



# ONTARIO ENERGY BOARD

**FILE NO.:** EB-2007-0606

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**VOLUME:** Motion Hearing

**DATE:** November 6, 2007

<b>BEFORE:</b>	Gordon Kaiser	Presiding Member and Vice Chair
	Paul Sommerville	Member
	Cynthia Chaplin	Member

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

**AND IN THE MATTER OF** an Application by Union Gas Limited for an Order or Orders approving a multi-year incentive rate mechanism to determine rates for the regulated distribution, transmission and storage of natural gas, effective January 1, 2008.

Hearing held at 2300 Yonge Street,  
25<sup>th</sup> Floor, Toronto, Ontario, on Tuesday,  
November 6, 2007, commencing at 9:30 a.m.

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Motion Hearing  
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BEFORE:

GORDON KAISER	PRESIDING MEMBER AND VICE CHAIR
PAUL SOMMERVILLE	MEMBER
CYNTHIA CHAPLIN	MEMBER

A P P E A R A N C E S

MICHAEL MILLAR	Board Counsel
RICHARD BATTISTA	Board Staff
MICHAEL PENNY	Union Gas Ltd.
DAVID POCH	Green Energy Coalition
JAY SHEPHERD	School Energy Coalition
PETER THOMPSON	Industrial Gas Users Association
MICHAEL BUONAGURO	Vulnerable Energy Consumers Coalition
JIM GRUENBAUER ALICK RYDER	City of Kitchener

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

Description

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NO UNDERTAKINGS WERE FILED DURING THIS PROCEEDING

1 Tuesday, November 6, 2007

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

3 MR. KAISER: Please be seated.

4 Good morning, ladies and gentlemen. The Board is  
5 sitting today to hear a motion that was filed by Union Gas  
6 Limited on September 21st seeking an order declaring  
7 Union's rates for distribution, transmission and storage of  
8 natural gas to be interim, effective January 1st, 2008.  
9 The procedural order was issued on October 18th, setting  
10 today as the date for hearing of this motion. May we have  
11 the appearances, please?

12 **APPEARANCES**

13 MR. PENNY: Yes, good morning, Mr. Chairman. My name  
14 is Michael Penny. I act for the applicant and the moving  
15 party today, Union Gas Limited.

16 MR. KAISER: Mr. Penny.

17 MR. POCH: Good morning, Mr. Chairman, Panel. David  
18 Poch on behalf of the Green Energy Coalition.

19 MR. KAISER: Mr. Poch.

20 MR. SHEPHERD: Good morning. Jay Shepherd on behalf  
21 of School Energy Coalition.

22 MR. KAISER: Mr. Shepherd.

23 MR. THOMPSON: Peter Thompson on behalf of the  
24 Industrial Gas Users Association.

25 MR. KAISER: Mr. Thompson, good morning.

26 MR. BUONAGURO: Michael Buonaguro on behalf of the  
27 Vulnerable Energy Consumers Coalition.

28 MR. KAISER: Mr. Buonaguro.

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1 MR. RYDER: Alick Ryder and James Gruenbauer for the  
2 City of Kitchener.

3 MR. KAISER: Mr. Ryder.

4 MR. MILLAR: Michael Millar on behalf of Board Staff.  
5 With me is Mr. Battista.

6 MR. KAISER: Thank you, Mr. Millar. Mr. Penny.

7 **SUBMISSIONS BY MR. PENNY**

8 MR. PENNY: Yes, thank you, Mr. Chairman. I earlier  
9 passed out to the parties present and gave to Board Staff  
10 copies for you of a decision of the Supreme Court of Canada  
11 that is referenced in my factum of the CRTC and Bell case,  
12 which I will be making reference to later in my  
13 submissions. I wonder if Mr. Millar and Mr. Battista could  
14 pass those to you.

15 MR. MILLAR: Yes. We will give this an exhibit  
16 number, KD, as this is the fourth preliminary day we are  
17 holding, KD.1. That is the Bell Canada decision.

18 **EXHIBIT NO. KD.1: CRTC V. BELL CANADA DECISION IN**  
19 **SUPREME COURT OF CANADA.**

20 MR. PENNY: I also -- Mr. Chairman, I may not  
21 specifically make reference to this in my submissions, but  
22 it may come up in the course of the proceedings. It is an  
23 excerpt from Union's evidence. It is Exhibit D, tab 3,  
24 schedule 5, and rather than ask you to, in advance, haul  
25 your binders up here, we just thought we would bring a copy  
26 of this with us.

27 So I don't think that needs to be given an exhibit  
28 number, because it is already part of the record, but it is



1 just for your convenience.

2 What Exhibit D, tab 3, schedule 5 shows is the rate  
3 amounts and percentage increases associated with each of  
4 the various items that are a component of Union's  
5 application. So to the extent you want to look at these as  
6 discrete entities, this gives you that information. But,  
7 as I say, subject to questions from your specific issues  
8 that come up, I may not make specific reference to that,  
9 but I thought you should have it for your convenience.

10 So, Mr. Chairman, Members of the Panel, the Board is  
11 familiar with the background to this motion. A brief  
12 summary is set out in our written argument.

13 Essentially, against its wishes, Union found itself in  
14 a situation where, because of the length of these  
15 proceedings, final rates cannot be implemented  
16 prospectively by January 1, 2008.

17 As the Board knows, Union sought on two occasions to  
18 have the proceedings to determine its rates expedited.  
19 Virtually all of Union's intervenors opposed the motions  
20 for Union's case to proceed on its own track, and it is the  
21 outcome of those motions which, in effect, brings us here  
22 today.

23 I say that because in the context of Union striving to  
24 avoid retroactivity in the determination of its rates, the  
25 Board, on both occasions when the issue came before it,  
26 indicated that the problem of retroactivity could, to some  
27 extent at least, be dealt with through interim rates.

28 The relevant passages from those decisions are quoted

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1 in our factum. On the second motion, for example, as we  
2 quote on page 4 of our factum, paragraph 12, the Board  
3 said, in rejecting Union's request to proceed independently  
4 and on an expedited basis, that:

5 "of course we remain concerned as we were on July  
6 13th about retroactivity. We said so then and we  
7 say it again. Retroactivity is not good. It is  
8 bad. There are, however, mechanisms we believe  
9 to reduce its impact. We will explore those  
10 mechanisms when and if these two applicants bring  
11 forward applications for interim rate increases  
12 and deal with it at that time."

13 So that is what brings us here today, trying to  
14 mitigate the deleterious effects of retroactivity through  
15 the use of interim rates, and specifically in this motion  
16 Union seeks two orders. The first is an order making  
17 Union's rates interim as of January 1, 2008, and the second  
18 is an order setting new interim rates based on Union's  
19 prefiled evidence, and, more specifically, as outlined in  
20 Exhibit D, in tabs 2 and 3.

21 The purpose of the first order is simply to enable  
22 Union the opportunity to recover the full annual amount of  
23 what is ultimately decided to be Union's final rates for  
24 2008.

25 The purpose of the second order is to avoid the  
26 accumulation or at least to mitigate the risk of the  
27 accumulation of significant retroactive charges as a result  
28 of procedural and process delays in the implementation of

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1 new rates, when the final order of the Board is made.

2 Undoubtedly, the Board has the power to order interim  
3 rates and to order interim rate increases or decreases  
4 pending final determination of any matter before it.

5 Section 21, subsection 7 of the OEB Act specifically  
6 confers on the Board the power to make interim orders.

7 It is fair to say, I think, that there is virtually  
8 universal support in the intervenors' submissions for the  
9 first order making Union's rates interim as of January 1,  
10 2008.

11 The delay in the ability to implement new rates  
12 prospectively from January 1 was not due to any fault or  
13 misconduct on Union's part. It is consistent with basic  
14 notions of fairness, therefore, that Union's ability to  
15 seek the full calendar year impact of the ultimate rate  
16 change be preserved. Making Union's current rates interim  
17 as of January 1, 2008 is the way to do that, in my  
18 submission.

19 The issue of interim rate increases, however, is  
20 perhaps more controversial, so I will focus my remaining  
21 submissions on this issue.

22 Union is seeking interim rates based on its incentive  
23 proposal. That proposal has two fundamental parts. First,  
24 there are rate-related changes to rates that arise from  
25 matters previously approved by the Board; and, second,  
26 there are rate-related changes to rates arising from  
27 Union's proposed incentive regulation plan itself.

28 The rate changes that have been previously approved by

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1 the Board are listed in paragraph 23 of our factum. The  
2 ones with material rate impact are the cost of  
3 implementation of GDAR, demand-side management costs, and  
4 the rate impacts associated with the NGEIR implementation,  
5 and that really derives from the change to the basis for  
6 sharing of the long-term storage premium.

7 These adjustments, in our submission, are not  
8 controversial, having already been approved by the Board.

9 As I read the intervenors' submissions most -- perhaps  
10 not unanimous, but most intervenors concede that these  
11 items are properly the subject of an interim increase in  
12 rates. The area where the controversy really arises is  
13 with respect to the components of Union's incentive  
14 regulation plan, and there are three elements contributing  
15 to the proposed rate increase.

16 Those are listed in -- again, in my factum, paragraph  
17 24. The three components are the application of the  
18 proposed price cap index itself, the second is the weather  
19 normalization adjustment, and the third is a change in the  
20 treatment of the forecast for storage, for that portion of  
21 storage and transportation margin that remains to be shared  
22 with -- or to accrue to the benefit of ratepayers.

23 The intervenors, as I read the submissions, say that  
24 because these three items are contested, the Board cannot  
25 order an interim rate increase for any of these items. The  
26 intervenors are saying, in effect, that the Board cannot  
27 order an interim rate increase in respect of any matter the  
28 Board has not already approved. This, in my submission, is

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1 misdirected. It is not the law, and it is not consistent  
2 with the nature and purpose of interim rates.

3 A brief explanation of why these three components of  
4 Union's incentive regulation plan are appropriate is set  
5 out in our factum at pages 7 to 9. But it is not my  
6 intention to walk you through those. You have had the  
7 opportunity to review it.

8 It is important to understand, however, the reason  
9 that these are set out. The reason that we get into the  
10 justification for these components of Union's incentive  
11 regulation plan at all is not, I emphasize, to convince you  
12 that we are right. And that's because that's not the issue  
13 on a motion for interim rates.

14 The issue is not -- we will get to this in a moment --  
15 the issue is not to make a disposition even on a  
16 preliminary basis of where things are going to end up. You  
17 don't need to make a finding that these components are  
18 justified, as some of my friends will have you do. You do  
19 not need to make a finding that these components are  
20 justified in order to make an interim order. All you need  
21 to do in my submission, is be satisfied there is a prima  
22 facie basis for the claim.

23 I will come back to that.

24 But fundamentally, if it were otherwise, it would  
25 defeat the purpose of ordering interim rate changes at all.

26 This is where, in my submission, the intervenor  
27 arguments are misdirected. The intervenors say essentially  
28 two things against any interim rate changes based on these

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1 three contested items. First they say because they're  
2 contested, the Board cannot approve a rate change, not even  
3 an interim rate change, unless it has heard all of the  
4 evidence, pro and con, and determined whether the proposed  
5 changes are just and reasonable. The second argument is  
6 that if the Board approved an interim rate increase on a  
7 contested issue, the intervenors would be prejudiced in  
8 some way in both their positions on the ultimate hearing of  
9 the matter and in connection with pending settlement  
10 discussions.

11 The intervenors are saying fundamentally that not only  
12 should you not approve an interim rate increase on these  
13 items, but that you cannot lawfully do so. I say, with  
14 great respect, that that is flat wrong and demonstrably  
15 wrong. The question, in my submission, is not can you  
16 order an interim rate increase on a contested item. I say  
17 you clearly have the power to do so. The question is  
18 whether you should make such an order. And that is a  
19 matter entirely within your discretion in which you are  
20 entitled to take any number of factors into account,  
21 including importantly, in my submission, the potential for  
22 retrospective increases to rates later in the year and  
23 whether it is better for customers, accepting that there  
24 will in all likelihood have to be some adjustments in any  
25 event, to -- better for customers to receive after-the-fact  
26 rate increases or after-the-fact rate credits.

