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ALBERTA UTILITIES COMMISSION
ROUNDTABLE DISCUSSION
Wednesday, February 2, 2011
Calgary, Alberta

1 Proceedings taken at the Alberta Utilities Commission,
2 400, 425-1st Street, SW, Calgary, Alberta
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4 February 2, 2011
5 D. Larder Chairman
6 D. Lowther AUC
7 C. Hughes AUC
8 A. Davison AUC
9 A. Michaud, Ms. AUC
10 Dr. M. Yahya AUC
11 B. Heggie AUC
12 C. Price TransAlta Corporation
13 L. Soria, Ms. ENMAX Energy
14 L. Connors, Ms. Counsel for AESO
15 J. Irving Powerex
16 K. Robinson, Ms. Powerex
17 D. Wood Counsel for Suncor
18 S. Heming, Ms. Suncor
19 K. Scott ATCO Power
20 M. Dylke, Ms. ATCO Power
21 H. Chandler MSA
22 D. Wilson MSA
23 M. Kocsar TransCanada Energy
24 J. Forrest TransCanada Energy
25 D. Crowther Counsel for Capital Power
L. Meyer, Ms. Capital Power
A. Ross Counsel for AltaLink
J. Petch Contractor
G. Kaiser Energy Arbitration Chambers
K. Poteet EPCOR
D. Gerbrandt, CSR(A) Official Court Reporter

21 MR. LOWTHER: Good morning, everyone. My
22 name is Darin Lowther, and I'm director of markets for the
23 Commission. I'm going to deal with some preliminary matters
24 before we get into the main subject matter. I notice ENMAX
25 isn't here yet. They did RSVP, so hopefully they're able to

1 make it shortly.

2 I'm going to start by recapping some of the
3 material that we sent out today just to make sure that
4 everyone around the table is up to speed with the
5 consultation about settlement agreements that we initiated
6 last November.

7 On November 12th of 2010 the Commission issued
8 Bulletin 2010-33. In that bulletin we identified the scope
9 of the consultation by five different issues that we
10 identified, and we invited the stakeholders to comment on the
11 topics in that bulletin or suggest additional topics.

12 On November 30th, 2010, the Commission
13 provided clarification requested by the MSA that the scope of
14 consultation was not intended to include the exercise of
15 discretion regarding specified penalties granted to the MSA.

16 On December 17th we issued a discussion paper
17 authored by Gordon Kaiser, who is here today and has been
18 retained by the Commission to assist on this consultation.

19 And then finally on January 24th we issued a
20 second discussion paper authored by John Petch, who is also
21 here today and has been retained by the Commission to assist
22 in this consultation. The Petch paper was distributed on
23 January 24 to all market participants on our market
24 distribution list.

25 I want to add that on January 27 the Alberta

1 Securities Commission requested that we remove that paper
2 from our website, which we've done. They expressed some
3 concern that the paper contained what they characterized as
4 non-public ASC enforcement procedures. They are aware,
5 however, that the paper has been distributed to all the
6 parties here and to all the parties on our markets
7 distribution list. So if you're wondering why it's not on
8 the website, that's why.

9 On the 24th of January we sent out an agenda
10 and assigned topics to get the ball rolling with respect to
11 various issues that were raised by parties. We assigned
12 people to kick that off. I want to extend our apologies to
13 ATCO Power. They were inadvertently omitted from that
14 process, and we distributed their comments and posted their
15 comments on January 31st.

16 One addition to the agenda -- or two additions
17 to the agenda, I guess. We're going to ask Gordon Kaiser to
18 give a five-minute introduction to the items that he raised
19 in his paper and we're going to do the same thing with John
20 Petch. We'll start with Gordon first so we'll insert him
21 just prior to the MSA on the agenda.

