possible the effects of the
8 market, which of course doesn't look at those social
9 policy type issues. On the other hand, you have
10 legitimate concern for something that has very pressing
11 soci -- social policy matters. And -- and how do you
12 balance those -- those two (2) competing values.

13 The -- the other authority and I'm sure
14 the Board is familiar with the Advocacy Centre for
15 Tenants Ontario versus Ontario Energy Board case, and
16 that's a 2008 case from Ontario. It's another -- another
17 case involving a low income program. And there the
18 specific of the legislation allowed the Board to adopt,
19 quote: "Any method or technique that it considers
20 appropriate in fixing rates."

21 The court also noted that there was --
22 that the statutory purpose to protect the interests of
23 consumers with respect to prices, which may sound not
24 that -- not very far off the Board's own legislation.
25 The court there concluded that the Board could consider

1 ability to pay, however it emphasized that cost of
2 service is a starting point building block in rate
3 setting. And it was of course open to the Board to
4 choose not to depart from the traditional rate analysis.

5 There's also some academic writing on this
6 -- this issue and I'll give you -- when I give you the
7 memo there's an excerpt from Bonbright who talks about
8 certainly the cost of services as being the basic
9 standard for rate making.

10 But he does acknowledge that departures
11 from -- from that standard can be made for valid social
12 policy reasons. And he identifies two (2) broad
13 categories of social policy considerations that -- that
14 often come up in rate making.

15 The first is ability to pay, which is
16 fairly self-explanatory, and the second is -- he
17 describes as diffusion of benefits, which is -- and he
18 describes diffu -- diffusion of benefit situations as
19 where the benefits of utility service are not limited to
20 the customers who are actually purchasing that service,
21 that the service itself benefits the community more
22 broadly.

23 And on that basis, some types of services
24 may properly be sold at less than cost and others at more
25 than cost for the purposes of attaining those types of

1 social benefits or, conversely, avoiding social costs.

2 He talks about sort of the risks and
3 benefits of -- of both types of social policy exceptions
4 to the rate making -- traditional rate making model, the
5 cost causation model. And seems to believe that ability
6 to pay is somewhat less risky because it is more rigid
7 and more narrow, whereas diffusion of benefits because
8 it's much broader and more flexible runs the risk of
9 undermining the roll of rate regulation as a proxy for
10 competition.

11 So I'll -- I'll leave that issue there,
12 but take you then to -- to the Board's jurisdiction and
13 the Crown Corporation's Public Review and Accountability
14 Act, which lists a number of -- of factors that the Board
15 may take into consideration in -- in reviewing
16 applications before it.

17 And I won't read all of them because I'm
18 sure the Board is familiar with them, but -- but the last
19 two (2) are.

20 "Any compelling policy considerations
21 that the Board considers relevant to
22 the matter, and any other factors that
23 the Board considers relevant to the
24 matter."

25 The -- the wording of the Board's

1 legislation appears to grant fairly wide latitude to the
2 Board; however, in the Advocacy Centre case even broad
3 language had to be interpreted carefully. In that case,
4 the Ontario division court said:

5 "The Board is engaged in rate setting
6 within the context of the
7 interpretation of its statute in a
8 fair, large, and liberal manner. It is
9 not engaged in setting policy -- social
10 policy."

11 Pardon me. As I said, there's a --
12 there's a push/pull there. The submission of CAS/MSOS is
13 that we all need to be mindful of the fact that
14 regulation is a substitute for competition and that when
15 we depart from the principles of cost causation we risk
16 undermining the basis for rate regulation.

17 That being said, CAC/MSOS do suggest that
18 the Board does have jurisdiction to consider social
19 policy, but the cost causality and the cost of service
20 analysis are the core standards.

21 In the case of the diesel zone, CAC/MSOS
22 submit that the overwhelming social policy factors here
23 justify departure from the principles of cost causation.
24 They suggest that this is a rare and limited
25 circumstance, but the situation is so serious here that a

1 -- a departure is justified.

2 So I'll -- I'll stop there. I will
3 circulate the memo in the next couple of days, and I hope
4 that it is of assistance to the Board, and to the
5 parties.

6 And I will turn now to Manitoba Hydro's
7 rate proposal. I'm in the odd, and somewhat unexpected,
8 position of appearing before the Board supporting an
9 Application for a 9 percent rate increase. I would not
10 have foreseen such a thing; however, the reality is that
11 9 percent is -- is modest compared to the increases
12 proposed for the -- the Federal Government, and First
13 Nation education customers.

14 As I've indicated, CAC/MSOS are concerned
15 about ever increasing costs, and their impact on rates.
16 And they're particularly concerned about affordability,
17 and effect on the communities.

18 They're certainly not happy that rate
19 increases are necessary, but the costs are there and they
20 have to be paid. Somebody has to pay them. The question
21 becomes who.

22 If we look at the different elements of
23 Manitoba Hydro's Rate Application, the first is the -- or
24 the first that I was going to deal with, in any event, is
25 the approval for a rate increase being conditional on

1 INAC's guarantee of incremental funding for First
2 Nations.

3 It's clear at this point that no guarantee
4 will be forthcoming, and CAC/MSOS believe that if this is
5 to be a requirement for rate setting, the diesel
6 communities may never get new rates. So while it would
7 be nice to -- to hope and to receive that type of
8 assurance, it's unrealistic, and the Board must move
9 forward, and set just and reasonable rates for these
10 communities.

11 In terms of the -- the rates that are
12 proposed by Manitoba Hydro, Hydro seeks to maintain grid
13 equivalent rates for the first 2,000 kilowatt hours per
14 month for residential and general service customers, and
15 CAC/MSOS support that recommendation. This -- it's an
16 essential service that is being supplied at a reasonable
17 cost to consumers.

18 Hydro proposes to increase the full cost
19 rate from forty-one point two seven (41.27) cents to
20 fifty-nine (59) cents, and CAC/MSOS agree with that
21 recommendation, or that -- that proposal. It doesn't
22 directly affect the -- the residential customers because
23 of the -- the tail rate, but it has an effect, frankly,
24 on everybody, and so they're -- they're reluctant to
25 support that -- that magnitude of a rate increase, but

1 they -- they don't see an alternative.

2 In -- with respect to the reduced tail
3 rate for residential and general service customers,
4 Manitoba Hydro is proposing, as Mr. Peters noted, for the
5 first time to have a third rate block of forty-five (45)
6 cents rather than -- than the full cost rate of fifty-
7 nine (59) cents.

8 The shortfall of three hundred and twenty-
9 two thousand five hundred and three dollars (\$322,503) to
10 be paid by the grid customers, twenty-nine thousand
11 (29,000) of that is at -- is relevant to the residential
12 customers, and two hundred and ninety-three thousand
13 (293,000) is as a result of general service consumption.

14 The impact of this subsidy is to increase
15 costs to grid customers, which is, of course, difficult
16 for my clients, but against that they balance the grid's
17 role in making energy more affordable to diesel
18 customers. And they recognize the reality that the full
19 cost rate is well beyond the means of residential
20 customers in the diesel zone.

21 I can tell you my clients really struggled
22 with this particular component, and -- and have gone back
23 and forth on -- on what to -- what to say to the Board on
24 this issue. They had little difficulty in agreeing that
25 the subsi -- to the subsidy in -- in terms of benefit

1 residential customers. They -- they absolutely support
2 it. What was problematic for them was the subsidy for
3 general service customers.

4 CAC/MSOS are generally speaking not in
5 favour of subsidizing costs for businesses; however,
6 they're aware of the impact on residential customers as a
7 result of increased costs for goods and services in the
8 communities.

9 Also included in this category as -- as
10 they understand it are Band offices, recreation centres,
11 other buildings owned by the First Nations, and operated
12 by the First Nations.

13 While CAC/MSOS have sympathy for -- for
14 the difficulties that the First Nations presumably have
15 in meeting their rising electricity costs, it's the view
16 of CAC/MSOS that those buildings are properly funded by
17 INAC, rather than the grid.

18 They've struggled with this issue, but at
19 the end of the day they support the reduced tail rate for
20 residential customers. They do not support it for
21 general service customers.

22 The next part of the Rate Application that
23 I'd like to talk about is the government surcharge to
24 increase in -- from ninety point seven (90.7) cents to a
25 dollar sixty (\$1.60). Again CAC/MSOS support that

1 proposal. They recognize that it's high, and nobody's
2 happy about it, and least of all, frankly, the people who
3 have to pay it.

4 But the reality is that this is one (1) of
5 the primary vehicles by which the Federal Government and
6 First Nation education customers fulfill their
7 responsibility to assist with the cost of service in the
8 diesel zone. So they support that increase to the
9 government surcharge.

10 Looking next to the revenue requirement
11 and -- and the issue of interest and depreciation on
12 unfunded capital expenditures, this affects residential
13 customers in the diesel zone insofar as they pay full-
14 cost rates. So if the reduced tail rates are approved by
15 this Board, this does not directly affect residential
16 customers in the diesel zone. It certainly affects the
17 other customers, and it affects the grid to some extent.

18 Manitoba Hydro seeks to include a portion
19 of the interest and depreciation on selected capital
20 expenditures, and I've excluded a couple for a variety of
21 reasons that we've already gone through. It seeks to
22 include those costs as a result of delays in collecting
23 cont -- customer contributions, and INAC objects to that
24 inclusion on the basis of lack of -- of consultation.

25 And INAC also suggests that some of those

1 costs should not be properly shared, for example, soil
2 remediation, and there was some discussion about fall
3 arrest as well.

4 On the subject of consultation, as
5 CAC/MSOS understood the evidence, Manitoba Hydro admits
6 that consultation was less than it ought to have been,
7 and CAC/MSOS appreciate Manitoba Hydro's willingness to
8 make that concession and -- and to -- to take
9 responsibility for that. It does appear that there were
10 some efforts made at -- at consultation, however, and
11 Hydro suggests that the other parties to consultation did
12 not always participate as perhaps they ought to have
13 done.

14 INAC clearly demonstrated through its --
15 through its evidence and -- and through some of its
16 questions in cross-examination that it had very specific
17 expectation as to what consultation would look like. And
18 it -- INAC appeared to suggest that nothing less would --
19 would be consultation.

20 CAC/MSOS don't necessarily have a strong
21 view on that issue. There are many different ways to
22 conceptualize consultation, it can look a lot of
23 different ways. They certainly believe that consultation
24 is more than simply providing information, it involves
25 some back and forth; whether it's what is apparently

1 demanded by INAC is another question.

2 The suggestions from INAC certainly were
3 reminiscent to me as a lawyer of the Crown's duty to
4 consult flowing from Section 35 and the honour of the
5 Crown and so on. And it's certainly not clear to
6 CAC/MSOS that those rights and that that duty to consult
7 are engaged in this case and by these issues. So
8 CAC/MSOS are not convinced that that duty is -- is
9 triggered replicable here at all.

10 What seems more -- most important on the
11 subject of consultation is that there be a meeting of the
12 minds between INAC and Manitoba Hydro and MKO and the
13 First Nations as to what consultation is going to look
14 like. They need to agree on what's required. And
15 frankly, if they can't agree on a process for
16 consultation, then CAC/MSOS will be concerned that the
17 future of collecting customer contributions on the basis
18 of that tentative settlement agreement, and now the
19 settlement agreement is in serious trouble.

20 So certainly one (1) of the
21 recommendations is going to be that they try to reach
22 agreement on that issue. There's been a suggestion
23 during the course of the Hearing that the purpose of
24 consultation -- or -- or pardon me, that costs related to
25 -- to projects for which there was no consultation should

1 be excluded, because the consultation was intended to
2 ensure that costs were reasonably and prudently incurred.

3 And there appeared to be a suggestion by
4 Mr. Hildebrand, and perhaps that was unintentional. The
5 costs not reviewed and approved by INAC and the diesel
6 First Nations were not reasonably and prudently incurred.
7 And that may well be the purpose of consultation.

8 CAC/MSOS are not parties to that agreement. They don't
9 know what was in the mind of -- of the parties.

10 But certainly CAC/MSOS are of the view
11 that -- that consultation is not the only way of ensuring
12 reasonableness and prudence, and in fact, that that is
13 very much the function of this Board, and this Board has
14 carried out that function for -- for many years. So they
15 just wanted to -- to address that point.

16 In terms of which capital expenses should
17 be funded, there was a great deal of discussion of soil
18 remediation expenses. CAC/MSOS found the arguments on
19 this issue somewhat difficult to appreciate. They -- I -
20 - they did not entirely follow the logic of some of the
21 arguments.

22 There was frequent reference to the
23 pollute or pay principle, which as far as M -- CAC/MSOS
24 could tell, CA -- is what Manitoba Hydro was proposing to
25 do. They -- the costs for mitigating, or remediating,

1 environmental damage related to generation supply of
2 electricity are part of the costs of supplying that
3 electricity.

4 Whether -- whether the damage is flooding,
5 whether it's damage to waterways, whether it's mitigation
6 to take measures to protect fish or birds, or whether
7 it's soil remediation, it can be any kind of
8 environmental damage that Manitoba Hydro might create in
9 the pro -- in the process of generating and supplying
10 electricity, Manitoba Hydro has to put that right as much
11 as it possibly can.

12 And the cost of putting it right is part
13 of the cost of supplying that electricity, and that those
14 costs must be collected from the customers who receive
15 the benefit of the electricity, or here, the parties
16 subsidizing that cost. So CAC/MSOS failed to see an
17 issue with -- with soil remediation costs.