27 Union is simply saying that if the choice is between  
28 after-the-fact increases versus after-the-fact rebates, it

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1 is pretty clear where customers would want to be.

2 The starting point for my friend's argument is what I  
3 submit is a misunderstanding or misrepresentation about  
4 what interim rates are. And to understand what interim  
5 rates are, and what they mean, you can't do better in my  
6 submission than to review a few pithy passages from the  
7 1989 Supreme Court of Canada decision in Bell and CRTC.

8 In this case, briefly by way of background, the CRTC  
9 granted interim increases in 1984 and 1985 which it later  
10 found in a hearing in 1986 to have been excessive.

11 So in 1986, accordingly, the CRTC ordered Bell to  
12 grant a one-time credit to customers rebating the amounts  
13 of the interim increases which it found, after the fact,  
14 had been more than was necessary.

15 So Bell appealed from that decision, arguing that  
16 having granted the rate increases in '84 and '85 the CRTC  
17 could not claw-back those increases by ordering a one time  
18 credit in 1986. Bell lost that case. And the reason Bell  
19 lost has to do with the nature of an interim order and the  
20 nature of an interim order is why my friends' arguments  
21 about the implication of this board ordering an interim  
22 rate increase are, in my submission, wrong.

23 The issue is dealt with in the decision or in the  
24 judgment excuse me of Mr. Justice Gonthier, and the  
25 relevant passages start at page 20 of the decision. I have  
26 marked, there is side-barred the three or four relevant  
27 passages that I want to refer to.

28 You will see at the bottom of page 20, Justice

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1 Gonthier, having just gone through a summary of some prior  
2 cases, he says:

3 "I agree with Hugessen J. and with the reasons of  
4 Laycraft J.A. in re Coseka where he made a careful  
5 review of previous cases. The statutory scheme  
6 established by the Railway Act and the National  
7 Transportation Act is such that one of the  
8 differences between interim and final orders must  
9 be that interim decisions may be reviewed and  
10 modified in a retrospective manner by a final  
11 decision. It is inherent in the nature of interim  
12 orders that their effect as well as any discrepancy  
13 between the interim order and the final order may  
14 be reviewed and remedied by the final order. I  
15 hasten to add that the words 'further directions'  
16 do not have any magical, retrospective content.  
17 Under the Railway Act and the National  
18 Transportation Act, final orders are subject to  
19 'further (prospective) directions' as well. It is  
20 the interim nature of the order which makes it  
21 subject to further retrospective directions."

22 And then he continues on the next page at the bottom  
23 of page 21 by saying:

24 "A consideration of the nature of interim orders  
25 and the circumstances under which they are granted  
26 further explains and justifies their being, unlike  
27 final decisions, subject to retrospective review  
28 and remedial orders. The appellant may make a wide



1 variety of interim orders dealing with hearings,  
2 notices and, in general, all matters concerning the  
3 administration of proceedings before the  
4 appellant. Such orders are obviously interim in  
5 nature. However, this is less obvious when an  
6 interim order deals with a matter which is to be  
7 dealt with in the final decision, as was the case  
8 with the interim rate increase ordered in Decision  
9 84-28. If interim rate increases are awarded on  
10 the basis of the same criteria as those applied in  
11 the final decision, the interim decision would  
12 serve as a preliminary decision on the merits as  
13 far as the rate increase is concerned. This,  
14 however, is not the purpose of interim rate  
15 orders.

16 "Traditionally, such interim rate orders dealing in  
17 an interlocutory manner with issues which remain to  
18 be decided in a final decision are granted for the  
19 purpose of relieving the applicant from the  
20 deleterious effects caused by the length of the  
21 proceedings..."

22 And that, in my submission, is the fundamental principle:  
23 relief from the deleterious effects caused by the length of  
24 the proceeding. Then he goes on to say:

25 "...Such decisions are made in an expeditious  
26 manner on the basis of evidence which would often  
27 be insufficient for the purposes of the final  
28 decision. The fact that an order does not make any

1 decision on the merits of an issue to be settled in  
2 a final decision and the fact that its purpose is  
3 to provide temporary relief against the deleterious  
4 effects of the duration of the proceedings are  
5 essential characteristics of an interim rate  
6 order."

7 That is really the key, in my submission, to the whole  
8 issue. but let me, before coming back and weaving this  
9 into the facts before you, let me just take you to the last  
10 paragraph I wanted to refer to you in this decision which  
11 is at the bottom of this page, page 22.

12 Justice Gonthier goes on to say:

13 "It is true, as the respondent argues, that all  
14 telephone rates approved by the appellant must be  
15 just and reasonable whether these rates are  
16 approved by interim or final order; no other  
17 conclusion can be derived... However, interim rates  
18 must be just and reasonable on the basis of the  
19 evidence filed by the applicant at the hearing or  
20 otherwise available for the interim decision. It  
21 would be useless to order a final hearing if the  
22 appellant was bound by the evidence filed at the  
23 interim hearing. Furthermore, the interim rate  
24 increase was granted on the basis that the length  
25 of the proceedings could cause a serious  
26 deterioration in the financial condition of the  
27 respondent. Only once such an emergency situation  
28 was found to exist did the appellant ask itself

1           what rate increase would be just and reasonable on  
2           the basis of the available evidence and for the  
3           purpose of preventing such a financial  
4           deterioration. The inherent differences between a  
5           decision made on an interim basis and a decision  
6           made on a final basis clearly justify the power to  
7           revisit the period during which interim rates were  
8           in force."

9           So what Justice Gonthier is saying there is that you  
10          might well consider it just and reasonable to mitigate the  
11          risk of after-the-fact accumulated charges. That's what  
12          that means. So he's not deciding - it's not just and  
13          reasonable in the ultimate sense, that the weight of the  
14          evidence supports the increase. That is for the final  
15          order to be made.

16          The issue that you are dealing with on an interim  
17          basis is a much different one, and that is mitigation of  
18          the risk of deleterious effects of systemic delay resulting  
19          from the regulatory process.

20          And, I would hasten to add, while in this particular  
21          case the issue before the CRTC was financial distress, that  
22          is just a specific application of the principle. This is,  
23          as I've said in our factum, it is not a financial distress  
24          case in our case. The deleterious effect we're concerned  
25          with is not that Union is going to go bankrupt. The  
26          deleterious effect we're concerned with is customers get  
27          hit with accumulated after-the-fact charges in July, which  
28          will have to reach back to the beginning of the year.

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1           And that -- as I said earlier that, in my submission,  
2 is the fundamental principle that we're dealing with.

3           So this definition, the Supreme Court definition of  
4 what an interim order is and what it does, in my  
5 submission, effectively guts the intervenor argument that  
6 you can't make an interim decision on the basis of  
7 contested evidence. That's the whole point of an interim  
8 order; and it also, in my submission, guts the suggestion  
9 that there is any legal or strategic benefit that accrues  
10 to the applicant, or that any legal or evidentiary burden  
11 shifts to the intervenors.

12           It's just simply not true, as some intervenors say in  
13 their written submissions, that once interim rates are set,  
14 it will be up to the intervenors to have to displace them.  
15 That's simply not so. Once interim rates are set, nothing,  
16 nothing, legally or tactically, changes. The applicant  
17 still has the burden of showing, for the final order to be  
18 made, that what it seeks is just and reasonable.

19           So there is no evidentiary burden that shifts. There  
20 is no tactical burden that shifts. There is no legal  
21 burden that shifts. It is simply -- it is just interim,  
22 and it is made for the purpose of avoiding deleterious  
23 effects resulting or mitigating the risk, I would say of  
24 mitigating deleterious effects that may result from  
25 regulatory process.

26           The intervenors at the end of the day and the Board  
27 will be totally unconstrained in their ability to challenge  
28 the rate increases sought or to advance their own proposals

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1 for what the rates should be. Similarly, the Board will  
2 have the power, unquestionably, to reverse retrospectively  
3 the effect of the interim rate increase to January 1, 2008  
4 if it finds the interim increase was too much, as it did in  
5 the Bell case, or, equally, of course, to increase the  
6 final rate beyond the interim level if it finds that the  
7 interim rate level was not enough.

8 The issue, as the Supreme Court said in Bell, is  
9 relieving against the deleterious effects caused by the  
10 length of the proceeding. So the interim decision is not a  
11 preliminary decision on the merits, as far as the rate  
12 increase is concerned.

13 Now, the intervenors say, Well, there may not be a  
14 rate increase, because one witness says -- one of the  
15 intervenor witnesses says that a rate freeze would be fair,  
16 or perhaps base rates might be adjusted down, or perhaps  
17 the Board will find that the productivity dividend should  
18 actually be set greater than inflation so that there should  
19 be rate decreases.

20 But the issue for the board on this motion is not to  
21 evaluate those claims or to make a preliminary  
22 determination of those claims, even though, in my  
23 submission, the support for these positions is thin. As  
24 the Supreme Court said, if the Board were required to make  
25 a finding that the interim rate increase is just and  
26 reasonable on the merits, so to speak, interim orders would  
27 never be made, because they would be no different from  
28 final orders.

1           In my submission, if the focus is placed where it  
2 belongs, on relief against the risk of the deleterious  
3 effects of systemic delay in the regulatory process, the  
4 questions become clear. Is there a material risk? On the  
5 one hand, is there a material risk of retroactive -- of  
6 substantial retroactive rate increases -- or accumulations,  
7 I should say, and can that risk be mitigated through the  
8 setting of interim rates? The answer in both cases, in my  
9 submission, is "yes".

10           So when the question is framed properly, in the  
11 context of the proper legal analysis of what interim rates  
12 are, it becomes clear that the Board has the power to set  
13 interim rate increases and that doing so will mitigate the  
14 risk of substantial after the fact -- the accumulation of  
15 substantial after-the-fact charges to customers.

16           So that is why, fundamentally, we say that an  
17 appropriate basis for determining the level of interim  
18 rates is Union's proposal, as there is a prima facie basis  
19 for it and that there is no prejudice, substantive or  
20 technical, to intervenors or to the Board's position at the  
21 end of the day.

22           Indeed, even though it would not, in my submission, be  
23 necessary for the Board to do so, the Board could, to  
24 preserve the parties' rights on these fronts, make it  
25 clear, if it does issue an order for an interim rate  
26 change, that it is not based on a preliminary determination  
27 of the merits; that the burden of proof, both substantively  
28 and tactically, remains with the applicant; and that the

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1 interim rate being issued is being issued only to mitigate  
2 the risk of the accumulation of retroactive charges being  
3 levied later in the year. And that it is completely  
4 without prejudice to all parties' positions, both in  
5 settlement discussions and, at the end of the day, in the  
6 hearing and in argument.

7 As our factum says, the principles of Union's  
8 incentive rate plan are derived from the Board's policy  
9 report on incentive regulation in the NGF report, to  
10 establish incentives for sustainable efficiency  
11 improvements and to create an environment conducive to  
12 investment for the benefit of both the customer and the  
13 owner.

14 The particulars of Union's application largely adopt  
15 the expert opinion of Dr. Lowry, who has been retained by  
16 the Board both in the context of incentive regulation for  
17 gas and for electricity distribution. We say we clearly  
18 present a prima facie case for the proposals made. The  
19 fact that some of these components are contested is not a  
20 bar to setting new rates.