22 We intend for this process to be open and
23 informal and on a without-prejudice basis. So the discussion
24 here is intended to not be used in any other proceeding or in
25 any other forum. We also anticipate that after today's

1 session you may want to submit written comments. We will
2 finalize that at the end of the process, but for
3 contemplation purposes at the outset we're going to
4 tentatively suggest that two weeks from today, February 16,
5 we would invite you to submit any final comments after you
6 absorb what's discussed today.

7 In terms of schedule we have the morning
8 scheduled. We'll plan for a break around 10:30. We're going
9 to have lunch brought in around noon and reserve an hour for
10 lunch. If necessary we will continue into the afternoon. It
11 just depends on the extent of the discussions that are taking
12 place.

13 As you see, we have tent cards in the room for
14 everyone. This is to assist our court reporter in catching
15 your name and your organization. I would ask you to keep
16 those tent cards visible so that she's able to better see
17 who's speaking, and would you please be mindful of having
18 only one person talk at a time so that she can catch that on
19 the transcripts.

20 To get the floor I will just ask you to raise
21 your tent card, and that can assist the meeting chair in
22 knowing that you would like to make a point.

23 In terms of the transcripts, we intend for
24 those to be made available to everyone. What we're planning
25 to do there is to distribute the draft version for people to

1 make corrections on. Once that's done we will distribute to
2 all parties the transcripts and we plan to post them on the
3 website and make them part of the record in this
4 consultation.

5 I would like to introduce Doug Larder, who is
6 beside me here. He is general counsel for the Commission and
7 he will be chairing the meeting. I would also like to
8 introduce Moin Yahya and Anne Michaud. They're commissioners
9 and they are here mostly to listen. They will not be
10 answering any questions, but they may comment or pose a
11 question from time to time.

12 In terms of facilities -- I see a tent card.
13 DR. YAHYA: I'm demonstrating the use of a
14 tent card and interjecting and saying that while members of
15 the Commission will also be making comments, they will be
16 doing so also on a without prejudice basis.

17 MR. CHANDLER: But still not answering
18 questions.

19 DR. YAHYA: We can modify the agenda as we
20 go.

21 MR. LOWTHER: Before we continue, just a
22 word about our facilities. The men's room is just across the
23 hall. We have a pass card for the women's. It's on the far
24 side of the lobby so you have to use that pass card to get
25 through the glass doors.

1 In the remote event that we have a fire alarm
2 the emergency exit is straight across the hall and you
3 proceed down the stairs. You can take instructions from
4 people that have little red hats on. We have a few.
5 There's coffee at the back of the room.
6 And I guess with that I would propose to go
7 around the table to have people introduce themselves and
8 their organization. And then after that we'll check to see
9 if there are any preliminary questions and then I will turn
10 it over to Doug to chair and Gordon to give his introductory
11 comments.
12 So we'll proceed with you.
13 MR. PRICE: Cairns Price. I'm with
14 TransAlta Corp.
15 MS. SORIA: I'm Liz Soria. I'm with ENMAX
16 Energy. I'm the vice-president of corporate responsibility
17 but compliance is within my portfolio.
18 MS. CONNORS: I'm Lynsey Connors, legal
19 counsel for the AESO.
20 MR. IRVING: I'm John Irving. I'm chief
21 legal officer of Powerex Corporation. And with me later on
22 this morning will be Katherine Robinson, who is corporate
23 counsel at Powerex.
24 MR. WOOD: I'm David Wood, counsel for
25 Suncor.