18 There was concern expressed about the --
19 the cost of complying with provincial regulations that
20 dealt with the fire suppression system, which I believe
21 has not yet been incurred, and the fall arrest equipment,
22 which has been incurred but the costs are not yet sought
23 in this Application. I understand that Manitoba Hydro is
24 hoping to consult, and -- and collect contributions.

25 Manitoba Hydro has an obligation to comply

1 with all applicable legislation. There is nothing in the
2 evidence to suggest that these costs were not reasonably
3 and prudently incurred for the provision of diesel
4 service.

5 MR. ROBERT MAYER: Well, not exactly
6 nothing. Mr. Mills was quite strident about that. If I
7 recall correctly, the outside fuel gauge measure.

8 MS. MYFANWY BOWMAN: Yes, in -- in
9 fairness, Mr. Vice Chair, there -- there was evidence on
10 that point. It was undermined in cross, so you're --
11 you're right. I -- I apologize, and I appreciate the
12 correction, thank you. No persuasive evidence.

13 The bottom line from -- from the
14 perspective of my clients is that if -- if INAC and the
15 diesel furnat -- First Nations are unwilling to -- to
16 contribute to those costs under the settlement agreement,
17 those costs will have to be incorporated into rates.
18 Certainly my clients are hopeful that -- that the parties
19 will reach an agreement. I guess time will tell.

20 My clients wanted to respond to the
21 suggestion that costs should be absorbed by Manitoba
22 Hydro, and they suggest that -- that that makes no sense.
23 There -- there was a suggestion that -- that costs that
24 should not be passed on to customers should be absorbed
25 by Manitoba Hydro.

1 Hydro has no money of its own. It doesn't
2 have a piggy bank, or an allowance that can be docked.
3 The money -- the money that Hydro has, it collects from
4 customers. It has no ability, as far as my clients are
5 aware, to collect anything from the province of Manitoba,
6 and so costs to Manitoba Hydro are costs to the -- to
7 Manitoba Hydro's customers.

8 And -- and my clients come back to the
9 principle that costs that are reasonably and prudently
10 incurred for the provision of die -- diesel service are
11 properly allocated to, and collected from, diesel
12 customers, or the parties subsidizing them, and there's
13 no reason or justification for trying to transfer those
14 costs to the grid. And certainly Mr. Hildebrand admitted
15 that in his IR responses.

16 In the course of the evidence, CAC/MSOS
17 were disappointed to hear that Manitoba Hydro had not
18 made efforts to collect capital contributions from
19 provincial government, and other Federal Government
20 customers for -- for capital expenditures.

21 They can understand Manitoba Hydro's
22 desire to have a working process in place before engaging
23 in those discussions, but the reality is that these
24 parties are not going to pay if they're not asked, and
25 one suspects that the passage of years is not likely to

1 make them more inclined to pay. I would suspect it
2 wouldn't make most of us more inclined to pay.

3 And -- and the reality is, it's unfair,
4 it's unreasonable to pass those costs onto the grid, so
5 that -- that was an area of disappointment for -- for my
6 clients.

7 Given the lengthy delay in collecting
8 customer contributions for capital expenditures, CAC/MSOS
9 agree with the proposal to include interest and
10 depreciation in the revenue requirement; however, they
11 submit that it should only be included in the full cost
12 rate, so long as there is a reduced tail rate for
13 residential. More properly, they suggest, that cost
14 should be included in the government surcharge.

15 The interest and depreciation that is
16 being sought is only a portion of the total interest and
17 depreciation. It's 79 percent which is the portion
18 allocated to the Federal Government and fed -- First
19 Nations' education customers. That cost should not be
20 passed on to residential customers or to the grid.

21 Manitoba Hydro's share of interest and
22 depreciation has already been notionally paid, it's
23 absorbed by Hydro. Whether that is through reduced
24 retained earnings, whether that's -- whether that's
25 through, ultimately, a rate increase, the cost is

1 absorbed by Manitoba Hydro, so the -- the grid has paid
2 its share and should not be asked to -- to pay the
3 government's share.

4 CAC/MSOS suggests that if any portion of
5 the interest and depreciation sought in this Application
6 is collected from residential customers on the grid that
7 they're being asked to pay twice and that that's not
8 appropriate.

9 So they suggest that the cost ought
10 properly included to be included in the government
11 surcharge. We did ask an IR on this and I -- I think
12 that there may have been some -- some confusion about the
13 -- the question that was being asked. The answers
14 suggested that all customers are responsible for interest
15 and depreciation costs, which is true, but here it's
16 quite clear from -- from page 6 of the application that's
17 it's only the Federal Government and First Nation
18 education portion of interest and depreciation that's
19 being sought here.

20 Now, given that the -- the reduced tail
21 rate shields residential customers from this cost it's
22 not a huge issue, but on principle the -- my clients
23 would suggest that -- that this cost properly belongs in
24 the surcharge. And certainly in the event that
25 residential customers are to be paying the full cost rate

1 on any consumption, then that cost should be in the
2 government surcharge and not the full cost rate.

3 CAC/MSOS believe that all capital
4 expenditures that are reasonably and prudently incurred,
5 of course, should be included, even those mandated by
6 provincial legislation. They encourage Manitoba Hydro to
7 make fulsome efforts to consult with the diesel First
8 Nations with respect to capital expenditures and to
9 collect contributions from them.

10 However, consultation is a two (2) way
11 street and they also urge INAC and the diesel First
12 Nations to seek out and participate in consultations with
13 respect to capital contributions. As I indicated
14 earlier, they suggest that Hydro, INAC, and the First
15 Nations need to reach an agreement on the nature and
16 extent of consultation that is required and how that is
17 going to take place.

18 And that, finally, they suggest in the
19 event capital contributions are not forthcoming within a
20 reasonable time, and a period of many years is not
21 reasonable, that Manitoba Hydro should be applying to
22 include those costs in rates in a timely way. And I
23 guess that wasn't finally, that was penultimately.

24 Finally, CAC/MSOS urge Manitoba Hydro to
25 pursue capital contributions from the provincial

1 government and other Federal Government customers. So
2 that I think is what I have to say on capital costs. I
3 will move on. Is the Board looking for its break or
4 shall I keep going?

5 THE CHAIRPERSON: How much longer?

6 MS. MYFANWY BOWMAN: I've -- I've got a
7 ways to go yet. I'm sorry.

8 THE CHAIRPERSON: Ms. Hart, how long do
9 you think INAC's closing statements would take
10 approximately?

11 MS. GLYNIS HART: I believe I'll be less
12 than an hour.

13 THE CHAIRPERSON: Okay. We'll take the
14 break then and then after you're finished, Ms. Bowman --
15 Ms. Hart, will you require any time after Ms. Bowman's
16 completed to reassess your closing statement?

17 MS. GLYNIS HART: Not unless there are
18 new issues that are brought up and possibly then I could
19 maybe expand on them in the afternoon, but I would be
20 able to go ahead with most of my submission.

21 THE CHAIRPERSON: Okay. We'll take the
22 break now. Thank you.

23

24 --- Upon recessing at 10:10 a.m.

25 --- Upon resuming at 10:34 a.m.

1 THE CHAIRPERSON: Okay. I'm sure Hydro's
2 probably in the other room and they will hear us.

3 MS. MYFANWY BOWMAN: I shall commence to
4 begin then, or resume.

5 THE CHAIRPERSON: Okay, Ms. Bowman.

6 MS. MYFANWY BOWMAN: Thank you. Moving
7 on to the -- the rate structure proposed by Manitoba
8 Hydro, I think the major rate structure change that --
9 that is being recommended by Hydro is the transfer of
10 provincial government accounts to the general service
11 class, and the implications of that are -- are twofold.
12 First there's the lost provincial revenue of -- of a
13 hundred and thirty-six thousand dollars (\$136,000). And
14 then there's the lost government surcharge of
15 approximately six hundred and twenty thousand dollars
16 (\$620,000), both of which, it is proposed, should be paid
17 by the grid customers.

18 CAC/MSOS do not support this proposal.
19 There is no compelling reason offered in the material or
20 in the evidence that CAC/MSOS heard, at least, to give
21 the provincial government an 83 percent rate decrease at
22 the expense of grid customers.

23 Hydro talked about needing to distinguish
24 between Federal Government and provincial government
25 accounts, why that would lead to an 83 percent rate

1 decrease was not clear to my clients. Manitoba Hydro has
2 never had difficulty distinguishing between these
3 customers in the past. It -- it's not clear why tha --
4 that will be an issue now.

5 The client's recor -- recognize the grid's
6 responsibility to assist with diesel costs, but they
7 maintain that the province also has a responsibility, and
8 -- and this is how the province, to a large extent,
9 fulfills that responsibility.

10 There was some suggestion in Mr.
11 Anderson's cross-examination that -- that this proposal
12 was motivated out of -- by concern for the Frontier
13 School Division. The evidence did not -- of that did not
14 appear to come out. If that is the real reason behind
15 this proposal, then my clients suggest that that needs to
16 be discussed directly. And if -- if it is a particular
17 client, whether it's Frontier School Division or somebody
18 else who has a legitimate need for rate relief, then that
19 needs to be discussed directly rather than approached
20 indirectly.

21 Because my clients can't really understand
22 the issue, they can't tell whether there's -- a solution
23 is required, and if so, what an appropriate solution
24 would be. Maybe the solution is to reclassify a
25 customer. Maybe there's nothing needed. Maybe there's

1 another way to deal with this. If we can't talk about
2 the real issue, then we really can't resolve it.

3 But on the evidence before the Board and
4 before my clients there was no persuasive reason given to
5 provide the pro -- province with an 85 -- 83 percent rate
6 decrease, so CAC/MSOS are opposed to that proposal. They
7 remain concerned about the tentative settlement agreement
8 and the delays in finalizing it. We're hoping that --
9 that that is now at an end and -- and --

10 MR. ROBERT MAYER: Don't spend a lot of
11 time on it.

12 MS. MYFANWY BOWMAN: Given the events to
13 date with respect to the sharing of capital costs, they
14 certainly have concerns about how the agreement is going
15 to work in practice. And the disagreements and disputes
16 about capital costs that -- that were aired in this
17 hearing room don't provide them a whole lot of comfort on
18 that, but hopefully things will improve and -- and it is
19 a new and glorious day, we hope.

20 In the circumstances, my clients are not
21 recommending that the Board set fi -- set final rates.
22 It sounds like there may be a final Rate Application
23 coming in the next while if -- if everything proceeds
24 according to plan. What they do recommend, however, is
25 an annual diesel rate review and status update. That may

1 not be as much of an issue if -- if things go as hoped
2 with the -- with the settlement agreement. But if not,
3 matters in the diesel zone should not be allowed to sit
4 over long periods of time.

5 An oral hearing there may not be required
6 at any given time, but the situation in the diesel zone,
7 including rates and de -- degree to which they're
8 recovering costs, including the status of capital costs
9 and Manitoba Hydro's success or lack of success in
10 collecting customer contributions, and, if necessary, an
11 update on the settlement agreement, all of those things
12 should be canvassed annually.

13 Moving on to INAC's recommendations.
14 Certainly CAC/MSOS are -- are pleased that INAC
15 participated in this proceeding. It was helpful to have
16 their information and -- and their input, and I'm sure
17 that their submissions will be of assistance.

18 My clients do have a little discomfort
19 with the incongruity between INAC's evidence and its
20 stated position. On the one hand, INAC indicates that
21 it's not here to make re -- make recommendations; it's
22 simply providing information. On the other hand, they've
23 provided the Board with the report of Dale Hildebrand.
24 They hired him, they requested his report, they filed it,
25 they paid him for four (4) days of attendance and two (2)

1 separate trips to Winnipeg, and they called him as a
2 witness on INAC's behalf.

3 The -- the evidence from Mr. Mills seems
4 to suggest that while INAC supports his recommendations,
5 they're not making a recommendation to the Board. And
6 the logic of that is -- is lost on my clients. From my
7 client's perspective, either INAC is relying on a --

8 MR. ROBERT MAYER: Ms. -- Ms. Bowman, you
9 need not go very deeply into that. The Board was much
10 appreciative of your cross-examination of Mr. Hildebrand,
11 and we heard everything he said.

12 MS. MYFANWY BOWMAN: Thank you, Mr.
13 Mayer. So -- so you have my client's concern there. I -
14 - I would like to confront head-on the suggestion that --
15 that rates should not be increased or -- or costs should
16 be shifted from the Federal Government customers to the -
17 - or Federal Government to the grid, because INAC may not
18 fund a rate increase to the diesel First Nations, or they
19 might make cuts elsewhere that would have negative
20 consequences.

21 And -- and my clients need to make two (2)
22 points on that topic. The first is that -- that INAC and
23 the Federal Government are going to make their own
24 choices with respect to funding. They have not, as we
25 understand it, they will not now, and they probably never

1 will provide guarantees of funding levels, and -- and
2 they have reasons for that, and it's hard to argue with
3 that. There are many things beyond their control.

4 But there's nothing that this Board or --
5 or these parties can do to control those funding
6 decisions. And there's a limit to how long we can try
7 and -- and walk around or step around that. The Board
8 has a mandate to set rates, and -- and the Board will
9 have to fulfill that mandate, and -- and hopefully things
10 will go well. The other point that -- that my clients
11 want to make on this topic is that while they certainly
12 can appreciate that INAC has a budget and the Federal
13 Government has a budget, quite frankly, everybody has a
14 budget.