21 Allowing an interim rate increase for only those  
22 matters that have already been approved by the Board is not  
23 really a risk-mitigation strategy at all, because the risk  
24 of substantial accumulated after-the-fact charges does not  
25 really -- does not really arise from these items. They  
26 represent about a quarter of the potential 1.5 -- in the  
27 case of, for example, residential customers, 1.5 percent of  
28 the potential 6 percent increase.

1           So the real risk that needs to be mitigated arises  
2 from the key elements of Union's incentive regulation plan  
3 which have become the focus -- as I apprehend it through  
4 the written submissions, the focus of this motion.

5           So for these reasons, we ask both that Union's current  
6 rates be ordered interim as of January 1, 2008 and that an  
7 interim rate increase be ordered, pending final  
8 determination of rates in this proceeding, on the basis  
9 outlined in Union's Exhibit D evidence, specifically in  
10 accordance with the rate schedules at tab 2 and the  
11 breakdown of the derivation of those rates shown in tab 3.

12           Those, subject to questions, are my submissions.

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

14           MS. CHAPLIN: Mr. Penny, if I can paraphrase sort of  
15 the substance of your arguments, your conclusion and  
16 Union's conclusion is that it is better to collect too much  
17 money and return it to customers later, rather than not  
18 collect enough and have to collect it from them later. Is  
19 that --

20           MR. PENNY: If those are your choices, that is right.

21           MS. CHAPLIN: If those are your choices.

22           MR. PENNY: It is unlikely you're going to get it bang  
23 on. Indeed --

24           MS. CHAPLIN: Presumably only to get it bang on, you  
25 would have to do the exercise you described, which is make  
26 a final order?

27           MR. PENNY: Exactly, and that is not the point of  
28 this.



1 MS. CHAPLIN: So I'm just curious. If the parties  
2 that represent the ratepayer interests are -- don't seem to  
3 share your conclusion or Union's conclusion that it is  
4 better to over-collect and return money than it is to  
5 under-collect and have to collect it later, on what basis  
6 does Union reach that conclusion that that is what  
7 customers prefer and that, in fact, is what is of benefit  
8 to customers?

9 MR. PENNY: First of all, let me say that it is --  
10 while you're not going to get it bang on, it is the  
11 intention of the proposal to reduce, to the extent  
12 possible, those adjustments either way. In other words,  
13 we're not saying, Oh, well, just make it some huge increase  
14 and give it all back later. That is obviously not the  
15 point.

16 We're saying within a reasonable range, within the  
17 range of what is prima facie available on the evidence,  
18 that you make something that is an approximation, but if  
19 there is to be -- so I just want to make that point as the  
20 starting point.

21 We are not -- it is ultimately -- in a perfect world,  
22 you would get it right, but it is just a recognition of the  
23 fact that we can't do that in the circumstances, until the  
24 final hearing is done.

25 Coming to your question, the basis for Union's claim  
26 in this regard is simply its experience on a day-to-day  
27 basis with customers. You have heard this from Union  
28 before and its witnesses in prior proceedings, that

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1 customers really don't like having to pony up later in the  
2 year for money that they thought they didn't owe. I can't  
3 really put it any differently than that.

4 MS. CHAPLIN: That is an explanation that they don't  
5 like paying after the fact, but is that response -- that is  
6 a slightly different response than if they are given the  
7 choice, Would you prefer to pay now and get a refund, or  
8 would you prefer to not pay now and have to pay later?  
9 That's a different question, I think.

10 MR. PENNY: Fair enough. I think, again, all we can  
11 say anecdotally is our experience is that there's a lot  
12 less concern over credits than there is about accumulated  
13 charges. That's just their experience.

14 MS. CHAPLIN: Okay, thank you.

15 MR. PENNY: They don't get complaints. The call  
16 centre isn't inundated with calls when there are credits.  
17 The call centre is inundated with calls when there are  
18 accumulated after-the-fact charges.

19 MS. CHAPLIN: Right.

20 MR. PENNY: Have we done a survey? No. I'm not in a  
21 position to tell you that.

22 MS. CHAPLIN: Okay. Thank you.

23 MR. SOMMERVILLE: Do we have some idea of the  
24 magnitude? As I understand it, the proposal would be for a  
25 5.7 percent increase, according to your motion. Compared  
26 to a 1.5 which is the approved charges? Let's take that  
27 gap for now.

28 MR. PENNY: Depending on which rate class. Schedule

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1 five shows all of the different ones.

2 MR. SOMMERVILLE: I'm looking at M1 and I see the  
3 others reflected underneath.

4 MR. PENNY: Yes. Let's take M1 as an example. The  
5 all-in proposal is 5.7. The piece that relates only to the  
6 previously-approved is 1.5.

7 MR. SOMMERVILLE: About a quarter, as you said.

8 MR. PENNY: Yes, that's correct.

9 MR. SOMMERVILLE: What are the dollar figures for M1  
10 for example? Do we have some idea as to -- let's assume a  
11 June implementation. What would the dollar figures be?  
12 Could we get some idea about that?

13 MR. PENNY: Of the accumulated --

14 MR. SOMMERVILLE: -- gap between those two?

15 MR. PENNY: I am sure we can develop that, although I  
16 don't know if we can do it this second.

17 MR. SOMMERVILLE: I understand. But that would be  
18 something that might be of interest.

19 MR. PENNY: Yes.

20 MR. SOMMERVILLE: As we look at this question of  
21 preference of customers at a given point in time for  
22 whatever option we choose, that maybe of some assistance.  
23 If you could develop that.

24 MR. PENNY: I'm sure we can promptly but perhaps not  
25 just this second.

26 MR. SOMMERVILLE: Thank you.

27 MR. KAISER: Mr. Penny, the 1.5, the uncontested  
28 amount, you're still in the process of having settlement

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1 discussions, I believe?

2 MR. PENNY: Well, that actually starts next week, the  
3 settlement conference.

4 MR. KAISER: When might we expect the results of that?

5 MR. PENNY: Well, I don't know, but it's scheduled to  
6 start -- the meetings among all of the parties are  
7 scheduled to start on Wednesday and they're scheduled for  
8 the balance of that week and all of the next week. The  
9 agreement -- under the procedural order, the agreement is  
10 supposed to be filed with the Board, if there is one, by  
11 the Friday of the following week.

12 MR. KAISER: Is that November 30th?

13 MR. PENNY: Yes.

14 MR. KAISER: As I recall. So we might have some more  
15 settled matters by the end of this month?

16 MR. PENNY: Yes.

17 MR. KAISER: You mentioned in your argument --

18 MR. PENNY: Sorry, if I might, Mr. Chairman. The  
19 difficulty with waiting is we wouldn't be able to implement  
20 anything for January 1. So there is the retroactivity  
21 problem.

22 MR. KAISER: When do you need a decision in order to  
23 implement by January 1? I thought it was December 15th. I  
24 remember that date.

25 MR. PENNY: For the entire process to run through.  
26 December 15th, that's just for the rate order itself. But  
27 the final rate order. But in order to have the -- under  
28 the process to have the draft rate order put out to parties

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1 and comment back and so on, we would really need to know  
2 within about two weeks, I think.

3 MR. KAISER: Two weeks prior to?

4 MR. PENNY: Mid-November.

5 MR. KAISER: Mid-November?

6 MR. PENNY: Yes. Roughly mid-November. Two weeks  
7 hence.

8 MR. KAISER: You mentioned in your argument that in  
9 line with Mr. Justice Gonthier's decision we are not making  
10 here a decision on the merits and it would be wrong and, in  
11 fact if we were making a decision on the merits there would  
12 be no point to an interim decision or interim order.

13 You indicated that, however, in your view you had to  
14 establish a prima facie case.

15 MR. PENNY: Yes. The reason I say that, I mean I  
16 don't think it is a big deal particularly. Under the  
17 Roncarelli v. Duplessis principle all administrative powers  
18 have to be exercised within some ambit. I think what I'm  
19 saying is it would not be appropriate for the Board or for  
20 us, for that matter, to recommend just picking a number out  
21 of the air. There has to be some, some prima facie basis.  
22 As Mr. Justice Gonthier said, there is some evidence before  
23 the Board. It is not tested. It may not be complete. But  
24 it is at least something.

25 I guess what I mean to say when I say prima facie  
26 case, is that if it were obviously, obviously unreliable or  
27 if it was, you know the evidence of an expert who obviously  
28 had no expertise. I mean I'm just saying you wouldn't have

1 to necessarily accept it just because someone said so. But  
2 as long as its prima facie valid, then that can form the  
3 basis of the -- that's all I meant by that.

4 MR. KAISER: The other point you made was that if we  
5 grant the order as you have requested, there is no  
6 prejudice to the customer.

7 MR. PENNY: Absolutely.

8 MR. KAISER: I take it that is because the customer  
9 can always receive a credit if the Board ultimately decides  
10 the interim decision was wrong?

11 MR. PENNY: That's right.

12 MR. KAISER: Is there any prejudice to you, to the  
13 applicant, in not granting the relief as you requested?

14 MR. PENNY: Well, again it relates in a way to what  
15 Ms. Chaplin was asking about, I think.

16 Union certainly regards it as prejudicial because --  
17 to have to implement a retroactive rate increase, because  
18 Union bears the brunt of the scorn and disappointment and  
19 anger that is engendered by that.

20 MR. KAISER: So your concern is --

21 MR. PENNY: I mean as I said before, it is not a  
22 hardship case. We're not going to go under because we  
23 don't have the money. The issue --

24 MR. KAISER: Just as the customer can get a credit,  
25 you can also gets an adjustment if we're wrong on the  
26 interim decision then you will ultimately get the money you  
27 are entitled to.

28 MR. PENNY: That's right.

1 MR. KAISER: It is not about money on either side.  
2 Money ultimately will be settled up.

3 MR. PENNY: Yes.

4 MR. KAISER: Your concern, the prejudice to you, if  
5 there is a prejudice, is that people will think poorly of  
6 Union and they will be angry that they have this  
7 retroactive increase. That's your concern?

8 MR. PENNY: Well, and I mean it is -- I mean I know  
9 because you've got intervenor representatives in the room,  
10 they will say that we don't know, perhaps they will say we  
11 don't know what we're talking about, but we think we know  
12 our business and we think we know our customers and we  
13 think our customers don't like this. So we think we are  
14 doing it on behalf of the customers not just ourselves.

15 MR. KAISER: Thank you.

16 MR. KAISER: Mr. Poch.

17 **SUBMISSIONS BY MR. POCH**

18 MR. POCH: Thank you, Mr. Chairman. Mr. Chairman, I  
19 should say when I filed my written submissions here October  
20 25th, I think I was probably first off the bat since I  
21 wasn't involved in the proceedings that all of the other  
22 counsel were. Our principal concern was to actually  
23 support the applicant in its request, insofar as it applies  
24 to the settled, uncontested matters and my client's concern  
25 of course is primarily the DSM budget. They should get the  
26 cash to not slow them down in that.

27 My sense is that no one disagrees with that prospect.  
28 So I won't spend any further time being helpful to my

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1 friend.

2 I did at the time, and I continue to offer the Board  
3 submissions, though, that suggest, I think along with all  
4 other intervenors, that there should be some limitation in  
5 granting the interim, the relief requested; that it should  
6 be limited to matters that are not contested.

7 Let me say off the bat, I don't disagree with Mr.  
8 Penny's interpretation in the Supreme Court of Canada  
9 decision and the jurisdiction of the Board, that the very  
10 nature of interim rates is that you can do a retrospective  
11 review and issue a remedial order. I don't think there is  
12 any debate about that at all.

13 If you look at the excerpts that Mr. Penny referred to  
14 in the Bell Canada decision, you see there it is noted that  
15 the problem was a serious deterioration in the financial  
16 condition of the -- of Bell. And quote:

17 "Only once such an emergency situation was found  
18 to exist did the [applicant] ask itself what rate  
19 increase would be just and reasonable on the  
20 basis of the available evidence and for the  
21 purpose of preventing such a financial  
22 deterioration."