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1 MS. HEMING: Susan Heming. I'm working
2 with Suncor.
3 MR. SCOTT: Kelly Scott, manager of
4 compliance for ATCO Power.
5 MS. DYLKE: Mary Dylke, ATCO Power.
6 MR. CHANDLER: Harry Chandler, MSA.
7 MR. WILSON: Douglas Wilson. I'm Harry's
8 boss. It's quite true, quite true.
9 MR. KOCSAR: Mark Kocsar. I'm a compliance
10 manager with TransCanada.
11 MR. FORREST: Joel Forrest. I'm with
12 regulatory law at TransCanada as well.
13 MR. CROWTHER: Doug Crowther. I'm here as
14 counsel for Capital Power.
15 MS. MEYER: I'm Lynn Meyer. I'm the
16 vice-president of regulatory and compliance at Capital Power.
17 MR. ROSS: I'm Alan Ross with Borden
18 Ladner Gervais, acting for AltaLink.
19 MR. PETCH: John Petch.
20 MR. KAISER: Gordon Kaiser.
21 MR. POTEET: Kirk Poteet with EPCOR.
22 THE CHAIR: Doug Larder, AUC.
23 MR. LOWTHER: Are there any questions on the
24 preliminary items or any items that we happened to omit?
25 Great.

1 Doug?
2 THE CHAIR: Thanks everybody for coming.
3 Maybe to emphasize a couple of those housekeeping matters
4 that Darin talked about. Donna is our court reporter down at
5 that end. I know we have the tent cards, but maybe the first
6 couple of times that you speak you could identify yourself.
7 Cell phones, BlackBerries, I would appreciate
8 it if you would put those back in your pockets and turn them
9 off.
10 We've scheduled this session for today. We
11 think we'll get through by noon, but if we don't we hope
12 you'll stick around. We can work through lunch. We'll have
13 lunch brought in.
14 You know in some ways, given Harry's view on
15 enforcement -- and it was articulated very well at the Power
16 Summit this year. It's a public document. This roundtable I
17 think in many ways is more important than the last one we
18 had. So I am encouraging everyone to speak up, to speak
19 frankly. I'll emphasize again we may be keeping a transcript
20 so we can have our commissioners look at that and get the
21 fullness of the debate, but we're not holding anybody to
22 anything that you say here. So please participate as fully
23 as you can.
24 Darin made reference to the ATCO submission.
25 There's a lesson there. If you have two people to e-mail

1 things to and one of them is mine, don't e-mail it to me.
2 That sat in my inbox for about ten days. I apologize, Kelly.
3 MR. SCOTT: No worries.
4 THE CHAIR: So without further adieu then
5 we'll kick it off and Gordon will introduce the topic here.
6 MR. KAISER: Well, when I was retained to
7 do this, to write this report, I was told "Well, just survey
8 the landscape and don't make any recommendations." I may
9 have come close to contravening that rule, but it was
10 unintentional if I did.
11 So what I started to do was -- I thought well,
12 I'll look at the antitrust area since I know a little bit
13 about that; I'll look at the energy area, I know a little bit
14 about that; I'll look at securities law, which I know nothing
15 about. But fortunately I hired a bright, young kid who had
16 worked with the Ontario Securities Commission who was now
17 practising law in Toronto.
18 I thought it was useful to look at what the
19 Americans would do just because I grew up in British Columbia
20 and we always believed that whatever the Americans would do
21 was right. And we learned that when they opened Disneyland
22 and believed that ever since. So I went to Washington and I
23 talked to some lawyers I knew in the justice department and
24 other agencies such as FERC and the FTC and the SEC to try
25 and get as best as I could an honest overview of what the

1 other people were doing, and also to answer a question that
2 was in the back of my mind at the beginning as I started to
3 review this situation, is why has it gone off the rails here
4 in Alberta.

5 I had, had some experience, well, in two
6 principle areas, which I suppose reflected my initial views.
7 One, and Harry would be familiar with this, was negotiating
8 prohibition orders or consent orders on behalf of the
9 competition authorities. They had a procedure and still have
10 a procedure where without admitting any liability the Federal
11 Court would issue a prohibition order and it would become an
12 order and enforceable, et cetera. So we had that procedure.
13 And of course we had the procedure before the Ontario Energy
14 Board, which I'll speak to in a moment.