15 The province has a budget, and when you
16 shift costs to them there's an impact there. Manitoba
17 Hydro has a budget and when you shift costs to them rates
18 go up. Grid customers have budgets, and they probably
19 have budgets with a lot less flexibility than the Federal
20 Government and INAC's budgets, because they're a lot
21 smaller. And when you shift costs to the grid, and the
22 grid customers, there are consequences for those
23 customers. So with my clients, that argument doesn't
24 hold a whole lot of water.

25 They also noted the concern expressed by

1 INAC about the impact of grid increases on diesel -- the
2 diesel multiplier and how that would affect their costs,
3 which seemed a little ironic given the -- their proposals
4 to -- to shift costs to the grid, but be that as it may.

5 I was going to talk a little bit about Mr.
6 Hildebrand's report. My clients suggest that this report
7 is -- is designed to accomplish one (1) thing, and that
8 is to reduce costs to the Federal Government. And they
9 suggest that the recommendations in the report make sense
10 only seen through that lens.

11 The pro -- the report proposes to shift
12 costs from the Federal Government to residential and
13 general service customers and to the grid. If we look at
14 the impact of Mr. Hildebrand's recommendations, and --
15 and trying to get the whole impact is a bit difficult,
16 but if we look at the -- the impact of the rate increase
17 alone, the residential revenue requirement increases by
18 five hundred and forty-five thousand dollars (\$545,000).
19 The general service revenue requirement increases by
20 ninety (90) -- ninety-four thousand dollars (\$94,000),
21 and the government -- the government and First Nations
22 surcharge re -- is reduced by five hundred and thirty
23 thousand dollars (\$530,000).

24 I -- I looked for a way to try and get a
25 handle on the cumulative impact of all of the

1 recommendations, and -- and I didn't feel that I was able
2 to -- to really do that. There is a table at page 26 of
3 the report that -- that tries to do that, but given that
4 it incorporates a 20 -- 20 percent reduction in
5 consumption, which on the evidence appears to be
6 unrealistic, it -- it's really hard to know what the real
7 impact of these -- what the real impact of these
8 recommendations will be.

9 But for what it's worth, based on that
10 table, residential rates increased by 51 percent. The
11 Federal Government and First Nation rates, the full-cost
12 rate decreases by 18.9 percent, and the Federal
13 Government and First Nations subsidies decreased by 29
14 percent. So, I mean, that's what this report is about,
15 and -- and that's where it leads us.

16 My clients suggest that the foundation for
17 this report is unreliable. Mr. Hildebrand relies very
18 heavily on the tentative settlement agreement, which he
19 had in draft form, but it's -- it's my client's
20 suggestion that the tentative settlement agreement does
21 not expressly say a number of the things upon which he
22 relies.

23 And I don't have the actual transcript
24 because it was in camera, but from -- from my notes, I --
25 I asked him, and he confirmed that there's nothing in the

1 already. I'm not going to -- to go over that ground
2 again. The recommendation is without merit. The costs
3 are incurred. There's no evidence that they were not
4 reasonable and prudent. They have to be paid. And the
5 tentative settlement agreement does not support many of
6 the elements underpinning that re -- that recommendation,
7 to the reasoning underpinning that.

8 I'd like to talk about the --
9 recommendation number 2, which is the -- the allocation
10 of the shortfall on the residential and general service
11 revenues, which is the -- the government surcharge,
12 essentially, and the proposal that it should be allocated
13 between Federal Government, provincial government, and
14 Manitoba Hydro.

15 My clients suggest that this proposal
16 should be rejected. Mr. Hildebrand recommends that the
17 shortfall should be allocated on the basis of the
18 tenalmen -- tentative settlement agreement. There's
19 nothing in the tentative settlement agreement to suggest
20 that, but that's his advice, and he tries to suggest that
21 there's some kind of principle basis related to cost
22 causation for allocating a portion of this cost to the
23 grid.

24 And that completely escapes my clients.
25 This is a subsidy, and subsidies are not about cost

1 causation. They are expressly a departure from cost
2 causation. That's what a subsidy is, and Mr. Hildebrand
3 conceded that on cross-examination, so how there can be a
4 principled cost causation reason to allocate this subsidy
5 to the grid is beyond my clients. They suggest that this
6 is a transparent attempt to shift costs to the grid.

7 Aside from capital costs, and we know how
8 many of them have been collected thus far through --
9 through customer contributions, the revenue shortfall
10 collected through the surcharge is the primary vehicle
11 through which Canada subsidizes the cost of diesel
12 service, at least sort of directly through Manitoba
13 Hydro. This is how the Federal Government fulfills its
14 responsibility to assist with the cost in -- of the
15 diesel zone, and this proposal seeks to shift that
16 responsibility, or a portion of it, to the grid.

17 We've already conceded that the grid
18 customers have a role to play, but the grid customers are
19 meeting their responsibilities. There's been a fair bit
20 of evidence about the -- the grid subsidies that are
21 provided to the diesel zone, and one (1) of the IRs
22 referred to Board Order 1/10, which referred to pre-2004
23 costs that had been absorbed by the grid, and by the
24 various other parties as a result of the settlement
25 agreement.

1 And based on that table, which was
2 confirmed in -- by Manitoba Hydro in the IR, the grid
3 absorbed \$16.9 million in pre-2004 deficit, 1.5 million
4 in surcharges, and 6.05 million in undepreciated capital
5 costs for a total of 24.45 million; INAC and the First
6 Nations absorbed 3.2 million in surcharges, and 19.9
7 million in undepreciated capital costs, for a total of
8 23.1 million; and other government customers absorbed 2.9
9 million in undepreciated capital costs. So the -- in
10 that process, the grid absorbed 24.45 million, the
11 Federal Government and the First Nations absorbed twenty-
12 three point one (23.1), and the other government two
13 point nine (2.9).

14 So I'm going to suggest that -- that the
15 grid is pulling its weight here. If we look at
16 PUB/Manitoba Hydro 9C, which is the followup to that
17 question, and it's, I think, in the book of -- it's at
18 Tab 4, I believe, of the Board counsel's book of
19 documents. It's the second page.

20 I won't read the whole table because you
21 actually physically have it in front of you, but Manitoba
22 Hydro indicates in this table that out of a total of
23 21.78 million in costs from -- I believe it's March 2004
24 to March 2010, INAC and the First Nations have been
25 allocated 6.77 million from a variety of sources, other

1 government customers 0.98 million, and the grid 14.03
2 million, so substantially the -- the majority, and even
3 more so when you consider that these are allocations and
4 INAC, the First Nations, and the other government
5 customers have not actually paid the bulk of this. So
6 the grid is carrying those costs until those payments are
7 collected.

8 So my clients suggest that the grid
9 customers are doing their share and possibly and then
10 some. And they're opposed to offloading federal
11 responsibility to grid customers. And the bottom line
12 for my clients is that if the grid customers are going to
13 pay more, then that increase should benefit the diesel
14 customers, and not INAC and the Federal Government. So
15 for all of those reasons, they're opposed to that
16 recommendation.

17 Recommendation number 3 is -- is to
18 implement aggressive DSM. This proposal is -- is a
19 little on the vague side. It doesn't specify precisely
20 what Manitoba Hydro's supposed to do. And my clients are
21 certainly concerned that 20 percent is probably
22 unrealistic. Certainly that was Manitoba Hydro's view.
23 And given the information that Hydro provided, my clients
24 are concerned about -- about 20 percent.

25 That being said, they certainly agree that

1 DSM efforts generally, and in the remote communities per
2 -- specifically, need to be greater, and they're
3 supportive of increased DSM programming to -- specific to
4 the needs of these communities.

5 Recommendation number 4 relates to a
6 review of the 2004 allocation net export revenues. My
7 clients are of the view that -- that this is unnecessary.
8 Cost allocation is going to review to -- as part of the
9 ongoing GRA, and it'll be addressed at that point, and
10 I'm sure again thereafter.

11 Which brings me to recommendation number
12 5. Then -- and that is the proposal to double equivalent
13 to grid rates over the next four (4) years in order to
14 encourage conservation. And it may not be a surprise to
15 the Board that my clients are strenuously opposed to this
16 recommendation. And it's their view that this will be
17 devastating to customers. It is unnecessary and it is
18 punitive.

19 The evidence is uncontroverted that
20 residential customers are price inelastic. Mr.
21 Hildebrand was very clear about that. He acknowledged
22 that he knows they're inelastic, but his view was that we
23 have to do something. My clients agree that we need to
24 do something, but conservation should be encouraged
25 through effective DSM programming and not by drastically

1 increasing rates for all revulerab -- vulnerable
2 customers.

3 Mr. Hildebrand suggested in one (1) of his
4 IR responses that it was important to increase all of the
5 -- rates at all levels, all the blocks, because some
6 customers only use a small amount of electricity, and so
7 we want to be sure that they get that price signal too.
8 I believe that was CAC/INAC-18A and 'B'.

9 MR. ROBERT MAYER: Ms. Bowman, nobody has
10 asked us to increase the rates in accordance with Mr.
11 Hildebrand's suggestions. Let me assure you that is not
12 on the Board's plate. You need not deal with that
13 recommendation. Not even INAC is suggesting that, I
14 don't think. Maybe we'll hear that later, but the Board
15 is not really amenable to that thought.

16 MS. MYFANWY BOWMAN: And I suspect,
17 frankly, the Board can imagine what else I have to say on
18 this subject, so I'll move on. Thank you. I appreciate
19 that. You've saved us a few minutes there.

20 Recommendation number 6 refers to the
21 electronic spreadsheets. My clients take no position on
22 that recommendation. So the bottom line with respect to
23 Mr. Hildebrand's report is that his -- his
24 recommendations are bad policy and the bulk of them
25 should be rejected.

1 Moving to other issues that -- that are of
2 interest to my client and issues that have been raised by
3 the Board at various points, and I'll -- I'll look first
4 at DSM programming. My clients believe that DSM needs to
5 be a very high priority, everywhere, but particularly in
6 the diesel zone where the cost of service is so high.
7 Prior to the implementation of the First Nations Power
8 Smart program my clients are certainly of the view that
9 DSM efforts in the diesel were inadequate. Manitoba
10 Hydro now appears to be on the right track. The -- the -
11 - it seems like a very good program, the energy audit,
12 supplying materials, offering training, all of these are
13 good things, and CAC/MSOS applaud that. They believe
14 that more can be done. And they encourage Manitoba Hydro
15 to retain outside expertise.

16 Philippe Dunsky has done some work with
17 Hydro in the past and was extremely helpful. And my
18 clients thought very highly of his recommendations, so he
19 would be a -- an excellent choice, but Hydro may have
20 someone else in mind.

21 But they would encourage Hydro to retain
22 outside expertise to examine and make recommendations
23 specifically about barriers to DSM in remote and First
24 Nation communities, to the opportunities that are
25 available in those communities, to the applicability of

1 traditional measures of DSM efficiency in those
2 communities, and what appropriate alternatives might be,
3 if necessary, and, finally, to make recommendations about
4 -- for an expanded DSM program for these communities.

5 In the alternative, CAC/MSOS would suggest
6 that the Board might retain an independent expert to
7 investigate some of that and make recommendations. But
8 their first position would that it ought to be Manitoba
9 Hydro who does that.

10 Other recommendations relating to -- to
11 DSM: my clients encourage Hydro to continue the First
12 Nations Power Smart program, beyond the initial ten (10)
13 audits and if possible to expand it. If at all possible
14 they would encourage Hydro to pay the cost of
15 transporting the DSM materials to the First Nations which
16 they understand to have been a barrier up till now. And
17 it was, I believe, the evidence of Manitoba Hydro that
18 that was something that they were looking at, so
19 hopefully that -- that will be resolved in the near
20 future.

21 My clients encourage Hyd -- Manitoba Hydro
22 to review the -- the effectiveness of providing higher
23 cost DSM options to the diesel communities, and -- and
24 whether those are windows, whether those are appliances,
25 lighting, it could be a lot of different things, they

1 acknowledge the evidence that the mere fact that the cost
2 is high does not mean that there are more opportunities.
3 But the high cost does have an impact on what is or is
4 not economically justifiable. And my clients suggest
5 that it's not appropriate to apply the traditional cost
6 effectiveness tests when you're dealing with low income
7 customers in remote communities with an extremely high
8 cost of service.

9 Efficiency measures that are uneconomic
10 here may very well be economic or close to economic
11 there. And particularly when you factor in not only the
12 high variable costs, but the capital costs, even if it's
13 only a few kilowatt hours you're saving the value is
14 high. CAC/MSOS recommend that -- that priority be given
15 to assisting customers to reduce their consumption in a
16 real way, and -- and that this might help.

17 They also recommend that INAC and MKO
18 become engaged and play an active role in facilitating
19 the development and rollout of DSM programs in the diesel
20 communities. And certainly on the face of the tentative
21 settlement agreement that seems to be an obligation that
22 flows from that agreement.

23 INAC and MKO should also be strenuously
24 encouraging participation in DSM, but they can do more
25 than simply encourage; they can help. And there may even

1 be possibilities when their -- when the First Nations and
2 INAC are looking at capital improvements, building
3 projects, and so on and so forth to partner with Hydro to
4 -- to take advantage of opportunities and -- and sort of
5 cross-pollinate in that way.