23 So, the example there is one where there was an  
24 emergency situation, prima facie an emergency situation.

25 I don't think it can be said that Union has certainly  
26 met that standard, if that is indeed the standard.

27 I think in Ms. Chaplin's and the Chairman's discussion  
28 with Mr. Penny, you have already elaborated what the

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1 concern is and I would suggest it is a relatively minor  
2 concern.

3 I don't believe that Mr. Penny seriously suggests that  
4 there is no strategic advantage to the company in getting  
5 the status quo changed in the interim. And the dynamic of  
6 rate-making and having to go back and change and so on, the  
7 status quo, the reality is the status quo holds some sway.  
8 And in my written submissions I have suggested that, that  
9 fact.

10 There is some prejudice when the Board goes ahead and  
11 makes a decision based -- to grant Mr. Penny the relief he  
12 asks, you would be saying you have met this prima facie  
13 test. So while the Board won't have weighed alternative  
14 evidence, implicitly the Board will have said, on the face  
15 of it, the company's evidence holds some sway.

16 That changes the status quo, and that is a  
17 disadvantage to the parties.

18 MR. KAISER: Can't we solve that just as Mr. Penny  
19 says, by making a statement that this decision doesn't  
20 represent any finding on the merits?

21 MR. POCH: Surely as a formal matter, I think that  
22 would be understood, whether or not you made that  
23 statement.

24 What I am suggesting, Mr. Chairman, is, de facto,  
25 there is a shifting of who then has to move the rock off  
26 the mark. That's an unavoidable reality, it seems to me.

27 Now, I guess in the alternative I would make the  
28 following further observation that I haven't offered in

1 written submission, and that is if Mr. Penny is right, that  
2 -- and the Board is persuaded that customers would rather  
3 see a credit than see a retroactive increase - which is an  
4 interesting question, because of course if you ask  
5 customers before the fact, I think you would get a  
6 different answer than if you ask them after the fact - then  
7 I think the Board should still ask itself -- well, it  
8 should still recognize that we must assume the company's  
9 position is at one extreme of what the Board is likely to  
10 order. I don't think anybody else is arguing for a result  
11 that exceeds the company's.

12       There is a range of positions and evidence presumably  
13 suggesting lesser increases. And if Mr. Penny is sincere  
14 and if we take -- if we agree with Mr. Penny's position  
15 that the object would be to try to pick an interim level  
16 that is most likely to approximate the end result, to  
17 minimize the disruption caused by retroactivity, then it  
18 seems to me it is open to the Board to somehow split the  
19 difference, and it would admittedly be that kind of a back-  
20 of-the-envelope operation; otherwise, you're into a  
21 weighing of evidence, which everyone agrees is not the  
22 point of today.

23       I simply offer that in the alternative as a -- for the  
24 Board to consider in this.

25       I think I will stop there. My friends who are more  
26 concerned with rate increases than my clients can take it  
27 further. I think I have -- as I have already indicated,  
28 our primary concern has already been addressed, my sense

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1 is.

2 MR. KAISER: Thank you, Mr. Poch. Mr. Shepherd.

3 **SUBMISSIONS BY MR. SHEPHERD**

4 MR. SHEPHERD: Well, I hate to burst Mr. Poch's  
5 bubble, but I disagree that the previously approved budget  
6 changes should be incorporated into a rate increase, but I  
7 will get to that in a second.

8 Let me start with the first issue, which is: Should  
9 the rates be declared interim? I agree with Mr. Penny. I  
10 think the consensus is that they should be declared  
11 interim. Regardless of what you do with the level of the  
12 rates, they should be declared interim.

13 Then let's come to the next question, which is -- and  
14 I am reminded of the saying, Beware of somebody who wants  
15 to do you a favour, because apparently Union wants to do  
16 the customers a favour by making an approximation, in Mr.  
17 Penny's words, as to what the rate increase might be and  
18 getting it now instead of later, when they have met their  
19 burden. Of course the approximation he is talking about  
20 is, Give us exactly what we have asked for, which is less  
21 of an approximation than I am normally used to.

22 What he is asking for, in fact, is -- I think the  
23 numbers are for the first six months about \$10 million from  
24 rate M1, of which about 2.8 million is for previously  
25 approved items, and \$7.2 million is for the new increase.  
26 They're going to come back and confirm the numbers, I'm  
27 sure, but I think those are in the right range.

28 What the company's argument is that the company's --

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1 the customers would prefer that they didn't have a  
2 retroactive rate increase later. I guess that is probably  
3 true, but I think Mr. Poch is correct that if you ask the  
4 customers today -- and I went and asked my clients. If you  
5 ask them today what they would like, their answer is -- and  
6 here's the practical reality for schools. What Union is  
7 asking for is a \$500,000 increase in rates for the period  
8 January to June for schools, \$500,000.

9 So if you ask schools, Do you want to pay that  
10 \$500,000 in the first six months of this year, that is in  
11 your current-year budget, and maybe get some of it back  
12 later, or do you want to hold onto it and pay whatever you  
13 owe later, their answer is, We don't want to close a  
14 library today, thank you very much. We would rather not  
15 have to meet our -- this year's budget because they want to  
16 hold onto the money.

17 If we owe it to them, we will pay it and we will do  
18 what we have to do, but if we don't owe it to them, we  
19 don't think we should be sending the librarian home because  
20 they want to hold on to the money. That's all this is  
21 about. It is about who holds on to the money in the  
22 meantime while the Board is making the decision.

23 It is a different story, and we've quoted Mr. Justice  
24 Gonthier's comments, but I think Mr. Poch has made the  
25 correct point, which is this was an emergency situation and  
26 the Board recognized that normally you set just and  
27 reasonable rates on the basis of evidence as to costs and  
28 need, but you have to keep your mind open to the

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1 possibility that you might have to set just and reasonable  
2 rates on a different basis when there is some emergency  
3 situation.

4       There, Bell was in a deteriorating decision -- was it  
5 Bell? Whoever it was -- was in a deteriorating situation.  
6 They had to figure out what was the best way to solve the  
7 problems that were before them, one of which was the  
8 deteriorating financial situation. They couldn't just  
9 ignore it.

10       So, yes, it would have been better to be able to look  
11 at the evidence. They didn't have time.

12       We don't have that problem here. So unless my friend  
13 can show us customers coming to this Board saying, Oh, yes,  
14 but it is going to cause us a big problem if you charge us  
15 later, I think that this Board doesn't have a problem to  
16 solve by breaking the rules, by -- not breaking the rules,  
17 that is the wrong phrase. By going against your normal  
18 policy of deciding just and reasonable rates on the basis  
19 of evidence properly tested before you.

20       Now, let me -- that is the sort of general point, and  
21 I think my friends will expand on it somewhat.

22       Now, I want to talk about the difference between what  
23 they've asked for in this application that this Board has  
24 never considered and what they have called the previously  
25 approved increase.

26       The point we have made in our written submissions, and  
27 I think this is -- I will just reiterate it briefly, is  
28 this Board has not previously approved any rate increases

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1 for Union. This Board has approved some budget items, some  
2 revenue requirement items, but we do not yet know what the  
3 rate impacts of those will be, because we don't know what  
4 the base will be. We don't know what the formula will be,  
5 et cetera.

6 So you don't have sufficient evidence yet to convert  
7 those budget items into rates. And, indeed, I mean, there  
8 is an expert report currently filed that says, taking those  
9 into account, there is no need for a rate increase. A rate  
10 freeze is fine.

11 So on the basis of the evidence before you, you have  
12 no reason to believe that a rate increase is required.

13 So that amount of money, which is \$2.8 million for  
14 residential customers in the first six months of the year,  
15 that amount of money is not yet justified as a rate  
16 increase.

17 So while it is true that the budget items are  
18 approved, and, in fact, because the DSM decision has been  
19 rendered, the budget is approved, Union is obligated to go  
20 spend that money. They know they're going to get it in the  
21 end. They just don't know whether they're going to get it  
22 in the form of a rate increase. They may have a decrease  
23 in something else that ends up balancing out the increase  
24 in the DSM budget.

25 So they don't have to worry about whether they have  
26 the money. They have that money. It is other money that  
27 they might not have.

28 So our view is that neither --

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1 MS. CHAPLIN: I'm sorry, Mr. Shepherd, if I could just  
2 hopefully not interrupt your train of thought, but you're  
3 saying that there might be decreases elsewhere. So you're  
4 assuming -- would that require a change, in a sense, in  
5 what has been called the base rates?

6 MR. SHEPHERD: It could be, or it could be in the  
7 productivity factor.

8 For example, we have just had an announcement that  
9 federal tax rates are going to go from 22.12 percent down  
10 to 18.5 percent next year. We know that is going to have  
11 an impact of many millions of dollars. It's more than  
12 enough to cover the DSM budget.

13 MS. CHAPLIN: Okay, thank you.

14 MR. SHEPHERD: You saved me because I was starting to  
15 blather, so I will stop there. Those are my submissions.

16 MR. KAISER: Thank you.

17 MR. KAISER: Mr. Thompson.

18 **SUBMISSIONS BY MR. THOMPSON**

19 MR. THOMPSON: Yes, thank you Mr. Chairman, Members of  
20 the Board.

21 Mr. Warren asked me to enter an appearance on his  
22 behalf for his client, the Consumers Council of Canada. He  
23 also asked me to make a few points of emphasis on his  
24 behalf. He can't be here today. I understand he is tied  
25 up in another -- I believe another Board matter. I would  
26 propose to do that at the conclusion of the argument I will  
27 present on behalf of IGUA, if that is satisfactory.

28 I have filed a factum and I would appreciate it if you

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1 could turn it up, because I will be referring to parts of  
2 it throughout my argument. It was filed November 1st, and  
3 it consists of about six pages but it also has a schedule  
4 attached to it. Hopefully you have that.

5 The first point I would like to make, since the one I  
6 make in the initial paragraphs of the factum, is this:  
7 Union as I understand it is moving for interim rates  
8 effective January 1, 2008. It seems to be asking that its  
9 current rates be made interim as of that date, as well as  
10 asking that new rates be made interim as of that date.

11 My respectful submission is that the current rates  
12 should only be made interim as of January 1, 2008 if you  
13 conclude none of the changes that Union seeks should be  
14 approved on an interim basis.

15 My submission is that if you agree that some changes  
16 to the current rates should become effective on January 1,  
17 2008, then these new interim rates replace the current  
18 rates effective January 1, 2008 and the current rates  
19 expire December 31, 2007.

20 That may all be semantics, but that's the view that I  
21 take of this request that you have both current and new  
22 interim as of January 1, 2008.

23 So the issue, from my client's perspective, really  
24 becomes: What, if any, rate changes that Union seeks  
25 should become effective January 1, 2008 on an interim  
26 basis?

27 You will see from the submissions that we make on  
28 behalf of IGUA, that we say some of the changes that Union

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1 proposes should become effective on an interim basis as of  
2 January 1, 2008, but not all of them.

3       Just to put it in context, Schools, in their written  
4 submissions, say you should limit the changes that become  
5 effective January 1, 2008 to the changes that are  
6 characterized as "revenue neutral" and the only change in  
7 that context is the M1, M2 rate class change. Others go  
8 beyond that and say, while there are some of the changes  
9 that Union seek which will have an adverse impact on  
10 customers, a rate increase effect that should be approved  
11 on an interim basis, and they limit the changes to matters  
12 that they characterize as non-contested.

13       My client, and Mr. Warren falls into -- and the CCC  
14 fall into that classification, I believe, as do VECC and  
15 the City of Kitchener.

16       My client approaches it a little bit differently and  
17 says that the interim increases should be confined to items  
18 upon which the Board has previously adjudicated. You will  
19 find that statement in paragraph 3 on page 2 of my written  
20 submissions, as the last sentence in the paragraph.