15 And as I started to look at this whole issue
16 of confidentiality and notice and public participation I
17 reflected on why it works in some areas and why it doesn't
18 work in other areas. One of the things as we went through
19 the process, it became pretty clear that there were two
20 phases. Whatever the statutory structure was or the practice
21 there was an investigatory negotiation stage, which was
22 invariably confidential, and there was an approval stage,
23 where somebody approved the deal because invariably the
24 parties wanted the deal to become part of an order so it
25 would be enforceable, and invariably that was public to

1 various degrees, which we'll discuss.

2 You know, for instance I looked at the Federal
3 Court procedure, and I was involved in a number of these
4 orders and, you know, there was no public notice. You simply
5 showed up at the Federal Court and you had an agreed
6 statement of fact and the two lawyers were there and the
7 Federal Court judge approved it.

8 Now, it then ultimately got published in the
9 newspaper, but there was no public participation. But there
10 was never any problem. These things never got turned down.

11 And I don't think that was because Federal
12 Court judges were stupid. I think it was because they had
13 confidence that the applicants knew what they were doing, the
14 applicants had the full facts. One of the applicants of
15 course was the Attorney General of Canada, who they more or
16 less respected. The Attorney General had made an arrangement
17 with the contravening party and the contravening party had
18 said, "I promise never to do this again and I admit the
19 following facts solely for the purpose of this proceeding."
20 And of course what they liked about it is the investigation
21 terminated, they got off the hook. So it was a settlement.

22 Now, interestingly enough, when this type of
23 procedure went to the Competition Tribunal, called consent
24 orders as opposed to prohibition orders, the Competition
25 Tribunal on a couple of cases said, "You know what? We don't

1 think this is right." And the commissioner of the
2 Competition at the time got so annoyed that they changed the
3 law so that the commissioner in the future just had to
4 register these things with the Competition Tribunal and they
5 became an order as a matter of course, which some people
6 thought was a questionable practice.

7 But the lesson I learned, or I thought I had
8 learned, was two things: Number one, these settlements, and
9 it doesn't matter whether you're in securities or whether
10 you're in energy or whether you're in antitrust competition,
11 they are a big part of the administration of justice. For
12 every litigated cases there are at least ten settlements.

13 Now, why is that important? Well, people talk
14 about regulatory efficiency, and that's true. It saves
15 costs. But it also saves a lot of time and it also gets, if
16 you will, a jurisprudence or precedence or rules out there
17 for the public, because that's what people look at when they
18 conduct themselves.

19 And so it is important to get these things out
20 the door. Because if you litigate everything it takes three
21 to five years, whereas you can get a lot of these quasi
22 judgments, if you will, in the form of settlements out the
23 door. So it becomes an important part of the process and one
24 that's important to preserve.

25 The other thing that struck me as to the

1 importance of these settlements -- and I'm speaking
2 generically, I'm not talking about necessarily the
3 settlements at issue here -- was that it gave the parties,
4 particularly the enforcement parties, considerable
5 flexibility.

6 And I look at my own experience in the
7 prohibition orders and I remembered that in one of them, in
8 Re/Max, we got the parties to pay the costs of the
9 Commissioner's investigation. That had never been done
10 before. In Toyota, they got Toyota -- which was a price
11 maintenance case, Harry will correct me -- they had to cough
12 up a significant amount of money to some charity. And the
13 John Deere prohibition order, which I did, we got John Deere
14 to give everyone who bought one of those green little lawn
15 tractors \$2,000. There's no authority in the statute, but it
16 was part of the deal.

17 Now, since then the government amended the
18 legislation to say that the contents of these prohibition
19 orders can retain anything the parties agree to to sort of
20 cover up what the commissioner of Competition was doing, but
21 it struck me that that's another important attribute of these
22 settlements, and you can look at them in any area. They are
23 flexible instruments, they can be issued in a timely fashion,
24 and they can have some important remedies that in a court
25 process may not be available.