6 And we encourage them to do that.
7 Finally, my clients encourage Manitoba Hydro to gather
8 further information about the barriers to DSM in these
9 communities. The better we understand the barriers the
10 better we can try and work around them.

11 Moving onto my next issue, this was an
12 issue raise by the Board, and that was the question of --
13 of grid rates for all customers except for Federal
14 Government and First Nations' education customers. With
15 Federal Government and First Nations' educations
16 customers to cal -- cover all deficits to premiums or
17 surcharges.

18 CAC/MSOS, while there's a certain
19 emotional appeal to that suggestion, do not recommend
20 this approach. It's their understanding from Manitoba
21 Hydro that 2,000 kilowatt hours per month at grid rates
22 should be sufficient for more residential purposes and
23 that unlimited consumption at grid light -- rates is unli
24 -- pardon me -- is likely to encourage customers to
25 convert to electric space heating, which is extremely

1 inefficient.

2 And that would be undesirable for both
3 economic reasons and also for environmental reasons.
4 Certainly the experience, we understand, from other
5 diesel communities that have been connected to the grid
6 and have therefore had unlimited consumption at grid
7 rates, their consumption has tripled and quadrupled.

8 To triple or quadruple consumption through
9 diesel generation, it -- it does not seem like a
10 desirable path to take. So while it's certainly not
11 perfect, my clients feel that the current rate structure
12 seems to be a reasonable compromise.

13 The last issue that I want to talk about,
14 you'll be relieved to hear, is the issue that the Board
15 has raised about a transmission line. Diesel is clearly
16 a high cost option. It has environmental impacts that
17 are experienced in the communities, and more broadly in
18 terms of greenhouse gases, and there's the reality that
19 customers are limited to 2,000 kilowatt hours per month,
20 and therefore don't have access to electric space heat.
21 Costs continue to rise, and there's ongoing wrangling
22 about costs and who should pay for them. Manitoba Hydro
23 has had trouble collecting capital contributions. There
24 are a lot of problems. Not that diesel generation
25 doesn't have a place, but -- but there are a lot of

1 imperfections in the current system, and the current
2 situation.

3 It's clear that all the stakeholders need
4 to think about the future of these communities, how
5 they're to be served, and how the costs are to be
6 recovered, and from whom.

7 My clients reviewed, with interest, the
8 report -- Manitoba Hydro's report to the legislature a
9 couple of years ago, which surveyed a number of options
10 for -- for getting away from, or -- or reducing diesel
11 generation.

12 As -- as they understood the -- their
13 report, none of the options were ideal, and none of them
14 were able to replace diesel generation entirely, except
15 for one (1), the transmission line.

16 That option seems to be, it's our
17 impression, the option preferred by the First Nations,
18 certainly that's what the report indicates, and there's a
19 -- there's a lot of intuitive appeal to a transmission
20 line.

21 It would bring diesel customers onto the
22 grid. And it in -- in some ways, diesel generation is
23 almost a symbol of exclusion, that they are shut out, and
24 this would bring them into the grid, into the fold, as it
25 were. And it would certainly solve the problems in terms

1 of rates, and surcharges, and capital costs, and -- and
2 all of the wrangling that we have been spending a lot of
3 calories on.

4 Customers would have access to electric
5 space heating at grid rates. That seems like a good
6 thing. It elimin -- eliminates issues of soil
7 contamination. It reduces greenhouse gas emission
8 materially. There's a lot to recommend the idea of a
9 transmission line, and my clients feel that appeal.

10 A transmission line, however, is not all
11 undiluted good news. Transmission lines do have
12 environmental impacts. How you compare them to the
13 impacts of diesel generation, I don't know. They seem
14 like apples and oranges, but there are impacts, and you
15 have to think about them, too.

16 Our understanding of the evidence from
17 Manitoba Hydro is that they may be a little bit less
18 reliable than diesel generation simply because of -- of
19 the length of the line, and the remoteness, and so if the
20 line goes down it's -- that's a big deal.

21 But by far, the biggest barrier is cost.
22 The cost is very, very high. Can you justify it?
23 There's -- there's been discussion during the course of
24 the hearing of business cases. Does there have to be a
25 business case? My clients aren't unsure. But the

1 decision has to make sense on some level, and to be
2 defensible in some way, the question becomes how.

3 There's a couple of different estimates
4 that have been referred to during the course of -- of
5 these proceedings. They're all very high level. They're
6 not tremendously detailed. And not necessarily
7 tremendously reliable. And -- and that's not intended as
8 a criticism.

9 Manitoba Hydro doesn't want to spend many
10 thousands of dollars on a study if no one's serious about
11 funding it. That doesn't seem unreasonable, but it makes
12 it a little bit harder to talk about it in an informed
13 way.

14 The estimate that we have been provided
15 previously, and I believe it was in -- in the report to
16 the legislature, was a 135 to \$255 million, which is
17 quite a range. The more recent suggestion is
18 approximately \$225 million for a 66 kilovolt line, and
19 \$274 million for 138 kilovolt line.

20 And we understand that you depreciate
21 transmission lines over fifty (50) years, so what does
22 that mean? I asked Mr. Harper that question, and he
23 wasn't able to give me a really specific answer.
24 Depreciation is a constant cost over the fifty (50)
25 years. Interest, as I understand it, is higher at the

1 beginning, and -- and it gradually declines over the
2 fifty (50) years.

3 Mr. Harper, and -- and this is not
4 evidence, this is just sort of a very, very rough
5 estimate based on 100 percent debt financing, and giving
6 -- using the earlier range of 135 to \$255 million,
7 thought that interest and depreciation in year 1 would be
8 between 12 and \$23 million depending on whether it's the
9 high end or the low end of the -- of the estimate, and by
10 your ten (10), interest -- pardon me, interest would be -
11 - this is just interest, this is not depreciation, would
12 be between 10 and \$21 million. So, again, that's quite a
13 range.

14 How do -- how do you make a decision with
15 that much uncertainty? And that's just deprecia --
16 pardon me, that's just interest. There's also the
17 depreciation. I lied. That is interest and
18 depreciations. It's both. It's not just one (1).

19 But on top of that there's OM&A costs. We
20 don't know what those are -- would -- would be likely to
21 be. There's the impact on net income potentially.
22 There's a lot of -- of uncertainty there. And then we
23 factor in another item referred to by the Chairman in --
24 I believe it was his opening comments.

25 MR. ROBERT MAYER: Ms. -- Ms. Bowman, we

1 understand what you're telling us. The problem is, and I
2 think you're aware, as much as we may like to, we have no
3 power toward our hydro to build a transmission line. We
4 can make a recommendation. We cannot make an order. And
5 we will not make that recommendation clearly one (1) way
6 or the other without obtaining the information which is
7 not as yet evidence.

8 MS. MYFANWY BOWMAN: All right. My
9 point, and I think the Board has it, is simply that --
10 that we ha -- we don't know. Assuming that a
11 transmission line is the best option, it would require
12 substantial participation from government, and, so far,
13 that has not been forthcoming, as I -- as -- as my
14 clients understand it.

15 If this is the right option for the diesel
16 First Nations, then the government needs to step up.
17 We've already talked about the -- the government's
18 responsibility to assist with the cost of diesel
19 electricity. The reality is that if the government were
20 to invest in a transmission line they save that cost, the
21 government cost that covers a substantial portion of the
22 variable operating costs through the surcharge, and
23 they're expected to cover a substantial portion,
24 approximately 75 percent of the capital costs.
25 Coincidentally, we learned that in the north central

1 project Canada pays 75 percent, Manitoba paid fifteen
2 (15), and Man -- and Manitoba Hydro paid ten (10). So
3 again we see that 75 percent seems to be, perhaps, the
4 ballpark we should be thinking about.

5 My clients are of the view that if a
6 transmission is the best option, both levels of
7 government should be contributing, and in a very material
8 way. My clients hear the Board's concern about social
9 issues, questions about quality of life, health impacts,
10 economic development, opportunities for children. There
11 -- there's been questions, and more questions than
12 answers.

13 These are all valid concerns. And it's
14 clear that there are very serious issues in -- in the
15 diesel communities. Are these issues related to
16 electricity? Maybe a transmission line would help. If
17 that evidence exists, it's not on this record. It's
18 possible. My clients don't know.

19 My clients do believe that we need to be
20 realistic about the impact of a transmission line. Would
21 it have a positive impact on these communities? My
22 clients feel absolutely, yes. Is it going to solve all
23 of their problems? That seems unlikely to my clients.
24 It's unlikely to address problems with housing, and
25 overcrowding, and mould, and problems with running water

1 and poverty. It's a transmission line. It can -- all it
2 can do is give them electricity. Electric heat isn't
3 going to change the fact that some of the houses don't
4 have windows. On the other hand, you have to start
5 somewhere. Sometimes if you -- if you start, good things
6 follow.

7 This room has been told that diesel
8 provides an adequate amount of electricity for all
9 residential uses except for space heating. It's not
10 clear that the problems facing the diesel First Nations
11 are related to a lack of grid connection as compared --
12 as opposed to the other problems -- or the other issues
13 that are at play, but that's not to say that a
14 transmission line is a bad idea or it wouldn't make a
15 positive difference.

16 And as -- as Vice Chairman Mayer
17 indicated, the Board doesn't have the authority to make
18 an order. All it can do is encourage Hydro and make a
19 recommendation.

20 When push comes to shove, and my clients
21 have really struggled with this issue because we know --
22 they -- they know it's of interest to the Board, and it's
23 -- it's of interest to them too, and they -- they've
24 wrestled with it, but they do not feel that they have
25 enough information to make an informed recommendation.

1 So their recommendation to this Board is
2 the formation of a working group. And, to some extent,
3 the thought of another group or committee is a little
4 depressing, but hopefully it will be a working group with
5 some motivation and with a fire lit under it to really
6 try and find a solution for these communities. And
7 hopefully that working group would review a number of
8 options for the diesel zone, but one (1) of those options
9 absolutely should be a transmission line and -- and how
10 one (1) would be funded.

11 My clients suggest that -- that the
12 working group must include representation from Manitoba
13 Hydro, from the First Nations, from INAC, from the
14 Province. It must include representation from consumers,
15 and we should consider whether there should be
16 representation from other stakeholders, for example,
17 environmental groups, general service customers and so
18 on. And I -- I leave that with the Board, but those are
19 the people that -- that my clients suggest need to be
20 involved.

21 And to avoid having endless studying and
22 discussion going on for years and years, my clients
23 suggests that the working group should be coming back to
24 this Board with recommendations within one (1) year.
25 That should be enough to come up with -- with a

1 reasonable plan.

2 And in the interests of efficiency and
3 making sure that things get off the ground, the Board
4 could consider appointing or recommending someone to
5 chair it or to take responsibility for getting things
6 started.

7 So that's their other thought. Otherwise
8 the -- my clients would have some concern that it might
9 just sit until the next hearing, and nobody wants that.
10 So those are the recommendations that my clients have for
11 the Board this morning. I hope that they're of
12 assistance and I'm certainly happy to answer any
13 questions.

14 Subject to any questions, I'd like to take
15 an opportunity to thank Manitoba Hydro for all its work
16 in preparing the application and the IR Responses, and
17 for all of their assistance during the proceeding. I'd
18 like to thank Board counsel for all of his work, and the
19 other Intervenors for their participation and assistance
20 as well.

21 So those are my -- my comments, subject to
22 any questions the Board might have.

23 THE CHAIRPERSON: Thank you, Ms. Bowman.

24 Ms. Hart, do you want a few minutes, or
25 are you ready to go now?

1 MS. GLYNIS HART: No, I'm ready to
2 proceed at this time, thank you.

3 THE CHAIRPERSON: Okay. Please proceed.
4

5 CLOSING COMMENTS BY INAC:

6 MS. GLYNIS HART: Thank you. As I
7 mentioned before, it's really out of the ordinary for
8 INAC to be at this Hearing. It's not a customer.
9 However, INAC has appeared at this hearing because the
10 PUB was interested in finding out more about INAC. We've
11 referred back to the Board's Order 1/10, and in that
12 order the Board had expressed a need for a more in depth
13 understanding of INAC's present and future funding levels
14 to First Nations in the diesel zone.

15 And at page 14 of that order the Board
16 said it needed to be provided with information about
17 INAC's level of funding in an open and transparent way.
18 And more specifically in the order the Board also set out
19 several of the assumptions that it had about INAC's
20 funding. I can refer you to page 13 of that order where
21 it states:

22 "The PUB understands that INAC provides
23 full funding support of First Nation
24 education accounts. The revised rates
25 would presumably rely on INAC for

1 increased support."

2 Also on page 13 the Board asked Manitoba
3 Hydro to provide written confirmation of PUB's assumption
4 that by only increasing the First Nation education
5 accounts, INAC would make funding adjustments to ensure
6 that First Nation education accounts would be paid in
7 full without having to reduce other expenditures that
8 INAC also funds.

9 So INAC appeared before you this fall so
10 you could hear about these funding issues, and your
11 assumptions directly, and not from others and what they
12 thought about INAC. INAC has tried to present the
13 information in an open and transparent way, and
14 hopefully, INAC has set the record straight.

15 But the answers to the questions that the
16 PUB asked, or the assumptions that it made are probably
17 not the ones that PUB wanted to hear. As Mr. Mills
18 testified, INAC cannot give the PUB the assurances that
19 it's requesting. If the rates increase for the customer,
20 INAC cannot assure that the First Nations won't receive
21 less INAC funding in other areas. And they can't state
22 that the First Nation education accounts will be paid in
23 full and that other program areas will not be affected.
24 INAC has a budget, it's a finite budget, they need to
25 manage it and prioritize First Nations' needs.