21       Before moving just to discuss, if I might, the  
22 evidence and the principles that I submit should guide the  
23 Board in considering this application, I would like to  
24 emphasize that what Union is seeking is to add something to  
25 its current rates on an interim basis without any  
26 demonstration of the extent to which its current rates may  
27 be too high. And this request that Union is making to add  
28 something to current rates brings into play the scope and

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1 the complete scope of the base rate adjustment topic, which  
2 is a matter in issue in these proceedings.

3 One aspect of that is: Are current rates too high?  
4 Now, there was a similar type of application brought by  
5 Union, not on all fours, but was made in an attempt to get,  
6 it wasn't interim rates, but permanent rates for 2006 on  
7 the basis of an escalation percentage over and above the  
8 company's 2005 Board-approved rates. And that motion was  
9 decided on October 13, 2005. The docket number is EB-2005-  
10 0449 and both Mr. Sommerville and Ms. Chaplin were members  
11 of the Panel that heard that application.

12 One of the factors that influenced the Board's  
13 decision in that case to reject this percentage add-on that  
14 Union was seeking was the fact that the 2005 rates were  
15 producing a revenue sufficiency.

16 I can provide you with a copy of this decision later.  
17 I am referring to page 5 of the decision, where the Board  
18 referred to one of the factors that the company was relying  
19 on, namely evidence of cost pressures, and a possible  
20 revenue deficiency in a future year. The Board said this:

21 "General evidence of cost pressures and a  
22 possible revenue deficiency in a future year are  
23 not sufficient grounds on their own to support a  
24 formulaic adjustment approach, particularly given  
25 that the evidence filed to date indicates a  
26 revenue sufficiency for 2005."

27 The Board went on to note in the following paragraph:

28 "It is noteworthy that since Union's last cost of

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1 service application, which was heard in late 2003  
2 for 2004 rates, the company has earned  
3 substantially more than the regulated rate of  
4 return."

5 So that, in my submission, does provide some support  
6 for the proposition that the starting point, when  
7 considering any request for interim increases are current  
8 rates and the question that should be asked is, are the  
9 current rates too high?

10 What you have in this case is that there is no  
11 evidence of how these current rates stack up, except for,  
12 the only evidence I could find, and I have referred to this  
13 in paragraph 14 of my factum -- is Exhibit C23.52, which is  
14 an answer Union provided to Schools which contains some  
15 forecasts for 2007 and beyond, where the utility ROE for  
16 Union is estimated at 8.75 percent, which is 21 basis  
17 points above its allowed of 8.54.

18 But the other evidence that will probably shed some  
19 light on this, which is available to the Board Panel but is  
20 not available to participants in this case yet, are these  
21 reports, the reporting and record-keeping requirements  
22 filings which Union is obliged to file under the provisions  
23 of these requirements, which you can find in Union's  
24 evidence at Exhibit B, tab 1, appendix J. I know that you  
25 will be more familiar with these than I am.

26 But in item 2.1.4 of these requirements, reporting  
27 requirements, Union is obliged to file, on the last day of  
28 the second month following the quarter and for the first

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1 three quarters, a statement determining an annualized  
2 revenue deficiency or sufficiency.

3 So there will be one of those reports for the period  
4 ending June 30, and as of November 30 there will be one of  
5 those reports for the period ending September 30. Counsel  
6 for Schools has asked for production of these documents in  
7 this case, and Union, as I understand it, is prepared to  
8 disclose them in confidence, but is awaiting the issuance  
9 of a confidentiality order from the Board before the  
10 materials will be disclosed.

11 So that's a source of information that may shed some  
12 light on this question about the level of current rates.  
13 That entire topic, in my submission, will be explored more  
14 fully as the case progresses.

15 The other aspects of base rate adjustments that are in  
16 play here, one is the weather normalization adjustment that  
17 Union seeks, and that jacks base rates up by about \$6.2  
18 million, and I have described that in my factum in  
19 paragraphs 10 to 12. What Union is effectively doing there  
20 is seeking a variance of a Board decision about three years  
21 ago that approved a weighting of the 20-year trend and 30-  
22 year average forecast, progressing towards a 50-50  
23 weighting, which I think would be applicable in this year.

24 Union hasn't sought to vary that decision. They just  
25 come in here and say, Well, Enbridge got something. We  
26 should get it, too. We, of course, take strenuous issue  
27 with that.

28 On the other side of this coin of base adjustments is

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1 one that we suggest should be explored in these  
2 proceedings, and that's the under-allocation of storage  
3 rate base to ex-franchise storage services, and that issue  
4 has never been tested.

5 The evidence on which the NGEIR panel made conclusions  
6 was filed by Union following its argument. But if they can  
7 raise weather, surely this issue is live, and that goes the  
8 other way. If storage assets are allocated to ex-franchise  
9 services in the same proportion as the amount of capacity  
10 that is dedicated to the ex-franchise market, one-third,  
11 then you will see in my factum at paragraph 17 that the  
12 revenue requirement is too high by about \$8.37 million.

13 So my whole point is there are issues about the  
14 appropriateness of the level of the current rates, and they  
15 may well go down when this base rate adjustment issue  
16 shakes out.

17 So that nothing, in my submission, should be done to  
18 prejudice the determination of those issues, either through  
19 the negotiation process or at the hearing.

20 Where does that leave us? In my submission, it leaves  
21 us with this, from my client's perspective and I believe  
22 from Mr. Warren's as well, is that it's permissible to use  
23 the current rates as a threshold to which you can add  
24 something by way of interim rates, but it should be  
25 recognized that that threshold is subject to further  
26 scrutiny during the course of the hearing.

27 So that then brings us to the guiding principles -- it  
28 brings me to the guiding principles that we submit should

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1 guide the Board in determining, How do you decide what  
2 should be added?

3 Where you're not dealing with a hardship situation, in  
4 my submission the guiding principle is you need to balance  
5 the avoidance of retroactivity, increase risk against the  
6 no perceived prejudgment of contested issues or the -- and  
7 the no prejudice to the perceived fairness of the process,  
8 including the settlement conference process. My clients  
9 are concerned about retroactive rate increases. They are  
10 also concerned about prejudgment. They're also concerned  
11 about fairness with respect to contentious issues.

12 So that's how we try and come to a decision as to what  
13 is appropriate with respect to what Union seeks.

14 That, then, brings me to the appendix in my factum. I  
15 don't know if the Board has it available, but I was going  
16 to try and just help you understand where these numbers  
17 come from in the -- I believe it is important for the Panel  
18 to have some understanding of what's at play here in terms  
19 of the dollars.

20 What you have in schedule A of my factum are the  
21 increases for the in-franchise rates. They do not include  
22 northern transportation and storage and they do not include  
23 the ex-franchise cost-based rate classes, and I will  
24 explain that in a little more detail in a moment.

25 What you will see here -- and this comes from Exhibit  
26 D, tab 3, schedule 3, all of these numbers are derived from  
27 the numbers on that schedule. There are four pages in that  
28 schedule, and that schedule does include northern

1 transportation and storage and ex-franchise cost-based  
2 rates.

3 What you will see is, in the first three columns, you  
4 have the approved revenue under current rates. That comes  
5 from D3, tab 3, schedule 3, page 1, column A, and then what  
6 you have is the proposed revenue that Union is seeking in  
7 the interim, as well as the permanent. So they're seeking  
8 about \$22 million of increases from these rate classes.

9 It breaks down into the following categories: Storage  
10 premium. This is their approach to the NGEIR decision with  
11 respect to storage premium, and their proposal to eliminate  
12 a revenue deferral account for short term and actually  
13 forecast a credit. And all of that is subject to further  
14 scrutiny, but the numbers that Union come up with are the  
15 \$3.750 million.

16 The price cap on the weather, this is all included in  
17 Union's price cap column in the Exhibit D, tab 3, schedule  
18 3 exhibit, but Mr. Gruenbauer has broken it down between  
19 the weather piece and the price cap piece.

20 As I will try to demonstrate in a moment, those two  
21 topics are very much in dispute, and it's my client's  
22 submission they should not form any component part of an  
23 interim increase.

24 We then have the incremental DSM costs and we have the  
25 GDAR, incremental GDAR costs. So the total is the 21.971.  
26 These numbers are derived from subtracting some columns in  
27 the exhibit in Union's evidence from others, but they  
28 reconcile within \$4,000.

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1           So in our factum, what we say would be an appropriate  
2 interim order is confined to storage premium, incremental  
3 DSM and GDAR and you will see in our factum in paragraph 21  
4 those items total about \$7.093 million.

5           With the other pieces, that is the northern  
6 transportation and storage and ex-franchise cost-based,  
7 there is only another \$6 million of storage premium. So  
8 for the whole of Union's rate classes, the number would be  
9 \$7.099 million. Or rounded, \$7.1 million.

10          There is a price cap piece that Union seeks to recover  
11 from ex-franchise cost-based services, that is \$2.486, I  
12 think it is, million. And that of course would not be in  
13 the amounts that my clients suggest would be appropriate  
14 for interim rates at this time.

15          So let me just, if I could -- just before I leave  
16 that. Mr. Warren and others say: Storage premium should  
17 be out, because that's NGEIR-related and NGEIR matters are  
18 still an open item, one factor, for example, is that the  
19 petition to the Lieutenant Governor is still pending.

20          My clients say, well, the Board has dealt with it and  
21 that's something that we can deal with by way of  
22 adjustment. But Mr. Warren and I believe the other  
23 customer reps would confine the interim order to the  
24 incremental DSM and GDAR, which in total, are \$3.343  
25 million versus my \$7.1 million.

26          Let me then just try to take you to some of the  
27 evidence with respect to price cap index values and weather  
28 normalization, which I have already touched on, which

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1 prompt us to say, you shouldn't make any interim inclusion  
2 of these dollars at this time for a number of reasons.

3 Now, I address the price cap value point in paragraphs  
4 19 and 20 of my factum. What we say is this: The untested  
5 evidence with respect to the components of a PCI adjustment  
6 factor for Union is capable of supporting findings that the  
7 sum of all of the components of the X factor will be more  
8 than sufficient to offset the currently forecast rate of  
9 inflation.

10 Let me just refer you, then, to the evidence which  
11 supports that statement. Part of it is found in the  
12 evidence of Dr. Loube, but it is spelled L-o-u-b-e. This  
13 was filed on behalf of the Consumers Council of Canada, the  
14 Vulnerable Energy Consumers Coalition and the City of  
15 Kitchener. What Dr. Loube has done is he has taken all of  
16 the data that PEG, Pacific Economics Group, uses. And the  
17 Pacific Economics Group data has a number of different  
18 weightings and different sample periods and this kind of  
19 thing, and Pacific Economics Group lands on a certain  
20 component of that mix that it prefers.

21 At page 25 of Dr. Loube's evidence, he has a table  
22 there summarizing the X factor calculations. He just takes  
23 that data and says: What is it at the higher the range?  
24 What is it at the lower the range? And he says this:

25 "Table 2 summarizes the different X factor  
26 estimates that are discussed in this testimony.  
27 The range is very large. It includes estimates  
28 that are greater than recent trends in inflation,

1           implying that a reasonable result would be annual  
2           reductions in rates over the term of the plan."

3           So my client and others take the view that we have  
4 evidence here that would support some rate reduction  
5 conclusions, and at the very least would support a  
6 conclusion that the rate of inflation and the X factor are  
7 offsets.

8           So any decision, I suggest, on an interim basis, that  
9 finds the net of those two items to be greater than zero  
10 will be perceived to be a prejudgment, and it will, in my  
11 submission, have a negative effect on the settlement  
12 conference discussions that are scheduled to commence on  
13 November the 14th.