1 Now, we do notice that rarely do they get
2 turned down. For instance in the case of energy law, rate
3 cases, the B.C. Commission and the Ontario Commission have
4 been doing this for 15 years. They invest a lot of money in
5 it. They pay for intervenors to participate. They pay for
6 facilitators or mediators and they rarely get turned down.
7 I'll tell you a bit of a story about that in one moment. In
8 fact there have only been two dissidents, one in each of the
9 cases in 15 years. Nothing turned down.

10 There was one case turned down, and I did turn
11 it down, and this was a -- it tells you something about the
12 process. None of this is in the paper. I'm just sort of
13 giving you some background. This was a case where the
14 parties came before us and they had a settlement agreement,
15 it was a rate case, and they had agreed that they would only
16 claim half their incomes. And I said, "Well, why would you
17 do that? Any utility is entitled to claim its income taxes."
18 And they said, "Well, we had to give them something." Of
19 course I said, "Why didn't you just give them a BMW?"

20 The other thing was we said, "Listen, you have
21 also cut half of a new CIS system. You've taken that out of
22 your application and yet you've told us your plant is well
23 beyond its useful life. You're going to have huge
24 expenditures in the future fixing this plant. Why would you
25 cut that expense?" Well, the same answer, "We had to give

1 them something."

2 So we said, "Well, we're not accepting it.
3 You go back and renegotiate this." Well, they did and it
4 turned out when they put in the capital expenditures they had
5 income tax write-offs and, guess what, it came out to the
6 same result.

7 But what was interesting, this was the first
8 time anyone in Ontario had turned down a settlement
9 agreement. And I tell you, walking around the halls people
10 said, "Have you lost it, turning down a settlement
11 agreement?"

12 So there was an institutional -- and of course
13 institutions can become depended on them. If the Ontario
14 board, and this is all within the walls of this room, had to
15 hear every one of these cases, couldn't settle them, I mean
16 they would have to double the size of the board.
17 Institutionally over 15 years agencies can become dependent
18 on settlement agreements.

19 Of course we had a rule too, which I don't
20 follow but should follow, it's in the rules, Alberta has it
21 as well, that settlement agreements are take it or leave it.
22 You can't cherry pick. You can't say "I like this part. I
23 don't like this part." And then the theory is "Well, the
24 parties have been give and take, it's all been in confidence
25 and whatnot. You can't fiddle with this. Either say yes or

1 no."

2 So we have an institution that's developed and
3 we've become dependent on it, and for good reason.

4 The other piece of this that's interesting --
5 so we have this situation where settlement agreements are
6 rarely turned down, whether you're talking about the Federal
7 Court or -- and I'm not going to go into the degrees of
8 public review, that's a discussion you have, but I ask myself
9 why is that outside of the possible institutional dependence,
10 which I just referred to?

11 And I think the other part of it is, and I
12 think this is at the crux of the issue here, is that the
13 reviewing body, whether it's a court or whether it's a
14 regulatory agency, generally has confidence in the
15 applicants. And why is that? Well often -- or in most
16 cases, I mean, the courts are going to have confidence in the
17 Attorney General. The Ontario Securities Commission is going
18 to have confidence in its staff. It knows the staff has all
19 the facts. They've gone through this. And maybe they have a
20 Commission member thrown in or maybe they don't, but in the
21 OEB Commission members can't go anywhere near this.

22 But that's a bit what's unique here of course,
23 is you've got an independent agency making the deal and then
24 coming to another agency for review and the other agency
25 says, "Well, I don't know whether we have all the facts.

1 What are we doing here?"

2 In my paper I refer to one of the few cases
3 where the OSC turned down a settlement agreement and I quoted
4 from the decision and they said, "We don't have all the
5 facts. There's not enough facts here, go away."

6 Well, they did go away and they came back two
7 weeks later and they had 40 additional paragraphs in their
8 application and the subsequent Commission approved it.