1 So if this Rate Application is granted the
2 First Nations as the customers will have decisions to
3 make.

4 1. With an increase they'll have to look
5 at managing their budgets, seeing if they can decrease
6 expenditures in other areas, like the grid customers will
7 have to do when faced with an increase.

8 If that won't work or is something they
9 won -- don't desire, they can then approach INAC for
10 additional funding for O&M for the electricity costs. In
11 turn, after the customers, the Fir -- the First Nations
12 approach INAC, INAC has a few choices to make in itself
13 if it doesn't receive an increase in funding from
14 parliament.

15 And at the risk of being alarmist, as Mr.
16 Mills testified parliament may even -- may freeze the
17 funding that INAC received or even decrease the funding
18 allocated to INAC. It's a tough economic client --
19 climate right now.

20 And even if there -- good news and there
21 was an increase in funding there may be other competing -
22 - competing priorities the First Nations may have with
23 their needs for those funds.

24 So what are INAC's options if approached
25 for increased funding? Mr. Mills testified that the INAC

1 region could approach headquarters, INAC headquarters,
2 but it might have other priorities for other First
3 Nations' priorities. And if it doesn't receive funding
4 there it leaves the region to look at its budget, what it
5 has.

6 I like to think of its budget as a -- a
7 pot of money or a pie, and with that pie, in the past,
8 INAC region has had to divide it up for all the various
9 competing priorities for First Nations. So if that pie
10 doesn't grow INAC has two (2) options. It could continue
11 to keep that slice that now goes for O&M the very same as
12 it right now, adjust its O&M formula, and then the First
13 Nations are then going to have make up that increase with
14 their budgets. That's one (1) option.

15 Or INAC could take that pie and that slice
16 that's there right now for an O&M funding, it could make
17 it bigger, but what happens when you make one (1) slice
18 bigger other slices become smaller. Funding would have
19 to be redistributed.

20 Where could INAC go for that funding?
21 Well, it's not going to come from education and social
22 development; those are top priorities. Where else might
23 INAC go then with an increase in rates? Water -- water
24 and waste water, that -- those might be some of the first
25 areas they look at. There's also the Band base capital

1 allocation that they provide to First Nations, which
2 included monies for housing. That could be dec --
3 decreased if the slice becomes larger for the O&M
4 funding. Maybe there is economic development funds that
5 would be -- be provided to First Nations. But that's the
6 tough message here that we have had to bring.

7 And there's another one, another
8 potentially unpopular message regarding funding. And the
9 PUB had asked the parties to comment on legal and ethical
10 obligations to fund First Nations' electricity costs.
11 And, more specifically, the PUB had asked the parties to
12 address obligations under statutes including the Manitoba
13 Hydro Act, the Indian Act, and the Constitution.

14 Although INAC is not really sure why the
15 PUB is requesting these comments, INAC's position is that
16 this is not the appropriate forum to determine any
17 party's legal funding obligations. The correct place for
18 doing that is in the court system.

19 I'd further like to point out that there
20 has been no evidence put before this Board about any
21 parties legal, or -- or ethical funding obligations. I'd
22 like to look at CAC briefly, and look at their
23 submissions. They're -- they've based a lot of their
24 recommendations, or views, on their view that INAC has a
25 responsibility to fund the First Nations O&M costs. That

1 it is a legal responsibility.

2 However, when counsel for CAC/MSOS looked
3 at the constitution, she looked at Sections 91, 92, and
4 conceded that she couldn't find any case law to support
5 an obligation, and in written submissions looked at
6 Section 36(1)(c) of the constitution, and stated that
7 it's inconclusive. She's not even sure if it's
8 justiciable whether a court could look at this and
9 decide. And our position is, these issues, both of those
10 two (2) in regards to those sections, are for the courts
11 to determine.

12 CAC/MSOS also spoke to -- about policy
13 reasons for both levels of government to share costs.
14 She said, policy reasons require both levels to share the
15 costs. In our view, that is not the jurisdiction of
16 either the courts, or the PUB, to determine policy
17 decisions of government.

18 Manitoba Hydro hasn't made their oral
19 submissions yet; however, they have, in their written
20 submissions, touched on this particular issue of legal
21 and ethic -- or legal obligations, and at page 13 of
22 their latest submission, they suggested that Canada has a
23 fiduciary duty, but did not provide any case law, any
24 background in regard to this.

25 Similarly, Hydro stated that they consider

1 INAC to be contractually responsible for costs if the
2 total -- tentative settlement agreement isn't signed.
3 But again, a determination of who is contractually
4 liable, we suggest, lies with the courts.

5 I noted in going back at a previous Board
6 order, that's 17/04, at that time Manitoba Hydro had
7 argued that Canada had a constitutional responsibility
8 for the provision of service to First Nations, so I'm not
9 sure whether they will expand upon that later this
10 afternoon, or not.

11 But these are the positions that we've
12 seen, and I'd like to comment on them a little bit
13 further. And just as in Mr. Mills' evidence at page 29,
14 INAC stated its view that the PUB doesn't have the
15 jurisdiction to make orders against INAC, including to
16 fund First Nations electricity costs in a certain matter.

17 So INAC's view is that PUB similarly
18 cannot determine legal or ethal -- ethical obligations,
19 and there are two (2) reasons for this -- for this. The
20 first reason would be -- is that the legislation doesn't
21 grant the PUB the jurisdiction to do so. Second, the PUB
22 is a -- is a provincial entity, so it doesn't have
23 jurisdiction over INAC, a Federal Government department,
24 a federal entity, and as such, it can't bind the Federal
25 Crown.

1 I want to point out that by being here,
2 INAC hasn't attorned to the PUB's jurisdiction. We are
3 here, as I said before, to make sure that funding issues
4 are explained clearly, so everyone understands them.

5 Further, INAC isn't a user of the service,
6 and it isn't subject to the legislative scheme. We had -
7 - or INAC had previously submitted its position on the
8 PUB's jurisdiction. That was back January 22nd, 2004,
9 and I'd like to confirm at this time that that submission
10 still reflects the current law. We've reviewed it
11 recently. And its submission from 2004 still refers to
12 the leading cases on this point.

13 One (1) of the cases back in that '04
14 submission, and I could resubmit it, it's not easy to
15 find, and the -- you have it -- thank you. In that, we
16 first of all refer to a 1979 Supreme Court decision, and
17 it's the Attorney General of Quebec and Keable, and it's
18 the leading case on the doctrine of intergovernmental
19 immunity.

20 And what happened in that case, in the
21 Keable case, is the Supreme Court quoted from one (1) of
22 its earlier cases, just a year earlier; it was the Queen
23 in right of Alberta and Canadian Transport Commission.
24 And in that earlier case the Court had said a provincial
25 legislature cannot in valid exercise of its legislative

1 power embrace the Crown in right of Canada in any
2 compulsory regulation.

3 Our position is that the Keable case that
4 I just referred to is -- is quite similar to the
5 situation in this Rate Application. Both cases involve
6 provincial entities; namely, a provincial commission of
7 inquiry in Keable and the PUB in this case.

8 And what happened in Keable is the pre --
9 the Supreme Court said:

10 "A provincial commission of inquiry
11 investigating crimes allegedly
12 committed by the police can't be
13 empowered by a province to investigate
14 a federal institution, such as the
15 RCMP, so as to recommend changes to be
16 made to its rules and methods.
17 Importantly, the commission's mandate
18 did not include questions related to
19 the RCMP's internal administration."

20 Similarly, INAC's position is that PUB's
21 mandate does not include questions related to INAC's
22 funding of First Nations for electricity costs. For
23 example, the PUB doesn't have jurisdiction to order INAC
24 to fund First Nation education accounts even if the PUB
25 feels it would be in the public interest to do so, and

1 neither does the PUB have jurisdiction to order INAC to
2 ensure that incremental funding will be provided
3 sufficient to cover the proposed increases in the rate
4 application without detriment to the level of funding
5 that INAC provides to any other -- to the First Nations
6 for any other purpose or any other area.

7 I'd like to move on from those tough
8 unpopular messages maybe and look though at the issue of
9 skyri -- rising costs and maybe something that we can do
10 or where we can positively contribute maybe to this idea.
11 And with these skyrocketing costs, I think everyone
12 agrees that some cost control is needed, but to do so,
13 probably have to have a big paradigm shift.

14 INAC sees two (2) important areas where
15 this shift is required. The first one (1) would be cost
16 control and cost oversight in -- spec -- specifically in
17 regard to capital expenditures that are being made at --
18 on the diesel First Nations. And the second, where a
19 real shift in thought, change idea is recognizing that
20 INAC does not equal the First Nations.

21 I'll start with the first one (1), looking
22 at cost oversight, and there may be two (2) areas to look
23 at and -- and the evidence has been presented on both of
24 those, and the first one is through the demand side
25 management.

1 And we were very encouraged this morning
2 to hear CAC's MSOS's submission and noting that they also
3 feel that this is a very high priority and they
4 understand its importance if we are going to keep these
5 costs under control.

6 Similarly, we were quite encouraged when
7 we saw Manitoba Hydro's submissions -- submissions at
8 page 8. They noted that they were willing to work with
9 the communities and develop a plan. So the backing of
10 others, recognizing that Manitoba Hydro should develop a
11 program in consultation with the First Nations is very
12 encouraging to INAC. Manitoba Hydro is the leader in
13 this area. It's their business. And we can encourage
14 them to continue their work with the First Nation.

15 The other point for the costs oversight
16 I'd like to talk a little but -- bit about is the capital
17 expenditures and some cost control on that. Back in 2004
18 the parties mapped out a process in their minutes of
19 settlement. Manitoba Hydro was to engage the First
20 Nations in meaningful consultation in attempt to reach a
21 mutual understanding of the requirement for the project,
22 and consideration of the pro -- the expenditure and what
23 it would do to rates. And then the First Nations could
24 engage with INAC in regard to funding, but it's fallen by
25 the wayside.

1 Further, I'd like to keep mind it's not
2 just about communication, but it's customer involvement,
3 customers using their expertise to review projects,
4 suggest alternatives, and help ensure that the best
5 choices are being made. And with that INAC is requesting
6 or asking Manitoba Hydro to work closely with the First
7 Nations.

8 And during the Hearing in September INAC
9 highlighted several ways to improve the current -- the
10 present process. For example, Mr. Mills recommended that
11 Manitoba Hydro consult with the First Nations and not
12 INAC prior to undertaking new major capital expenditures.
13 The First Nation could then cons -- sider whether to
14 secure the funding or other alternatives, but this
15 communication, we suggest, needs to occur as early as
16 possible.

17 As INAC stated during the Hearings early
18 consultations with the First Nations would help ensure
19 that they fully understood the project, contributed
20 technical advice where available, disseminated the
21 information to their communities, and contributed
22 resources such as Band-based capital where appropriate
23 and they felt it proper to do.

24 INAC also recommends among other things
25 that Manitoba Hydro outline to the First Nation the pros

1 and cons of the various options they have, the cost or an
2 accurate estimate of the project, and an update of that
3 estimate as time moves on, the impact of the project on
4 the reliability of power, the impact on rates, and
5 consider options the First Nations may recommend, to have
6 a dialogue, a conversation, with them.

7 With this information the First Nations
8 can then determine whether to approach INAC, how to go
9 about securing the funding arrangements. So early and
10 transparent communication would also help INAC determine
11 if the First Nations request for funding fell within
12 INAC's authorities and policies.

13 And in addition, going back to this -- the
14 -- the cost control idea, INAC could conduct its due
15 diligence, it could also determine if the expenditure
16 would fit into its five (5) year capital plan, especially
17 considering it's accountable for public funds. So we
18 suggest it's more than just notification or forwarding of
19 Manitoba Hydro's five (5) year capital plan to the First
20 Nations. It's much more than that.

21 Also, an extra benefit by Manitoba Hyd --
22 with Manitoba Hydro involving their customer, the First
23 Nation, too is Manitoba Hydro may get better First Nation
24 buy-in to the DSM initiatives if the First Nations feel
25 engaged and a part of decision-making.

1 And the second issue I talked about with
2 this paradigm shift that we think would help would be the
3 -- the recognition that INAC does not equal First
4 Nations, so it -- frequently throughout the Hearing we
5 would hear INAC this, INAC pays, but really it was the
6 First Nation. And there seems to be some confusion.
7 Maybe by appearing at these Hearings we've even added to
8 that confusion that INAC is the First Nations. I hope
9 we've clarified that point.

10 MR. ROBERT MAYER: Ms. Hart, you -- you
11 can be sure that if we didn't have it clear before we got
12 here, we have that fairly clear now. Thank you.

13 MS. GLYNIS HART: Thank you. Thank you.
14 I -- I think I was a bit disheartened though. In page 13
15 of Manitoba Hydro's written submissions, it -- it says --
16 Manitoba Hydro says it considers INAC to be the customer
17 until the tentative settlement agreement is signed. So
18 that paradigm shift we're talking about, that moving of
19 that mountain to who Manitoba Hydro's customer is, I --
20 I'm glad the PUB has heard that. We're try -- hoping
21 Hydro has heard that message also, too.