14           This information that Dr. Loube refers to assumes a  
15 stretch factor of 50 basis points. If you assume a broader  
16 stretch factor of 50 basis points, then the conclusion that  
17 my clients draw from this evidence, the conclusion that  
18 they say it is capable of supporting, to the effect that a  
19 rate reduction is possible becomes even stronger.

20           On the question of stretch factor, the Board -- this  
21 Board in Union's first incentive regulation case, found  
22 Union's stretch productivity factor to be 140 basis points.  
23 Not 50. And in the electric case it is 125 basis points, I  
24 believe, was your determination in the first generation PBR  
25 there.

26           Those numbers are mentioned in the IGUA material that  
27 has been filed in this case.

28           So that is why we say that, in these circumstances,

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1 any interim order which implies a PCI adjustment factor  
2 greater than zero will be perceived as a prejudgment in  
3 Union's favour of disputed matters in issue. And we also  
4 say any, granting any interim relief in Union's favour with  
5 respect to the price cap will materially prejudice the  
6 settlement negotiations between intervenors and Union  
7 scheduled to commence on November 14th.

8 Now, with respect to the weather adjustment piece. I  
9 have already made my submissions on that point. It is  
10 simply one of the base rate adjustment issues and it's a  
11 topic on which the Board has already ruled against Union.  
12 So surely that issue ought not to be prejudged in Union's  
13 favour.

14 So it is for that reason that IGUA submits that the  
15 interim relief that you grant should be no greater than the  
16 \$7.1 million that I have referenced.

17 The other aspects of Union's request for relief that I  
18 think you should be aware of, is they're basing their claim  
19 for a price cap on revenue on general service PCI of 2.42  
20 percent and all other services at 1.30 percent. You will  
21 find those numbers in Exhibit D, tab 3, schedule 1 of  
22 Union's evidence.

23 That segregation between general service and all other  
24 turns on this average use decline topic, which is a matter  
25 in dispute certainly as between ratepayer interests, as  
26 well as between ratepayers generally and Union.

27 The point I want to emphasize is this. Again, in the  
28 evidence, and it's in Exhibit C13.1, this is Union's answer

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1 to IGUA where they were asked to show us the difference  
2 between what you're seeking and what PEG is recommending.  
3 On this spread topic, PEG's recommendations are quite  
4 different.

5 I will just give you these numbers, but at the 2004  
6 inflation rate that is shown in Exhibit D, tab 3, schedule  
7 1, the PEG recommendation for the price cap for general  
8 service M2 at rate 01 would be 1.99 plus 18, would be 2.27.  
9 And for the customers of which my client is part, the non-  
10 residential, it would be 0.08 plus 0.18, which would be  
11 0.26, and that assumes 50 basis points of stretch. If you  
12 have 75 basis points of stretch, then the result for the  
13 non-residential is essentially zero.

14 The point is, again, we really shouldn't be, in my  
15 submission, making decisions that will be perceived to tilt  
16 these debates one way or another, and the way to do that  
17 and respect the principle of fairness, procedural fairness,  
18 is to confine the interim rate increase to the 7.1 million,  
19 as I have suggested, or if you leave the stretch premium  
20 adjustment out at \$3.343 million.

21 The only other point that we make in our factum, and  
22 others have made it, it is in paragraph 23. Any interim  
23 order increasing Union's rates should be specifically  
24 conditioned to be without prejudice to the rights of any  
25 parties and subject to refund or other adjustment when the  
26 Board's final rate order issues.

27 Finally, with respect to Mr. Warren's client's  
28 submissions, if you could just put your finger on his

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1 factum, the point that he wished me to emphasize on his  
2 behalf is that his clients are also concerned about  
3 retroactive rate increases and avoiding retroactive rate  
4 increases, but they, similarly, have an equal concern with  
5 fairness and the rules of natural justice.

6 His submissions, in striking that balance, are  
7 contained in paragraphs 13 through to 15. I will just read  
8 15, where he says:

9 "The council agrees that avoiding significant  
10 retroactive charges is an important goal.  
11 However, the achievement of that goal must be  
12 balanced against the interest of ensuring that  
13 all rates reflect a full and fair consideration  
14 of the arguments and evidence of all parties. In  
15 order to strike the appropriate balance, the  
16 council submits that the Board should approve  
17 interim rates which reflect the matters  
18 previously approved by the Board, and therefore  
19 no longer contested, but not approve rates based  
20 on matters which are still contested."

21 And in an e-mail to me yesterday, he said:

22 "As I indicated in my e-mail the other day, I  
23 have included the incremental DSM and GDAR  
24 amounts in those items which are not contested.  
25 I did not include the storage premium simply  
26 because the NGEIR process is arguably not  
27 complete."

28 With that, I complete the submissions of Mr. Warren,

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1 which were much more eloquent than my own, on behalf of  
2 IGUA, and unless there are any questions, those are my  
3 submissions.

4 MR. KAISER: Thank you, Mr. Thompson.

5 MS. CHAPLIN: Mr. Thompson, are there any  
6 circumstances in which you would see that it would be  
7 appropriate for the Board to order a rate increase on an  
8 interim basis on contested items? Would financial distress  
9 be the only one, or would you even accept that that was  
10 appropriate?

11 MR. THOMPSON: Whether it is financial distress or  
12 not, it is a demonstration that the rates in 2008, current  
13 rates in 2008, will be insufficient to earn the allowed  
14 rate of return.

15 MS. CHAPLIN: I am just trying to square that in my  
16 mind with what that, then, does to your -- what the  
17 implication is for your argument with respect to fairness  
18 and prejudice. Does that still not arise, and how is that  
19 resolved in that set of circumstances?

20 MR. THOMPSON: Well, there is a demonstration, at  
21 least a prima facie demonstration -- there is some evidence  
22 to show that these current rates are too low and will not  
23 produce a reasonable return in 2008.

24 MS. CHAPLIN: But presumably other participants might  
25 dispute that evidence in the same way that you are  
26 disputing Union's evidence in this case regarding what it  
27 should be collecting for 2008.

28 MR. THOMPSON: Yes, but to dispute it, I think you

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1 would have to have some information before the Board that  
2 would support a submission similar to what I tried to  
3 capture in our factum, which is that the body of the  
4 evidence out there is capable of supporting a range of  
5 solutions.

6 When you are dealing with what are rates going to  
7 produce in a future test year, I think it is a little  
8 different than what we have here, which is trying to come  
9 up with a price cap based on a whole lot of data, where the  
10 data itself supports a broad range of conclusions.

11 MS. CHAPLIN: So your conclusion is that any sort of  
12 an increase on an interim basis, setting aside those items  
13 that the Board has already adjudicated, is inevitably  
14 predicated on some sort of consideration of the merits of  
15 that case?

16 MR. THOMPSON: It is predicated on some information to  
17 demonstrate that the current rates in the future will not  
18 be just and reasonable. You do not have that here.

19 Union specifically says, This is not our case. They  
20 don't lead any information. The stuff in your confidential  
21 filings may help you with what this, but we don't see  
22 anything of that nature.

23 MS. CHAPLIN: Oh, okay. So your test is that the  
24 current rates have to be not just and reasonable to  
25 continue as opposed to the test being that the proposed  
26 increase on its face is just and reasonable, because Union  
27 has provided some evidence to support it?

28 MR. THOMPSON: Well, not so much current rates are not

1 just and reasonable. It is the rates in the period for  
2 which Union is seeking rate increases are not just and  
3 reasonable.

4 We're saying it is very difficult to conclude that one  
5 way or the other in this particular case, except for these  
6 pieces that we say, Fine, add on, but at the end of the  
7 day, the whole package may go down. We are trying to find  
8 this balance that respects the fairness principle and we  
9 maybe can revisit it after the settlement conference. I  
10 don't know.

11 But we're very concerned what a decision before the  
12 settlement conference will do to the prospects of settling  
13 this on the basis of the information that we feel supports  
14 our case. It's a tough call. I appreciate it, but that's  
15 the way we feel about it.

16 MS. CHAPLIN: Thank you.

17 MR. SOMMERVILLE: Mr. Penny predicated a good portion  
18 of his argument -- Mr. Penny will have an opportunity to  
19 reply to this if I characterize this incorrectly, but I  
20 think what Mr. Penny was getting at is that there is a  
21 species of prima facie case here, and I think he was  
22 purposely not particularly rigorous about defining what  
23 that prima facie standard was, but that there was a  
24 critical mass of evidence to support the price cap piece  
25 and the weather normalization piece, in particular.

26 He is suggesting that in the -- that as a prima facie  
27 matter there is enough to support a Board decision for  
28 interim rates reflecting those elements of the application.

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1           Can you put your argument in that context, the context  
2 of the prima facie case that appears for the weather  
3 normalization and the price cap calculation?

4           MR. KAISER: Mr. Thompson, before you answer, I  
5 understood your submission to be, just to follow on that  
6 point, you went through the evidence of Dr. Loube. I took  
7 it you were making a position that a prima facie case has  
8 not been made with respect to the price cap, at least? Was  
9 that your point?

10          MR. THOMPSON: Yes. Nor with weather normalization.  
11 The prima facie case is the last Board decision. That was  
12 for the longer term, where they came in with their 20-year  
13 trend and the Board rejected it.

14          So under the Board's Rules of Practice and Procedure  
15 to vary that decision, there is a process to follow. You  
16 have to apply and you have to demonstrate material changes  
17 in circumstances.

18          So I would suggest that prima facie case on weather  
19 normalization is no weather normalization until they have  
20 demonstrated to your satisfaction that decision was wrong,  
21 and prima facie on base adjustments, base-rate adjustments,  
22 there is no evidence from Union to show current rates are  
23 too low.

24          The only information we have indicates they're too  
25 high. And prima facie I would suggest, on the storage  
26 adjustment, storage allocation of rate base to ex-franchise  
27 services, that has never been tested. The Board acted on  
28 some information it got from Union in argument, but when

1 you roll all of that together, I say, just leave the base  
2 alone for the purposes of interim rates.

3 MR. SOMMERVILLE: With respect, the prima facie case  
4 has nothing to do with the testing of evidence. Prima  
5 facie case is that there is evidence to the effect, in the  
6 absence of evidence to the contrary, that would support the  
7 finding.

8 So the question as to whether the evidence has not  
9 been tested is not crucial to that test, is it?

10 MR. THOMPSON: Well, I guess what I'm saying is there  
11 is lots of evidence to the contrary, on the base rate  
12 adjustment issue. They're saying it should go up.

13 MR. SOMMERVILLE: Right.

14 MR. THOMPSON: We say, okay, we think it should go  
15 down.

16 MR. SOMMERVILLE: I understood you to be saying with  
17 respect to the storage forecast evidence, that that  
18 evidence simply has not been tested. In my view, that is a  
19 different standard.

20 MR. THOMPSON: I take your point. But on the price  
21 cap, I say the evidence -- there's no prima facie case one  
22 way or the other, that the evidence supports a broad range  
23 of conclusions and we shouldn't go there by way of interim  
24 relief, because of the way it distorts what I say is the  
25 fairness principle. If that helps.

26 MR. KAISER: Thank you. We will take the morning  
27 break now and come back in 15 minutes.

28 --- Recess taken at 11:00 a.m.

1 --- Upon resuming at 11:31 a.m.

2 MR. KAISER: Please be seated. Mr. Buonaguro.

3 **SUBMISSIONS BY MR. BUONAGURO**

4 MR. BUONAGURO: Thank you. VECC submitted a factum as  
5 well, and I will make some brief references to it to  
6 summarize some of our positions. With respect to Union's  
7 request for an interim rate order in simplicitor, we  
8 haven't objected to that.