9 So part of the issue at the end of the day I'm
10 going to suggest is a mechanism to solve that problem, which
11 is not a problem of anyone's making, it's just an
12 institutional fact that results from sort of the unique
13 structure here.

14 That's all. Or do you want more?

15 THE CHAIR: We're paying you big money.
16 You could at least talk about, you know, the benefits of
17 disclosure and the public process. Thirty seconds worth
18 anyway.

19 MR. KAISER: You know, as you look through
20 the different agencies that do this it varies. For instance
21 I just talked about the prohibition order, the consent
22 orders, and the competition law. If you go to the United
23 States and the Attorney Act requires that you publish these
24 for comment. I mean, there's very substantial public review
25 in these things. You know, if you're talking about

1 disclosure to the public, the degree of public participation
2 is a real issue.

3 And one of the questions I ask myself, this is
4 in the paper: Is there a difference between a rate case and
5 an enforcement proceeding? Because, you know, if we look at
6 disciplinary proceedings -- and you see this on the law of
7 notice. The law of notice is pretty clear and if it's a rate
8 case you have to publish it in the newspaper, you have to
9 publish it in French if there's any French people out there
10 in that area, you have to outline the issues how it might
11 affect those particular people and so on. But if we
12 discipline a doctor or a lawyer, or maybe even a public
13 utility, there is a notion, a reputation at issue, which you
14 see in some of the submissions that some of the parties have
15 made.

16 And people make the comment, well, the person
17 could be proven not guilty, completely innocent and yet all
18 people read was the first announcement or whether it's
19 somebody who's in trades and securities. I mean, reputation
20 to them is very important. If they've been hauled before the
21 OSC or the Alberta Commission, or even if they've been
22 acquitted -- I actually know of one particular circumstance,
23 and those people lived with that for a long time.

24 So you ask yourself maybe we have to recognize
25 that all the proceedings aren't the same. That means that

1 you have to somehow fine tune the degree of public inquiry in
2 the second phase, which is really what this is about. Nobody
3 questions, I don't think, seriously that there's a settlement
4 privilege and that should be respected even by statute or by
5 rule or by common law. I don't think there's any question.

6 But also nobody questions, I think, that when
7 you review these things there should be some kind of public
8 hearing. The question is how public is public? And you see
9 in the OSC -- and I don't know whether the OSC is happy with
10 me in this comment where I said they try to dance around a
11 fine line. You know, they publish it on their website. It's
12 not published in any publication. They have a hearing two
13 days later. They have an agreement with the parties as part
14 of a standard form agreement that the settlement agreement
15 will remain confidential and if it isn't approved it stays
16 confidential forever. If it is approved it goes on the
17 public record.

18 And so you ask yourself well, is that enough
19 public participation? Because not surprisingly, at least in
20 the ten cases I reviewed, nobody ever showed up. And in the
21 hundred prohibition orders that the Federal Court has
22 approved today no one ever showed up. Well, they didn't show
23 up because there really wasn't notice.

24 Or possibly these things are really they don't
25 have a public dimension to them. I mean, they have a public

1 interest requirement, but they're really penalties where, you
2 know, there's no big question. Somebody offended the law.
3 They've agreed they've offended the law. With a nod and a
4 wink they agreed they offended the law, because of course
5 they don't admit liability. And that's another part of this
6 thing that you have to recognize. This goes back to my
7 opening statement, which is what's the importance of these
8 things.

9 You know, people come to the bargaining table
10 for a reason. I know this, having negotiated these things
11 with Harry and others in the competition area, and you get
12 things. The enforcement agency gets things you probably
13 wouldn't get from a court, and you certainly wouldn't get
14 without a huge expense and a huge risk about whether you were
15 going to succeed. You know, you throw a bunch of Toronto
16 lawyers in a courtroom, they can cause a lot of damage to
17 your case.