22 Now, so unless --

23 MR. ROBERT MAYER: We -- we also heard,
24 however, that the -- somebody may actually have signed
25 that elusive agreement. Well, we'll get back --

1 backbenchers there says it may be so, and Mr. -- and Mr.
2 -- yeah, and Mr. Anderson certainly felt like it was
3 close enough that he had to go and do a bunch of
4 paperwork, so maybe that won't be a problem.

5 MS. GLYNIS HART: Right. But -- but that
6 under -- that -- that conception in Manitoba Hydro's --
7 what they seem to be saying, you know, would help explain
8 why -- why they're contacting INAC, why they're writing
9 letters to INAC about capital expenditures, and we hope
10 this is the start of a new, looking at who the customer
11 is, and recognizing that the customer is not INAC.

12 So just looking -- just sort of recapping
13 on consultation that the parties looked at in 2004, we
14 think it has some distinct objectives. Just summarizing,
15 the First -- First Nations will understand the need for
16 the proposed expenditure, including the options, and they
17 will then have enough information to see if -- determine
18 if they want to seek and obtain funding, and it will also
19 ensure costs are reasonably and prudently incurred, with
20 another set of eyes looking at the expenditures.

21 So Mr. Mills' evidence went to INAC's
22 information requires -- requirements for access for the
23 funding. It wasn't to the requirements of the duty to
24 consult where treaty rights are at stake, but that
25 sharing, that engagement with your customer, and the

1 benefits that happen when you do that in a variety of
2 ways, whether it's helping keep costs under control,
3 being part of a partnership to work together to implement
4 energy management in -- initiatives.

5 I just have a few other little comments
6 about capital expenditures, and those expenditures 2004
7 to the present. I don't really have anything to say
8 right at this point in time. I might have something
9 later on today, and with the Board's permission, if -- if
10 possible, if at the end I could add a comment if there's
11 a further update in regard to those expenditures? I'd --

12 THE CHAIRPERSON: Yes, that's fine.

13 MS. GLYNIS HART: -- like that. Thank
14 you. And in regard to post capital expenditures, the PUB
15 had offered alternatives, options for the future capital
16 expenditures, and that was at pages 734 and 735 of the
17 transcripts.

18 And one (1) of the options included
19 putting all the costs back into rates with no diesel cost
20 of service outside the rate setting project -- process,
21 sorry, and I'd just like to advise that INAC does not
22 recommend this option. Its preferred option is one (1)
23 similar to that set out in the minutes of settlement, the
24 tentative settlement agreement, but with improved
25 communication consultation, the parties working together.

1 And importantly, everyone would need to get together to
2 help develop that process.

3 Finally, I'd like to speak a little bit to
4 the Appropriations Act. The Board had inquired about
5 this, and I'll do my best to explain a fairly complicated
6 matter, and if you have further questions on it after I
7 run through, you can maybe follow up, and it's a rather
8 complicated matter. But under the Constitution Act, 1967,
9 there are a number of provisions that relate to Canada's
10 appropriation process, and I'm not going to read them
11 out, but I will give you the reference for them, if you
12 want to look further.

13 Sections -- 1867, sorry. Yeah, very
14 recent. Yeah, a typo, I'm sorry. It's Sections 53, 102,
15 and 106. I won't read them out, but I'll basically tell
16 you what they talk about.

17 What they do is essentially say that all
18 of Canada's income forms one (1) consolidated revenue
19 fund, and it's only parliament that can appropriate funds
20 from this consolidated revenue fund, and parliament would
21 appropriate these funds, let's say, for the public
22 service.

23 So, as a result, all government
24 expenditure must stir -- first start with an
25 Appropriation Act in parliament. So for the funds to

1 come out of the consolidated revenue fund, we need an
2 Appropriation Act. I could refer the Board to the
3 current Appropriation Act that we're looking at. It's
4 Appropriation Act number 2, 2010/'11, and it was Bill C-
5 44, titled:

6 "An Act For Granting To Her Majesty
7 Certain Sums of Money For The Federal
8 Public Administration, For The
9 Financial Year Ending March 31st,
10 2011."

11 And what it speaks to then is -- is
12 expenses of Federal Public Administration and it talks
13 about the total amounts of items as set out in the main
14 estimate. So I want to talk a little bit first about
15 estimates. What are estimates? Well, the estimate
16 process is annually, through the estimate process, each
17 government department puts forward its proposed
18 expenditures in the estimate for which appropriations are
19 then sought.

20 The estimates provide a breakdown of the
21 proposed expenditures into various categories. And under
22 the Appropriation Act an amount authorized to be paid in
23 respect of an item may only be paid for the purposes and
24 subject to any terms and conditions specified in the
25 item.

1 So the Appropriation Act is a very high
2 level budget process and it authorizes expenditures which
3 are then managed by the departments and the Treasury
4 Board. When I go back to the Expe -- the Appropriation
5 Act that I mentioned, the one for 2010/'11, if you work
6 through it you'll find the sections then that refer to
7 Indian Affairs, also sections for the federal
8 interlocutor for Metis and non-status Indians, and
9 certain definite amounts are listed there.

10 There are also amounts for -- it says:

11 "Native claimants in regard to research
12 development and negotiation of claims."

13 There's another line for lo -- loans to
14 First Nations in British Columbia so that they can
15 participate in the BC treaty commission process.

16 Item 5 relates to Indian Affairs and
17 Northern Development, as does number 10. Item 5 relates
18 to capital expenditures, and I won't go into it in great
19 detail, but that's about 6 1/2 million.

20 And Item 10, Indian Affairs and Northern
21 Development, the grants listed in the estimates and the
22 contributions is -- are almost \$6 billion.

23 Finally, expenditures are also subject to
24 the Financial Administration Act. And in a nutshell, I
25 believe, what it says is basically you're not going to

1 make a payment unless there is sufficient unencumbered
2 balance available out of the appropriation that I
3 referred to earlier.

4 So what does that mean? Well, it means
5 the government can't enter into a binding agreement for
6 payment of money unless there's a sufficient unencumbered
7 balance in the appropriation, and that's usually the
8 allocation that particular department was given. And
9 this standard can't be met unless the amount of the
10 expenditure is known.

11 And the consequences down to this Hearing
12 then are, therefore, there's no assurance of continued
13 growth in O&M funding to support diesel costs of First
14 Nations through this process.

15 I hope this has been of some help, trying
16 to give a brief overview of the appropriations process.

17 THE CHAIRPERSON: Information is always
18 helpful, okay.

19 MS. GLYNIS HART: Those are all the
20 submissions I have to make at this time, other than
21 subject to maybe coming back to the Board later if
22 further information is available.

23 THE CHAIRPERSON: Thank you, Ms. Hart.
24 And we will avail you of that opportunity as long as it
25 comes before 4:00.

1 MR. ROBERT MAYER: Ms. Hart --

2 MS. GLYNIS HART: M-hm.

3 MR. ROBERT MAYER: -- I have one (1) or
4 two (2) questions. In -- depending upon the information
5 you may or may not have about the execution and
6 implementation of the agreement, do you have a
7 recommendation with respect to whether we are going to be
8 in a position to issue a final order, or yet another
9 interim order, on rates?

10 And secondly, I might as well get them
11 both on the table at the same time, can you advise as to
12 whether this issue of interest and depreciation on post
13 '04 capital is still on the table? I suspect that's a
14 question I'm going to have to ask Hydro, but with respect
15 to the issue of final rates, I'd be interested in your
16 views.

17 MS. GLYNIS HART: If we could just take a
18 moment on that. Thank you.

19

20 (BRIEF PAUSE)

21

22 THE CHAIRPERSON: Ms. Hart, would you
23 prefer a bit more time, and you could answer the question
24 at one o'clock, or --

25 MS. GLYNIS HART: Yes, that would be very

1 helpful, thank you --

2 THE CHAIRPERSON: Okay. And then after
3 that --

4 MS. GLYNIS HART: -- sir.

5 THE CHAIRPERSON: -- we will have
6 Manitoba Hydro. Thank you.

7

8 --- Upon recessing at 11:47 a.m.

9 --- Upon resuming at 1:08 p.m.

10

11 THE CHAIRPERSON: Okay. Well, I'd like
12 to reacquaint myself from looking to left and right to
13 centre.

14 Ms. Hart, do you have some other things to
15 tell us?

16 MS. GLYNIS HART: Yes, sir. Two (2)
17 questions were posed just before the lunchbreak and I've
18 talked to my client about both of them.

19 And the first one was in regard to whether
20 INAC would be recommending in -- interim or final -- an
21 interim or final order. And, as the other parties have
22 stated, INAC's preference would be that it's an interim
23 order for several reasons. Even though it appears that
24 all the parties are close to signing the tentative sentil
25 -- tentative settlement agreement, I don't think it would

1 hurt to step back when it is signed and check to see that
2 the Rate Application is indeed in accordance with the
3 settlement agreement.

4 And, also, INAC would like to leave the
5 door open still to the discussions about some
6 contributions towards the capital expenditures. You
7 understand INAC's discussing this, and some funds may
8 flow, but we would also like to keep that open until the
9 end of the fiscal year, as you probably understand --
10 stand how INAC's funding works. We have to look to see
11 for the money, and that's when any money would most
12 likely become available.

13 THE CHAIRPERSON: So you're speaking
14 March 31st, I take it?

15 MS. GLYNIS HART: Yes, that would be the
16 end of INAC's fiscal year. However, though, and this
17 goes to your second question in regard to interest and
18 depreciation when we're looking at capital expenditures,
19 and that is that INAC's authorities don't allow for the
20 interest and depreciation expenditures. It goes back a
21 bit to the Appropriations Act I talked about before, and
22 that flowing down to the terms and conditions that would
23 be in any program funding INAC has. And those funding
24 provisions do not allow for the payment of interest or
25 depreciation.

1 THE CHAIRPERSON: Thank you.

2 MS. GLYNIS HART: That's -- thank you.

3 THE CHAIRPERSON: Okay. Thank you very
4 much, Ms. Hart. And we are appreciative of INAC's
5 participation in the Hearing.

6 Ms. Fernandes...?

7 MS. ODETTE FERNANDES: If I could just
8 have one (1) moment.

9 THE CHAIRPERSON: Of course.

10 MS. PATTI RAMAGE: I -- I was just going
11 to, Mr. Chair, attempt to add something to Ms. Fernandes'
12 argument. But rather than confusing her that way, I
13 thought I'd take the simpler step by taking the
14 opportunity -- there's been a gentleman here in the last
15 few days from Manitoba Hydro who the Board wouldn't be
16 familiar with as one of our usual back row participants,
17 and that's Mr. Wayne Wittmeier, who is the division
18 manager at Manitoba Hydro who is now responsible for the
19 diesel communities. I think Mr. Warden referred to him
20 in evidence.

21 And I just thought it was important to
22 note for the Board his presence over the last few days,
23 because I think it's indicative of, certainly, Mr.
24 Wittmeier's commitment with respect to the diesel
25 communities and the ongoing -- the -- the process we see

1 going forward, such as consultation. And he wants to get
2 a better understanding of all of the process here. And
3 he is taking the lead in the committee, we indicated in
4 evidence, that has been formed to deal with a lot of
5 these issues to ensure that things like consultation move
6 forward properly.

7 So I thought it was important to note Mr.
8 Wittmeier's presence on the record and introduce him to
9 the Board.

10 THE CHAIRPERSON: Thank you, Ms. Ramage.

11 MS. PATTI RAMAGE: M-hm.

12 THE CHAIRPERSON: Welcome, sir.

13

14 CLOSING COMMENTS BY MANITOBA HYDRO:

15 MS. ODETTE FERNANDES: Thank you. Mr.
16 Chairman, Mr. Mayer, and Dr. Kinew, Manitoba Hydro first
17 filed its diesel rate application on April 27th of this
18 year. After all the evidence we have heard and read,
19 Manitoba Hydro still believes that its Application, as it
20 stands, best balances the requirements of cost recovery
21 and customer sensitivity.

22 The Application calls for an increase of
23 the current tail block rate for residential and general
24 service classes from forty-one point two seven (41.27)
25 cents per kilowatt hour to forty-five (45) cents per

1 kilowatt hour.

2 Should the PUB approve this increase, by
3 the time it is implemented it will have been almost four
4 (4) years since the last rate change. Thus, the average
5 increase of the tail rate will have been approximately
6 2.2 percent per year, which is similar to the rate of the
7 consumer price inflation in Manitoba, and less than the
8 increases to grid rates over the same period.

9 As Mr. Warden noted at transcript page
10 111, the costs incurred by Manitoba Hydro to serve these
11 communities is approximately \$8 million per year. More
12 than half of this cost is for the diesel fuel alone. At
13 current rates, Manitoba Hydro only recovers about 4.8
14 million per year, or about 60 percent of the cost to
15 serve.

16 A rate increase is required to reduce the
17 current subsidy of approximately 3.2 million. With the
18 proposed rate increase, the subsidy will not be
19 eliminated, but it will be reduced to approximately 2.1
20 million per year.

21 Part of the 2.1 million subsidy arises
22 because Manitoba Hydro is not seeking to make the tail
23 block equal to the full average cost of service as it has
24 done in past Applications. Manitoba Hydro has calculated
25 the full average cost to be fifty-nine point zero four

1 (59.04) cents per kilowatt hour, and that number can be
2 found at Attachment 1, Schedule 1, of Manitoba Hydro's
3 Application.

4 By setting the tail block rate for
5 residential and general service classes at forty-five
6 (45) cents instead of fifty-nine point zero four (59.04)
7 cents, Manitoba Hydro estimates that it is foregoing
8 revenue of approximately three hundred and twenty-two
9 thousand dollars (\$322,000). And that is taken from
10 Schedules 4.1 and Schedule 4.2 of Manitoba Hydro's
11 Application.