9 With respect to adjustments related to "uncontested  
10 matters", Mr. Thompson properly put us in his camp on those  
11 issues. Specifically, in paragraph 3 of our factum, we  
12 have agreed to those changes, insofar as the rate  
13 adjustments pending relate to previous Board decisions on  
14 these matters. So it goes beyond his group. He specified  
15 an exception for IGUA in terms of relating those  
16 adjustments to previous Board decisions, and we're also in  
17 that camp. So in that respect, I think I can fairly rely  
18 on his detailed submissions on those "uncontested matters".

19 With respect to the rest of the requested relief,  
20 which relates to issues which are contested in this  
21 proceeding, I think I can -- our factum summarizes our  
22 position, which was that you shouldn't award those  
23 increases as part of an interim rate increase. I think the  
24 paragraph that best summarizes our position is paragraph 8,  
25 which talks about the competing interests between, I guess,  
26 what the company puts forward as its prima facie case and  
27 the intervenor positions on its prima facie case in  
28 opposition.

1           Mr. Thompson took you through a variety of examples,  
2 and specifically brought you to Dr. Loube's evidence on a  
3 potential rate freeze, based on his evidence, or even a  
4 rate decrease.

5           Our submission is that the Board, at this stage,  
6 shouldn't be put in the position of having to decide  
7 between one prima facie case versus another, absent -- and  
8 the way we have put it absent extraordinary circumstances.  
9 It is our feeling that extraordinary circumstances haven't  
10 been shown to exist in this case, which takes me to the  
11 more specific point I would like to make orally, and it is  
12 with reference to the case that Union put in this morning.

13           They refer to it in their factum, but they provided it  
14 to the Board this morning, the Bell Canada case, and the  
15 reason why we're here in the first place. The case at page  
16 22, and it has been cited a couple of times now, sets out  
17 why it is that interim rates are applied for in the first  
18 place. And to quote the first full paragraph at page 22 of  
19 that case, and Mr. Penny brought it to your attention a  
20 couple of times, he says that:

21                   "...its purpose is to provide temporary relief  
22                   against the deleterious effects of the duration  
23                   of the proceedings..."

24           That's why you apply for an interim rate order. In  
25 his submissions-in-chief today, he mentioned what I  
26 understood to be two deleterious effects that he's trying  
27 to avoid through this motion: first, the obvious one,  
28 which I don't think anybody has opposed, the deleterious

1 effect of not being able to recover up to six months' worth  
2 of rates at all, because rates aren't interim. By granting  
3 an interim rate order, that deleterious effect can be  
4 avoided. I don't think I have to say anything more about  
5 that.

6 The second one, as I understand it, is -- and the  
7 company has conceded that it is not financial hardship or  
8 any kind of issue related to financial deterioration, which  
9 was the primary reason for the interim rate increase asked  
10 for in the Bell case, but rather the risk that there will  
11 either be an over-collection or under-collection of rates  
12 as a result of interim rate order effective January 1st.  
13 That appears to be the deleterious effect that Union is  
14 trying to avoid as the purpose for the motion.

15 The problem that we have with that is that in every  
16 interim rate order, that risk is realized or that becomes a  
17 risk. The mere fact of ordering rates to be interim will  
18 trigger that risk. You have a risk of over-collecting.  
19 You have a risk of under-collecting. So it can't simply be  
20 the triggering of that risk or the creation of that risk  
21 through an interim rate order that grounds an order for an  
22 interim rate increase. There has to be something more to  
23 that.

24 Again, in our paragraph 8, we have called it an  
25 extraordinary circumstance. In the Bell case, they talked  
26 about an emergency situation. The question that I pose is:  
27 Where is the emergency? Where is the extraordinary  
28 circumstance? I don't think anything has been demonstrated

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1 yet.

2 Now, in the event that -- I guess arguably what Union  
3 is saying is that the chances of under-collection is an  
4 extraordinary circumstance or some sort of emergency  
5 situation. And the Board put it to Union, If your customer  
6 -- which would you prefer? Are we supposed to decide which  
7 customers prefer under-collection or over-collection? And  
8 sort of put it to ratepayers to say something about that.

9 From our perspective, and on the facts of this case, I  
10 look at or we look at under-collection as being the  
11 preferred option or the preferred risk to take for a simple  
12 reason.

13 If you over-collect rates through an interim rate  
14 increase, you are going to over-collect month by month a  
15 full month's worth of over-collection within the term of  
16 the rates. So if rates are interim for four months as a  
17 result of delay in the proceeding, you're going to over-  
18 collect -- and it turns out rates are going to be lower,  
19 you're going to over-collect for four months. That four-  
20 month over-collection is going to have an impact within the  
21 four months. They will be over-collecting within those  
22 four months.

23 If you under-collect in those four months and you're  
24 going to go -- and it turns out that the rates that are  
25 finally ordered are too low, therefore under-collection,  
26 the Board has some flexibility in terms of looking at the  
27 quantum of the under-collection and then making an order as  
28 to how those are collected in the future in order to make

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1 up the difference.

2 So you might have four months of under-collection, but  
3 the Board could order a longer term to mitigate the impact  
4 of that under-collection by recovering it in any number of  
5 ways.

6 So in that basic way, based on the facts of this case,  
7 we would suggest (a) that there is no emergency situation  
8 that has been demonstrated anyway; but even if it is, I  
9 think that the preferred option is to under-collect,  
10 because the Board will have flexibility to look at what the  
11 actual under-collection is, and then mitigate the impact on  
12 customers, if mitigation is necessary, by making the  
13 appropriate order at the time that the actual rates are  
14 set.

15 In essence, those are my submissions. Thank you.

16 MR. KAISER: Thank you. Mr. Ryder.

17 **SUBMISSIONS BY MR. RYDER**

18 MR. RYDER: Thank you. The only facts that I would  
19 ask you to take into account that were not listed in  
20 Union's factum is, first of all, that there are petitions  
21 outstanding on the storage premium issue which relate to  
22 the NGEIR implementation item. And, secondly, as noted by  
23 others, there appears to be a distinct possibility of Union  
24 over-earning in 2007. So there may have to be an  
25 adjustment to base rates as the base revenue requirement  
26 for the incentive regulation plan.

27 Now, let me turn directly to issue 2 raised by Union's  
28 application, and, on that issue, Kitchener has no objection

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1 to an increase for those items which have received final  
2 approval, and that would include the adjustments for GDAR  
3 and DSM.

4 That leaves outstanding the other three adjustments:  
5 First of all, for the NGEIR implementation; secondly, for  
6 weather normalization; and, thirdly, for the price cap  
7 index. Kitchener objects to an increase, an interim  
8 increase, to take into account those items.

9 The numbers that illustrate those items are, as Mr.  
10 Thompson said, attached to schedule -- or shown on Schedule  
11 A to his factum and Schedule A, I am told, has primarily  
12 been developed by Mr. Aiken, and Mr. Gruenbauer wanted me  
13 to make that attribution. He has some responsibility, but  
14 he gives primary responsibility to Mr. Aiken.

15 Now, dealing first with the NGEIR implementation.  
16 That, of course, still remains the subject of a petition to  
17 Cabinet. Cabinet hasn't decided on the petitions yet. And  
18 I submit that you should consider this item as any court  
19 would consider an item that is subject to appeal, and of  
20 course an item which can be stayed if it is pending appeal,  
21 and the case law on stay applications, while it is  
22 voluminous, it goes in every direction, basically comes  
23 down to the question of the balancing of convenience  
24 between staying or not staying.

25 And in the circumstances here, it is only November 5,  
26 and the petitions could well be answered before January  
27 1st. I submit the premium amount should simply be kept out  
28 of any interim order that you decide on until the petitions

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1 have been decided.

2 Now, with respect to the other items of costs which  
3 have not yet received final approval, and that is the  
4 weather normalization method change and Union's price index  
5 plan, I submit there should be no interim order for two  
6 reasons. The first is that it can't be said that their  
7 inclusion in rates would result in just and reasonable  
8 rates, which is still the governing requirement for your  
9 jurisdiction. And turning that issue around, it means that  
10 it can't be said that Union has made out a prima facie case  
11 that its rates should be increased. I say you can't say  
12 that Union has made out a prima facie case any more than  
13 you can say the intervenors have made out a prima facie  
14 case.

15 For example, in particular, the possibility exists  
16 that rates could remain unchanged and, more importantly, on  
17 a prima facie basis, there is no evidence that Union will  
18 not earn its allowed rate of return.

19 So on one of the admitted criteria for interim relief,  
20 which is a prima facie case, that hurdle has not been  
21 crossed.

22 Now, with respect to your determination of the  
23 existence or otherwise of a prima facie case, let me just  
24 add to the debate, that I submit you must consider all of  
25 the evidence before you. You can't be selective in your --  
26 in the evidence that you consider and only consider the  
27 evidence of the company.

28 If I am wrong in that and if you can just consider the

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1 evidence of the company, then even there a prima facie case  
2 has not been made out, because there is no evidence that  
3 Union will not earn its allowed return in 2008.

4 So I submit that on a number of fronts, the  
5 requirement of a prima facie case has not been met here.

6 The second reason I oppose interim relief on those two  
7 items of weather and price cap index is based on the second  
8 criteria for interim relief that the courts apply, and that  
9 is that the balance of convenience must favour the granting  
10 of interim relief. And I submit this test addresses the  
11 balancing raised in questions by Ms. Chaplin, as between  
12 the benefit of collecting too much and then returning it  
13 later, as opposed to collecting too little and collecting  
14 the balance later.

15 While it is agreed that retroactive charges are to be  
16 avoided, so too is the requirement of telling customers  
17 that the interim increase was unjustified and has to be  
18 returned to the customers. And on that balance, the City  
19 of Kitchener, as a customer, prefers to hold in hand the  
20 disputed amounts and then, if required, return it in July  
21 of 2008 or whenever your final decision is made. We would  
22 rather that scenario than have Union hold the money for us  
23 and then return it to us in July 2008.

24 I would have thought that the same reasoning would  
25 apply to most customers, if not all customers. A bird in  
26 hand is not to be deprecated.

27 So those are my submissions, thank you.

28 MR. KAISER: Thank you. Mr. Millar.

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1           **SUBMISSIONS BY MR. MILLAR**

2           MR. MILLAR: Mr. Chair, we did prefile a brief  
3 submission. I don't intend to go over it here. It simply  
4 outlines some of the options that Board Staff saw as being  
5 before the Board and some of the implications of following  
6 those options but I have nothing to add.

7           MR. KAISER: Thank you. Mr. Penny.

8           **FURTHER SUBMISSIONS BY MR. PENNY**

9           MR. PENNY: Yes, thank you, Mr. Chairman. I will be  
10 very brief, but let me begin by at least giving a partial  
11 answer to Mr. Sommerville's question about the dollars  
12 involved.

13           Mr. Sommerville, what we determined at the break was  
14 that approximately 65 percent of the billing units occur in  
15 the first six months. So if, as we anticipate currently  
16 that rates were not implemented till July, then you would  
17 find an accumulation of 65 percent of what other ultimate  
18 increase might occur as a result of a final order would  
19 occur between January 1, 2008 and the end of June 2008.

20           To take your example on a global basis of rate M1, you  
21 would, in order to work this out -- we did the math. I  
22 will just describe briefly the methodology and then give  
23 you the bottom line, but we took the total. So we took  
24 delivery and storage. I am looking now at tab 3, schedule  
25 5, page 2 that we were looking at earlier. You took the  
26 difference between column A and column J. For both the  
27 delivery revenue and the storage revenue, you get a \$12.458  
28 million difference between what's in current rates and what

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1 would obtain from the approval of what Union is seeking.

2 And 65 percent of that is 8.098 million.

3 So the accumulated retroactive charge by July of 2008  
4 would be for M1, would be roughly \$8 million.

5 MR. SOMMERVILLE: Thank you.

6 MR. PENNY: Is that what you were looking for?

7 MR. SOMMERVILLE: Do you have a sense of what the  
8 monthly or what the accumulated balance would be for the  
9 average customer?