18 So if you can negotiate you try and negotiate
19 and they need something. And one of the things that they
20 want, this came up in this situation here, is they don't want
21 to have collateral liability, particularly in class actions.
22 So they want a very clear statement. You see this in the OSC
23 documents and you see this in the prohibition orders in the
24 Federal Court. I've quoted them. These admissions are for
25 the purpose of this proceeding only.

1 You know, you can say, "Well, should there be
2 an admission? Should they really admit they're bad guys?"
3 Well, yeah, that would be about nice, but what would happen,
4 you wouldn't get all these deals.

5 So it's -- as with all things. This happens
6 every day when we make decisions on confidentiality. You
7 know, there are cases where you hold proceedings in camera
8 where you think the private interests outweigh -- of
9 confidentiality outweigh the public interest brought by the
10 disclosure. It's a balancing act and you have to make that
11 balancing act, and I think that's what's at issue here.

12 THE CHAIR: Okay. Well, thank you. Thank
13 you, Gordon.

14 I do want to come back to the content of your
15 paper. You spent some time in the paper on the Ontario
16 Securities Commission approach to settlement, the two stages,
17 the conference and then the hearing, and we'll return to
18 that. And it might be covered off in the different topics
19 that have been allocated in any event. That's what I'm
20 really looking for some discussion on from around the table.

21 But we'll hear from the MSA now, and I'm not
22 sure what order you're going, whether Harry goes first or
23 Doug, but take it away.

24 MR. WILSON: Okay. Thanks, Doug. For the
25 record Douglas Wilson with the MSA.

1 I'm going to touch on a couple of things
2 obviously that we brought out in our written comments, but my
3 intention here is not to simply repeat all of that verbiage,
4 and I mean all of that because it was pretty long. I'm also
5 going to try to avoid skating too far into other people's
6 topical areas, you know, to allow them to do justice to it
7 without me damaging it beforehand.

8 So having said that I'm going to start here by
9 going out on a limb and I am going to assume that the
10 Commission's existing rules, in particular Rule 1 and
11 Rule 14, are within the authority and the power of the
12 Commission. And I feel comfortable making that assumption
13 partly because I'm not aware of any raging legal challenges
14 around those rules.

15 Having said that I'll happily yield the floor
16 if anybody wants to take a run at the Commission on that
17 point right here right now. Okay.

18 MR. CHANDLER: You're on a roll.

19 MR. WILSON: I guess so. So Rule 1 and
20 Rule 14 allow the Commission to grant confidentiality for
21 materials in a proceeding on various grounds. One would be
22 confidential commercial information by way of example.

23 My understanding is that the Commission has
24 indeed granted confidentiality in various proceedings under
25 those rules. An example being in regulated rate tariff

1 proceedings some claims to confidentiality around
2 commercially sensitive information. It might be practices of
3 the procuring company, something like that.

4 Rule 1 also in section 43 allows for private
5 hearings. In the right circumstance if the Commission feels
6 it's the right thing to do it can hold a private hearing, and
7 in my view there seems nothing wrong with that in principle.
8 It appears to me -- and again since I'm Harry's boss I'm
9 going to speak on behalf of the MSA. It appears to us that
10 public policy does not require absolute transparency in a
11 hearing, in a proceeding. Public access, transparency in
12 particular, can come after the fact.

13 So a question is in an enforcement
14 proceeding -- and Gordon highlighted this somewhat. In an
15 enforcement proceeding under section 44, for example, where
16 the settlement agreement is proposed between the MSA and a
17 market participant, is that not a situation where essentially
18 there's one directly affected party and it lends itself to
19 the possibility of essentially a private hearing? Or where
20 you can reasonably limit transparency at least for a period
21 of time.

22 Anyone here of course can jump in at any
23 moment as I'm rambling on. I'm certainly open to that. In
24 some ways I'm trying to provoke that.