12 The significantly larger amount for
13 general service is reflective of the fact that a much
14 larger share of general service usage occurs at levels in
15 excess of 2,000 kilowatt hours per month to which the
16 tail block applies.

17 The decision was made to set the
18 residential and general service tail block rate at forty-
19 five (45) cents instead of at what was the full cost as
20 noted by Mr. Warden at transcript page 113.

21 To set the tail block at the full fifty-
22 nine point zero four (59.04) cents would be a block rate
23 increase of 43 percent, and this would impose hardship on
24 the residential and general service customers.

25 Mr. Warden also noted, at transcript page

1 114, that the foregone revenue as a result of this
2 decision would not be collected from other classes in the
3 diesel zone, but rather would be absorbed by Manitoba
4 Hydro.

5 In addition to supporting retention of the
6 tail block price below average cost, the rates in
7 Manitoba Hydro's Application incorporate the usual
8 subsidy to maintain residential class revenue cost
9 coverage at 82 percent, and general service revenue cost
10 coverage at 89 percent.

11 In terms of the revenue foregone, Manitoba
12 Hydro's Application, at Schedules 4.1 and 4.2, show that
13 the subsidy amounts to eight hundred and forty-two
14 thousand dollars (\$842,000) for residential customers,
15 and two hundred and twenty-eight thousand dollars
16 (\$228,000) for general service customers, for a total of
17 \$1.07 million.

18 This subsidy has been provided by Manitoba
19 Hydro for many years to recognize that a similar under-
20 recovery of revenue relative to costs exists with respect
21 to grid customers living in rural or remote parts of the
22 province.

23 Apart from the RCC and tail block
24 subsidies, the remaining subsidy against current year
25 costs in this Application results from Manitoba Hydro's

1 decision to reclassify provincial government accounts
2 into the general service class.

3 This decision segregates accounts funded
4 by the Federal Government into one (1) rate class, and
5 makes it clear which accounts are the responsibility of
6 Federal agencies, including INAC. And this was given at
7 transcript page 115.

8 This also affords the provincial
9 government customers the same treatment applied to First
10 Nation general service customers in 2004.

11 The total subsidy implicit in the decision
12 to reclassify the provincial government account is seven
13 hundred and fifty-seven thousand dollars (\$757,000),
14 which includes a hundred and thirty-six thousand
15 (136,000) resulting from the general service rate
16 revenues, being less than average full cost, and a
17 further six hundred and twenty-one thousand (621,000)
18 resulting from the elimination of the surcharge on
19 provincial government accounts.

20 This amount is being fully absorbed by
21 Manitoba Hydro, and is not being passed onto INAC, or the
22 First Nations. Mr. Mills has suggested, in his direct
23 evidence, and during his -- his examination, that
24 Manitoba Hydro's decision to change the classification of
25 the provincial government accounts will affect INAC, and

1 the First Nations, because of its impact on the grid
2 rate, and how that flows through the -- to the
3 multipliers, which affect the level of funding for diesel
4 electricity.

5 Manitoba Hydro would just like to note
6 that while there is a theoretical affect, its impact is
7 not material. Dividing the seven hundred and fifty-seven
8 thousand dollars (\$750,000) by the approximate 24,000
9 gigawatt hours of usage on the grid yields a total rate
10 impact of point zero zero three (.003) cents per kilowatt
11 hour, that is three-thousandths (3/1000) of a cent per
12 kilowatt hour.

13 The impact of this change on Mr. Mills'
14 chart cannot be discerned at the level of two (2) decimal
15 points shown on that chart. In any event, its impact is
16 less than that of the 1.07 million of RCC subsidies to
17 which Mr. Mills does not appear to have objected.

18 Manitoba Hydro's Application also includes
19 an increase in rates to the Federal Government and First
20 Nation education accounts. The rates per kilowatt hour
21 to these accounts includes the full cost of fifty nine
22 point zero-four (59.04) cents per kilowatt hour plus a
23 surcharge to cover the costs to serve residential and
24 general service customers which are not covered by either
25 revenue from the customers themselves or subsidies

1 provided by Manitoba Hydro.

2 Manitoba Hydro is seeking approval of a
3 total rate to government and First Nation education
4 accounts of two dollars and nineteen cents (\$2.19). The
5 surcharge included in that rate is a dollar sixty (\$1.60)
6 per kilowatt hour. And this is found at Schedule 4.3 of
7 Manitoba Hydro's Application.

8 The full cost portion of the rate includes
9 the fuel, operating and maintenance costs of providing
10 diesel service, as well as approximately five hundred and
11 eighty thousand dollars (\$580,000) in interest and
12 depreciation on capital invested since March 31st, 2004
13 for which no contribution has been received.

14 While Manitoba Hydro believes that these
15 contributions are now being seriously considered by the
16 First Nations and INAC it appears unlikely that an
17 agreement on the quantum of the contribution will be made
18 before Manitoba Hydro expects to implement new rates.

19 In any event, the impacts on the full cost
20 rate is four point three (4.3) cents per kilowatt hour
21 and, should the contribution be received, an adjustment
22 to the rate can easily be made in future applications.

23 With respect to the surcharge, Manitoba
24 Hydro has calculated and applied it in the same way it
25 has previet -- previously done. That is the amount of

1 surcharge revenue requires -- required is determined and
2 is divided among government accounts on the basis of
3 their usage. This has resulted in 83 percent of the
4 surcharge revenue requirement being applied to Federal
5 Government and First Nations' accounts.

6 We have heard evidence from Mr. Hildebrand
7 that Manitoba Hydro is not appropriately allocating the
8 surcharge between federal accounts and Manitoba Hydro.
9 His direct evidence in that respect is at transcript
10 pages 760 to 762. Mr. Hildebrand would like the
11 surcharge revenue requirement allocated on the same basis
12 as the contribution requirement for pre 2004 capital
13 costs perhaps updated for new energy shares.

14 It is important to note that the capital
15 contribution and a surcharge have two (2) different
16 purposes and the same ratios that apply to capital do not
17 necessarily apply to the surcharge. The capital
18 contribution is intended to cover the capital costs for
19 all users, government, as well as affiliated residential
20 and general service accounts.

21 In this respect it is appropriately -- it
22 is appropriate to sum up the percentages of load in each
23 of these classes which relates to a particular entity.
24 For example, First Nation -- First Nation residential,
25 First Nation general service, and First Nation education

1 accounts relate to INAC.

2 On the other hand, the surcharge revenue
3 requirement relates to the revenue shortfall of two (2)
4 classes, residential and general service, and this was
5 acknowledged by Mr. Hildebrand at transcript page 887.
6 Manitoba Hydro's billing information is that 82 percent
7 of the usage in these two (2) classes is attributable to
8 First Nation accounts which, by coincidence, is pretty
9 well equal to the share of government energy usage by
10 federal accounts.

11 In any event, in the current Application,
12 INAC is getting a much better deal than that. From
13 Schedule 4.1 and 4.2 in the Application it can be seen
14 that the revenue shortfall is 4.036 million for the
15 residential class and nine hundred and seventy-one
16 thousand dollars (\$971,000) for the general service
17 class, for a total revenue shortfall of \$5.007 million.

18 From Schedule 4.5 it is seen that the
19 Federal Government surcharge will produce 2.962 million,
20 which is 59 percent of the revenue shortfall. Manitoba
21 Hydro is not proposing to include any amount in the
22 current revenue requirement in respect of past deficits.

23 The Application is structured to recover
24 the appropriate -- appropriate amount of annual operating
25 costs and is not backward looking for such costs. It was

1 a decision on Manitoba Hydro's part not to apply for rate
2 increases in the intervening years between January 1st,
3 2007 and September 1st, 2010.

4 On this basis, it would not be appropriate
5 to recover such deficits through even higher rate
6 increases in the future. Further, continuation of past
7 practice would have added over ten (10) cents to the full
8 cost rate and would have aggravated rate impacts on
9 customers.

10 As Mr. Warden stated in his evidence, at
11 transcript pages 114 and 115:

12 "Manitoba Hydro will track deficits and
13 surpluses with the objective of
14 minimizing net deficits over the longer
15 term."

16 A significant part of the capital costs
17 incurred since March 31, 2004, which is included in the
18 current application is the costs related to soil
19 remediation at Brochet. This project accounts for 3.4
20 million of the 4.8 million in capital, as shown in
21 Attachment 1, Schedule 8. Soil remediation is an
22 integral -- integral part of diesel operations. The need
23 for the soil remediation was incurred for the operation
24 of the facility to provide service in the community, and
25 is part of the cost of providing safe and reliable

1 service.

2 Manitoba Hydro has sought INAC
3 contributions in respect of Bro -- Brochet soil
4 remediation as far back as 1998, and this was discussed
5 at transcript page 273. Although INAC has never agreed
6 to provide a contribution, it was not included in rates
7 until now, because the costs were booked after the
8 determination of undepreciated capital costs for the
9 purpose of the tentative settlement agreement. And since
10 2004 Manitoba Hydro has not iclud -- included any capital
11 costs in its rate applications.

12 INAC points to its polluter pay policy as
13 justification for not making capital contributions on
14 account of soil remediation projects, or including such
15 costs in rates. And this was dealt with in response to
16 CAC/INAC-8(b) and CAC/INAC-10(a) and (b). This position
17 fails to recognize that cost allocation deals with the
18 apportionment of costs incurred by utility to various
19 customer classes, not apportionment of liability as
20 between the utility and a third-party.

21 To such extent Manitoba Hydro incurs soil
22 remediation costs, such costs must be allocated and
23 ultimately recovered either through capital contribution
24 or rates. There is no basis for allocating such costs to
25 any party other than the customer class who benefited

1 them."

2 Mr. Hilderbrand stated that it appears
3 that historically Manitoba Hydro appeared reluctant to
4 target comprehensive energy management programs in the
5 remote communities to address the special needs and
6 considerations of these communities, and he discussed
7 that at page 70 -- 765 of the transcript.

8 When Manitoba Hydro challenged this
9 assertion, Mr. Hildebrand admitted that his comments were
10 his perspective and were based on what he refers to as
11 the first time period from 2004 to 2008, and this is
12 found at page 896 of the transcript.

13 Manitoba Hydro would not agree with this
14 assertion, and as shown in its evidence, Manitoba Hydro
15 staff made, on numerous occasions, visits to the
16 communities to explain the benefits of Power Smart
17 programming, and to encourage uptake in the communities.
18 And that as early as 2004 in its diesel rate application,
19 Manitoba Hydro provided the Public Utilities Board with
20 detailed information regarding efforts to promote energy
21 conservation in these communities. Part --

22 THE CHAIRPERSON: Excuse me, Ms.
23 Fernandes, we've got a little problem here.

24 MS. ODETTE FERNANDES: Yep, no problem.

25 THE CHAIRPERSON: We'll only be a couple

1 seconds.

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(BRIEF PAUSE)

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THE CHAIRPERSON: Sorry for the
interruption.

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(BRIEF PAUSE)

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MS. ODETTE FERNANDES: All right.
Manitoba Hydro would not agree with Mr. Hildebrand's
assertions. And as shown in its evidence, Manitoba Hydro
staff made, on numerous occasions, visits to the
communities to explain the benefits of Power Smart
programming and to encourage uptake in the communities,
and that as early as 2004 in its diesel Rate Application
Manitoba Hydro provided the Public Utilities Board with
detailed information regarding efforts to promote energy
conservation in the communities, particularly with
regards to the use of electric heating and energy
efficient lighting and appliances.

And this information was provided in
Manitoba Hydro's rebuttal at page 24. Notwithstanding
this disagreement of the first time period, it is more
important to note that Mr. Hildebrand admitted in cross-

1 examination that, in what he refers to as the second time
2 period, Manitoba Hydro was implementing the kind of
3 direct energy management programming he was anticipating,
4 which included the announcement of the First Nations
5 Power Smart Program, consultations with the First
6 Nations, and the auditing of homes.

7 Mr. Hildebrand also recommended that the
8 equivalent to grid rates be doubled over the next four
9 (4) years. Based on the Vice-Chair's comments during
10 CAC's submission, Manitoba Hydro will not get into detail
11 on the impacts of this proposal or who the winners and
12 losers are. It appears the Board is fully aware --
13 aware.

14 Suffice to say that Manitoba Hydro does
15 not believe that doubling rates will result in a tangible
16 reduction in consumption in the diesel First Nation
17 communities. More importantly, doubling rates of the
18 poorest customers just to do something shows a complete
19 lack of sensitivity to these customers.

20 The ability to respond to a price signal
21 is dependent on circumstances such as substitutes for the
22 good in question, as well as the extent to which the
23 customer is responsible for the energy bill. With this
24 being said, due to the energy options in diesel
25 communities, as well as the social landscape, a doubling

1 of rates may have a small impact on conservation, while
2 at the same time increasing the costs of energy for those
3 paying for the bill, as well as potentially in --
4 increasing the cost for basic amenities, such as milk.

5 Manitoba Hydro believes the best way to
6 reduce energy consumption is by way of demand side
7 management programs as well as customer education
8 programming. This is being pursued through the First
9 Nation Power Smart Program.