10 MR. PENNY: The people in Chatham are working on a  
11 specific -- and maybe what I could do is follow up. But I  
12 think on a preliminary basis, you would get -- if you will  
13 just bear with me for a second.

14 I think on a preliminary basis, if -- you probably  
15 don't have this, but Exhibit D, tab 3, schedule 11, page 1  
16 has the general service customer bill impact. It is for  
17 rate M1, assuming an annual consumption of 2600 square  
18 metres of product. That shows that the total delivery  
19 charge impact of the entire proposal is \$14.74 per month  
20 -- sorry, per year.

21 MR. SOMMERVILLE: That's per year?

22 MR. PENNY: Yes, I apologize. So again if you --  
23 directionally, and we're working on making sure this is  
24 right -- but directionally, if you took 65 percent of that  
25 you would be talking about the accumulated amount, so that  
26 is about roughly nine or ten dollars.

27 MR. SOMMERVILLE: I think that gives me what I needed,  
28 subject to my fellow Panel Members, if they need any more

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1 specificity. I am satisfied with that answer.

2 MR. PENNY: All right. Thank you.

3 So let me then just respond very briefly to a couple  
4 of the submissions you have heard.

5 I wanted to say, perhaps partly in jest, but to make  
6 what I think is a serious point. Mr. Poch described what  
7 we're talking about here, which is the timing difference of  
8 when we collect the rates, as a relatively minor concern.  
9 And I simply rhetorically say that this is -- well, I don't  
10 say rhetorically. I say this is not, in Union's view, a  
11 minor concern; that our experience with retroactive charges  
12 is that they are taken very seriously by customers. And  
13 the rhetorical part is let Mr. Poch man the phones in July  
14 if there's six months of an accumulated increase.

15 It's not a relatively minor concern, in my submission.

16 Now, with respect to -- I will take Mr. Thompson's  
17 submissions on behalf of IGUA as the paradigm, if you will.  
18 Some others have said similar things. But I wanted to make  
19 the observation that most of his submissions were on the  
20 merits.

21 He is, in effect, saying, Well, there is other  
22 evidence, too. There isn't just Union's evidence, and it  
23 is not a foregone conclusion that Union will succeed in  
24 everything it asks for.

25 Well, we accept that. We disagree with him and, in  
26 fact, for example, on this weather normalization piece, I  
27 couldn't disagree with him more on his analysis of that  
28 situation. It's not, in our view, at all foreclosed by the

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1 prior Board decision, and it is simply fatuous to suggest  
2 that we require some variance of that [inaudible].

3 But it is all irrelevant to the issue before us  
4 today, is my point. The issue before us today is: What is  
5 the risk of the accumulation of accumulated retroactive  
6 charges?

7 I say, for today's purposes, I turn that around: Is  
8 it a foregone conclusion that Union will fail? And the  
9 answer to that surely is no.

10 That means that there is a prima facie case. And I  
11 will come to Mr. Sommerville's question, but put another  
12 way: If Union's evidence were accepted, would it support  
13 the rate increases that Union is seeking? That's a prima  
14 facie case.

15 The fact that there is another prima facie case,  
16 perhaps, and I'm not even sure there is, but to grant Mr.  
17 Ryder the point that maybe -- well, if there is some other  
18 evidence, maybe that's a prima facie case that Union might  
19 fail or that some other result might obtain. That is  
20 not -- again, that is not the point. We're not weighing  
21 the balance of the evidence. We're weighing the risk.

22 And we say, of course, that if Union's evidence were  
23 accepted, that it does support the rate increases that  
24 Union is seeking.

25 So it is simply not relevant that there may be other  
26 evidence going the other way, because you're not weighing  
27 the evidence.

28 At the end of the day, I think Mr. Thompson

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1 effectively conceded this, because he said that the issue  
2 was weighing the risk of the accumulated retroactive  
3 charges against the perception - he said the perception -  
4 of prejudice.

5 In my submission, you can't say there is no risk of  
6 accumulated retroactive charges, but you can say there is  
7 no material risk of prejudice, because it is simply wrong  
8 to say there is prejudice associated with an interim  
9 order, and that's clear from the Supreme Court decision in  
10 the Bell and CRTC case.

11 You are not prejudging anything, and to the extent  
12 that there is a "perception", it is not clear whose  
13 perception that is. It is certainly not a perception we  
14 would hold. It is not a perception the Board would hold,  
15 and presumably it is not a perception that IGUA or Mr.  
16 Thompson -- well, IGUA. Forget Mr. Thompson, he is just  
17 the lawyer -- that IGUA would hold.

18 And so if there is a prejudice, in my submission,  
19 all you're prejudging is that mitigating the risk of  
20 significant accumulated retroactive balances is a desirable  
21 outcome. That is the only prejudice that is associated  
22 with what we're here today to do.

23 So accepting Mr. Thompson's characterization of the  
24 balance you're trying to strike, I say that it clearly  
25 weighs in favour of avoiding that risk, because there is no  
26 -- there is no risk of a perception of prejudice, or at  
27 least not one that would be warranted in any way, in any  
28 material way, by the law.

1           So those are my submissions in reply, subject to any  
2 further questions of the Board.

3           MR. KAISER: Thank you.

4           [Board Panel confers]

5           MR. KAISER: We will come back in half an hour.

6           --- Recess taken at 11:56 a.m.

7           --- On resuming at 12:05 p.m.

8           MR. KAISER: Please be seated.

9           **DECISION**

10          MR. KAISER: The Board this morning heard a motion by  
11 Union Gas filed on September 21st seeking two Board Orders.  
12 First, an order declaring that Union's rates for the  
13 distribution, transmission and storage of natural gas would  
14 become interim effective January 1st, 2008. Secondly, an  
15 order implementing new interim rates effective January 1st,  
16 2008 in accordance with Exhibit D, tab 2 of Union's  
17 prefiled evidence in this proceeding.

18          The rate increase at issue is approximately \$15 a year  
19 on the average consumer bill for a M1 customer which is  
20 currently \$350. That would rise to \$365 on an annualized  
21 basis.

22          Union concedes that this is not a hardship case and it  
23 is not seeking an interim rate increase due to financial  
24 distress. The company argues that the sole issue at play  
25 here is the avoidance of having to collect significant  
26 retroactive charges later in the year.

27          There are six consumer groups represented in this  
28 proceeding and all oppose Union in this application to

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1 varying degrees. The intervenors all agree that  
2 retroactive charges are to be avoided. However, they all  
3 argue that this goal must be balanced against the interests  
4 of ensuring that all rates receive full and fair  
5 consideration of the arguments and evidence of all of the  
6 parties.

7 The intervenors argue that in order to strike an  
8 appropriate balance, the Board should approve by way of  
9 interim rates only those matters that have been previously  
10 approved by the Board or are uncontested. There are  
11 differences between them, however and I will come to those  
12 in a moment.

13 VECC points out, as others do, that the choice is  
14 between under-collecting or over-collecting, and that  
15 under-collecting, in their view, is to be preferred. In  
16 part because the Board can take steps later in this  
17 proceeding to mitigate those amounts, i.e., spreading those  
18 amounts over longer periods, should that become necessary.

19 Kitchener supports this as does SEC. Kitchener says  
20 that the Board should apply the balance of convenience test  
21 and in applying that test the Board should move towards  
22 under-collecting as opposed to over-collecting. As Mr.  
23 Ryder says, a bird in the hand is something not to be  
24 dismissed lightly.

25 The amounts at issue are set out in Schedule A of Mr.  
26 Thompson's factum which reflects Exhibit D, tab 3, schedule  
27 3. The total amount of the change, if Union's application  
28 were granted in full, adds up to \$21.9 million. That is

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1 made up of five components; the storage premium is \$3.7  
2 million. The price cap is \$8.7 million. Weather  
3 normalization is \$6.2 million. Incremental DSM is \$1.7  
4 million. And GDAR is \$1.6 million.

5 IGUA and others would allow an interim increase  
6 totalling some \$7 million, which reflects amounts for the  
7 storage premium, incremental DSM and the GDAR.

8 Kitchener agrees with the GDAR and incremental DSM,  
9 but does not believe the storage premium should be granted  
10 by way of interim rate increase at this time. That's  
11 because there is a petition filed by Kitchener and others  
12 to the provincial Cabinet which has yet to be ruled on.

13 The DSM and GDAR amounts alone would yield an interim  
14 rate increase of approximately \$3.3 million.

15 There have been various arguments regarding the degree  
16 of analysis and fact finding the Board should engage in at  
17 this point. At one end of the spectrum, Mr. Penny says  
18 that the Board is not expected to make any fact finding or  
19 decision on the merits at this point, it being understood  
20 this is an interim decision which is all subject to change  
21 ultimately when the final decision is made.

22 However, Mr. Penny also concedes that he should  
23 establish a prima facie case. He says a prima facie case  
24 simply means that if his evidence is accepted, it would  
25 yield the interim rate increase he is requesting.

26 Mr. Thompson has taken that a step further. With  
27 respect to the price cap and weather normalization, he  
28 argued that a prima facie case is not made out on the

1 evidence. He refers to the evidence of Dr. Loube, that  
2 there is untested evidence with respect to the components  
3 of the PCI adjustment factor for Union, and it is capable  
4 of supporting findings that the sum of all components of  
5 the X factor will be more than sufficient to offset the  
6 currently forecasted rate of inflation.

7 The Board is not of the view that we need to engage in  
8 a detailed fact-finding analysis at this point. The  
9 evidence is untested. Everyone recognizes that. We are  
10 mindful of the real issue here. It is not an issue of  
11 hardship. It is an issue of what is in the best interests  
12 of the consumers, or the customers. The customers are  
13 represented here by six different groups. And to a man,  
14 they all argue that under-collection is the preferred  
15 route.

16 VECC has raised a concern as have others, that any  
17 decision at this point would prejudge the outcome of the  
18 settlement process or prejudge the Board's ultimate  
19 decision. We do not agree with that. We do not think this  
20 decision, in any way, prejudices the Board's position on any  
21 of these matters.

22 But weighing all of the interests, we have come to the  
23 conclusion that we should accept the position outlined by  
24 Mr. Thompson. That is to say, the interim rate increase  
25 should be allowed to the extent of the \$7 million, as set  
26 out in Schedule A of his factum.

27 Any questions?

28 MR. POCH: Mr. Chairman, just a point. I believe --

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1 and correct me if I'm wrong, Mr. Thompson -- that would --  
2 of necessity right now doesn't include LRAM adjustment,  
3 because I presume it is not calculated yet. I will perhaps  
4 wait for my friends at Union. And the Board may simply want  
5 to word the -- to accommodate that, once known.

6 MR. KAISER: Is that in there, Mr. Thompson?

7 MR. POCH: I was observing, I believe the seven of  
8 necessity doesn't include the LRAM amount because it's not  
9 yet specified. Is that correct? I'm not sure.

10 MR. KAISER: Mr. Thompson.

11 MR. THOMPSON: The application was based on the  
12 Exhibit D, tab 3, schedule 3. [inaudible]

13 MS. CHAPLIN: Microphone.

14 MR. THOMPSON: Sorry. I don't know if LRAM is in or  
15 out, or what my friend is even talking about, quite  
16 frankly. But I don't know if Union was asking any special  
17 relief with respect to that.

18 MR. PENNY: From our perspective is it is immaterial  
19 in the LRAM. It doesn't matter to us. Some of it is up.  
20 Some of it is down.

21 MR. KAISER: Ms. Chaplin has asked me to point out  
22 that we are accepting the implementation of the new M1 and  
23 new M2 rate classes.

24 MR. PENNY: Thank you.

25 MR. KAISER: Any further questions? Thank you,  
26 gentlemen.

27 MR. PENNY: Thank you.

28 --- Whereupon the hearing adjourned at 12:15 p.m.

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