10 When developing the Corporation's lower
11 income and First Nations' program Manitoba Hydro looked
12 for opportunities that resulted in the greatest energy
13 savings for the customer, taking into account the
14 economics associated with the energy efficient
15 opportunities and what Power Smart programs were
16 available to all of Manitoba Hydro customers.

17 In the latter case, the objective was to
18 ensure that lower income and First Nation customers had
19 access to comparable programs being offered to other
20 program -- to other customers, provided the economics of
21 offering these programs was considered reasonable
22 relative to the energy savings being achieved.

23 As indicated in Manitoba Hydro's written
24 submission, in regard to the implications of additional
25 DSM programming in these communities, Manitoba Hydro

1 Hydro would submit that is because there just aren't --
2 that is because they just aren't there. This isn't to
3 say that Manitoba Hydro isn't looking. It's Ms.
4 Johnson's job to look.

5 Manitoba Hydro has a solid team dealing
6 with demand side management in these communities, and
7 they are in the best position to determine when outside
8 expertise is warranted. We don't need to impose cost on
9 the diesels for expertise the Corporation already has.

10 Going back to Mr. Hildebrand's
11 recommendation, to base a recommendation of 20 percent
12 savings by comparing the diesel communities to Jasper is
13 an uneducated comparison, and then to make a suggestion
14 of 20 percent savings because if you don't have a goal
15 you will never reach it, is flawed logic.

16 In order for the First Nation program to
17 be successful, a coordinated approach is needed.
18 Manitoba Hydro is currently working, and will continue to
19 work, with the communities in an effort to see that they
20 take advantage of all residential and commercial
21 opportunities.

22 Manitoba Hydro also intends to leverage
23 any learnings from our experiences to further improve the
24 program. As Mr. Hildebrand repeatedly stated, it takes
25 two (2) to tango, and Manitoba Hydro welcomes the

1 opportunity to mark -- to partner with the First Nations,
2 and INAC, to further impact reductions in energy
3 consumption in First Nation communities.

4 To date, Manitoba Hydro has initiated
5 discussions with INAC, and is hopeful a partnership can
6 be forged. In addition, education workshops are being
7 offered to the communities to ensure savings are
8 sustained, and that any additional behaviour-based
9 savings can be realized.

10 The suggestion has been made that Manitoba
11 Hydro has not consulted, or has not adequate --
12 adequately consulted with the First Nations regarding its
13 capital expenditures.

14 Mr. Warden indicated on the record that
15 better communication is required, and that Manitoba Hydro
16 is committed to enhancing its communication, and has set
17 up a committee to address this issue. And this was found
18 at transcript page 147.

19 It is clear, however, by the evidence
20 placed on the record that there were many attempts by
21 Manitoba Hydro on various occasions to consult other
22 parties.

23 However, as addressed in Manitoba Hydro's
24 rebuttal evidence, and in the documents filed in this
25 proceeding in response to PUB/MH-17B as Appendix 2,

1 Attachment 2, it is difficult in every instance to
2 initiate, carry out, and conclude consultations in a
3 timely manner, enough to secure funding prior to the
4 installation of needed facilities, and infrastructure.
5 And this is found at -- in Manitoba Hydro's rebuttal
6 evidence at page 16.

7 Further to this, the evidence shows that
8 Manitoba Hydro has attempted to establish a formal review
9 process with the other parties, and this was -- Mr. Mills
10 was taken through that by Ms. Ramage in her cross at
11 pages 705 to 707.

12 Manitoba Hydro agrees with the submission
13 of CAC/MSOS with regard to the importance of engaging the
14 First Nations in this process. Manitoba Hydro also sees
15 an important role for INAC as the principle funder. The
16 parties are presently working on a defined consultation
17 process, and Manitoba Hydro is optimistic that the
18 process that is currently underway will be successful.

19 Mr. Hildebrand seems to believe that after
20 consultation, if the First Nations or INAC does not share
21 the same opinion with Hydro, that a capital expenditure
22 is necessary, that one (1) of two (2) scenarios will
23 occur; first, Manitoba Hydro does not expend the capital,
24 and if that results in the degradation of services to the
25 communities, then so be it. And second, Manitoba Hydro

1 goes ahead and makes the expenditure without having the
2 funding in place, in which case it does so at its own
3 risk. And this was discussed at transcript page 923.

4 Manitoba Hydro considers Mr. Hildebrand's
5 proposals to be unacceptable, bad policy, and in
6 contravention of Manitoba Hydro's responsibilities.
7 Manitoba Hydro will not compromise safety and rebo --
8 reliability to remote customers, whether or not
9 concurrence is achieved.

10 In the event that concurrence is not
11 received from the parties, and the expenditure is
12 necessary to re -- achieve safe and reliability
13 objectives, Manitoba Hydro will apply to recover
14 associated costs through rates.

15 The Chairman requested yesterday that
16 parties address the issue of landlines to the four (4)
17 diesel communities. Manitoba Hydro has prepared a study
18 with respect to the issue of the transmission line
19 option.

20 This report was filed with Manitoba
21 Hydro's Application at Appendix 1 and a copy was also
22 provided to all First Nation communities. As outlined in
23 the rep -- report and in Manitoba Hydro's response to
24 Undertaking number 18, Exhibit 22, the costs are
25 significant.

1 Manitoba Hydro cannot support the funding
2 required to build such transmission lines on its own and
3 would require a significant commitment on the part of
4 funding agencies, both federal and provincial, prior to
5 any agreement to construct transmission lines to the
6 diesel communities.

7 Further to this, even if there is a
8 commitment to funding the next steps in deciding to move
9 forward with any option includes site investigations,
10 detailed design of the option, licence application,
11 environmental approvals, and project funding agreements.

12 Further, as indicated by Mr. Warden at
13 page 351 to 352 of the transcript, Manitoba Hydro has
14 compared alternatives to landlines such as fuelling the
15 diesel generators through liquified natural gas, biomass,
16 wind, and small energy, which over the long-term make
17 more economic sense than -- than the landline to these
18 communities.

19 Ms. Hart noted, this morning, INAC's
20 concern with Manitoba Hydro's reference to INAC as
21 customer in its written submission. The tentative
22 settlement agreement acknowledges that the First Nations
23 are the customers.

24 The reference was intended to be a gentle
25 reminder that if the agreement is not signed and the

1 funds paid are withdrawn, Manitoba Hydro would expect to
2 revert to its pre-2004 position with respect to
3 contractual responsibility. It was not intended to
4 address Manitoba Hydro's relationship with the First
5 Nations as we move forward.

6 Manitoba Hydro has provided an explanation
7 of the financial risks the corporation would be exposed
8 to if the final order is issued prior to the execution of
9 the tentative settlement agreement. While it appears
10 signing is imminent this risk continues to exist until
11 all the Is are dotted and Ts crossed; therefore, Manitoba
12 Hydro requests that its Application be approved on an
13 interim basis until confirmation is provided that the
14 agreement has been file -- finalized and any associated
15 housekeeping matters have been attended to.

16 When Manitoba Hydro first filed its
17 Application it sought approval to implement new rates
18 effective September 1st, 2010. Mr. Warden's direct
19 examination, he indicated that Manitoba Hydro was seeking
20 an October 1st of November 1st, 2010 implementation.
21 Manitoba Hydro is now requesting that new rates be
22 implemented December 1st, 2010 with no retroactivity.

23 In its written submission, Manitoba Hydro
24 has provided legal opinions addressing question from
25 Board counsel regarding Section 43(3) of the Manitoba

1 Hydro Act, which Manitoba Hydro does not believe is
2 contravened as a result of the transfer of the province
3 from the government account to the general service
4 account.

5 And that's located at pages 18 and 19 of
6 our written submission. Manitoba Hydro has also provided
7 responses to the Chairman's questions regarding the duty
8 to serve, which Manitoba Hydro feels is a qualified duty
9 to serve a company by a corresponding duty on the part of
10 the customer to pay, and further complicated by the fact
11 that reserve lands fall under federal not provincial
12 legislation. And that submission is found at pages 9 to
13 11.

14 On the issue of costs in general and
15 obligations to fund First Nations' electricity costs
16 where the Corporation has indicated that, although there
17 has been no legal obligation found for the Federal
18 Government to fund electricity costs, it suggests that
19 there is fiduciary obligation on the part of the Federal
20 Government to assist in the funding of First Nation
21 electric costs. And our submission on that is found at
22 pages 11 through 13.

23 In summary, the proposed rates present a
24 fair balance between customer sensitivity and cost
25 recovery. Grid customers are making a reasonable

1 contribution and should not be asked to pay more. The
2 province should not be asked to subsidize what Manitoba
3 Hydro views to be a federal responsibility. Manitoba
4 Hydro is actively pursuing all DSM opportunities and
5 intends to continue to do so in partnership with con --
6 communities.

7 And finally, diesel electric service
8 remains as the most reliable and cost effective means of
9 providing electricity services to these remote
10 communities at this time.

11 Just a couple of housekeeping matters.
12 Manitoba Hydro understands that MKO is filing its
13 submission later this week and -- and that CAC/MSOS will
14 provide a legal research paper either later this week or
15 early next week. Manitoba Hydro just wishes to reserve
16 the right to comment on those submissions if necessary.

17 And, secondly, this morning Mr. Mayer
18 inquired as to whether, if and when the tentative
19 settlement agreement is signed, the position of the
20 parties as to whether the in camera transcripts can be
21 made public. And Manitoba Hydro does not have any
22 objection to the in camera hearing being made -- being
23 put on the public record once the tentative settlement
24 agreement is signed.

25 And subject to any questions the Board may

1 have, that concludes Manitoba Hydro's oral submission.

2 MR. ROBERT MAYER: Ms. Fernandes,
3 firstly, December 1st is going to be pushing it. There -
4 - we think we probably have a little more on our plate to
5 be able to issue an order by December 1st, but I have
6 your posi -- we have your position on the final -- on
7 final or interim. And I'm taking it that the post-2004
8 capital interest and depreciation won't likely be
9 resolved by even January or February.

10 However, I take it, however, that when you
11 talk about dotting I -- dotting Is and crossing Ts, can
12 you give us any kind of projection, or is that going to
13 depend upon whether you can sit down and talk to INAC and
14 the First Nations?

15 MS. ODETTE FERNANDES: Do you mean when
16 it's going to be signed?

17 MR. ROBERT MAYER: Well, I -- I'm
18 assuming, from what we're hearing from Mr. Anderson on
19 basically an hourly basis, is that the papers are coming
20 in and everybody's putting their -- putting their
21 signatures on it. It's my assumption that INAC and
22 Manitoba Hydro have already signed.

23 So things are looking good, that if we
24 keep getting updates from Mr. Anderson, that we'll have
25 all the documents in place by possibly four o'clock

1 today, but I'm assuming that doesn't mean all the other
2 issues that may arise and clarification of some of the
3 issues like contribution to the post-'04 capital.

4 MS. PATTI RAMAGE: I think you're --
5 that's correct. And I think it should be also noted that
6 I think right now everybody in the room is on the same
7 page in terms of their understanding of -- of what is
8 coming back to us. Manitoba Hydro hasn't seen what Mr.
9 Anderson is putting together in terms of band counsel
10 resolutions independent legal advice, and I don't believe
11 INAC has either, and I'm confident the Board hasn't, so
12 we're all on an equal footing right now.

13 THE CHAIRPERSON: Even the dog's in the
14 same boat. Thank you very much, Ms. Fernandes and Ms.
15 Ramage. So subject to this other material coming in,
16 hopefully we'll receive the rest of Mr. Anderson's
17 material by Friday. And we'll provide an opportunity if
18 there's something in that material for the other parties
19 to comment on if they wish.

20 And subject to a surprise imminent receipt
21 of a settlement agreement as opposed to a tentative
22 settlement agreement -- Mr. Peters, do you have anything
23 to add? Otherwise, I was going to bring it to a close?
24 And subject to the other material coming in, we'd go into
25 our deliberation phase.

1 MR. BOB PETERS: I think you're at that
2 point, Mr. Chairman, where that's where we are. Mr.
3 Anderson, as the Vice-Chair noted, he's been in contact
4 with the Board office and myself within the last hour,
5 and in Ms. Fernandes' words, he's dotting the Is and
6 crossing the Ts; I hope I've said that right. And he was
7 going to try to make it to the Board's hearing this
8 afternoon, but he again was uncertain as to whether he
9 could.

10 But he did want to indicate that, if I
11 have this correct, he has one (1) signed doc -- set of
12 documents in hand and understands three (3) are in
13 transit, and he hopes that he will have them shortly.
14 And I do believe shortly, to him, meant this afternoon.

15 So that deals with the tentative
16 settlement agreement, or settlement agreement. And then
17 what flows from it, I think, as has been indicated, there
18 are some concerns the parties need to address, in terms
19 of the specifics, and some of that may take some time to
20 -- to work their way through.

21 The other aspect that the Board will not
22 yet have will be from Ms. Bowman, her memo that she was
23 going to provide, either by Friday or Monday, if
24 possible, of next week. And therefore, there will be an
25 opportunity again for parties to respond before the Board

1 will enter into full deliberations on all of the record
2 of this proceeding --

3 THE CHAIRPERSON: Presumably we can
4 complete this with paper rather than returning to an oral
5 phase.

6 So that would bring an end to the oral
7 phase of the Hearing. I want to thank all parties that
8 have participated and attended. And at least for now, we
9 stand adjourned. Thank you.

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11 --- Upon adjourning at 1:48 p.m.

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13 Certified Correct

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Cheryl Lavigne, Ms.

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