25 THE CHAIR: I'll jump in then, Doug.

1 MR. WILSON: Okay. Thank you.
2 THE CHAIR: The notion of the private
3 hearing, when we go to the section in our home statute, the
4 Alberta Utilities Commission Act, and we go to the MSA
5 section and then you go to the settlement provisions, there's
6 a provision of section 44(3), and it says essentially that
7 the settlement provisions that are found in the Electric
8 Utilities Act and the Gas Utilities Act do not apply to MSA
9 settlements.

10 MR. WILSON: Hmm hmm.
11 THE CHAIR: When you look at a couple of
12 the sections in the -- like the Electric Utilities Act, for
13 example, it specifically says the AUC Commission, not staff,
14 the Commission can meet with parties when they're in
15 settlement discussions. But that doesn't apply to MSA
16 settlements. I mean, that's a proposition that I'm making to
17 you.

18 Also if you look at the Electric Utilities
19 Act, it says that the Commission has all kinds of discretion
20 to make things confidential. In effect it can't refer to
21 material that the parties treated as confidential unless the
22 parties expressly agree. But that doesn't apply to MSA
23 settlements if you read that provision section 44(3) in the
24 Alberta Utilities Commission Act.

25 How do you interpret section 44(3)? What's it

1 intended to do if not the kinds of things I've just
2 highlighted?

3 MR. WILSON: Well, a couple of things. I
4 think 44(3) is written that way to allow the Commission the
5 opportunity to do things differently if it chooses. I think
6 in the legislation there's also a provision to the effect
7 that the Rules of Court do not apply, but that doesn't mean
8 the Commission can in a free-wheeling manner totally ignore
9 the common law, for example. The Commission has an
10 opportunity to be flexible.

11 I guess again 44(3) to me says you've
12 essentially got an open page on what you can do here within
13 the bounds of the common law. So we're not bound by what
14 happens in other settlement proceedings or settlement-related
15 matters.

16 I'm also guided -- and this may come up in
17 some later discussion. I'm also guided by provisions in the
18 Alberta Utilities Commission Act, and I don't think those are
19 precluded by 44(3). Section 9 talks about -- I'm trying to
20 recall it here, but it gives the possibility -- section 9, I
21 think it's 9(3) -- of a nonpublic proceeding, no public
22 hearing.

23 So I think that creates an opportunity that is
24 reflected in Rule 1. I know that Rule 14 in the Commission
25 is intended to apply to MSA-related proceedings, but I don't

1 think that Rule 1 doesn't apply at all. I think we can use
2 it for guidance. And I think this discussion is also about,
3 you know, how might we do things. So the existing rules are
4 the existing rules, but there's also an opportunity to change
5 the existing approach.

6 Rule 1 says there can be a private hearing,
7 for example, which is what I highlighted earlier. You know,
8 that's part of the concept that might be appropriate here,
9 subject to what everybody lands on and what the Commission
10 thinks.

11 I don't know if that fully answers your
12 question, Doug.

13 THE CHAIR: Well, without stopping you in
14 midstream, Doug, can we get some opinions from around the
15 table on this issue? Like what guidance, if any, can the
16 Commission take from section 44(3)? Unless somebody has a
17 copy right in front of them I'll read it verbatim.

18 So the little title is called "Settlement" and
19 44(1) I'll paraphrase. It grants the MSA the authority to
20 enter into settlements. 44(2), they have to file the
21 settlement with the Commission for approval. And 44(3):

22 Division 3 of Part 9 of the Electric
23 Utilities Act and sections 28.51 to
24 28.8 of the Gas Utilities Act do not
25 apply to a settlement of a matter under

1 this section.

2 So reach into your best canons of construction or
3 maybe you remember from Dredger. Like what principle of
4 interpretation should govern how we view that section?

5 Doug, if I read yours, if I understand your
6 point, it's like we don't need that section. It can still
7 leave everything wide open to us in terms of an MSA
8 settlement. So why put it in?

9 I'm not asking you directly right now, Doug,
10 because certainly you can respond. Does anyone else have any
11 ideas?

12 Yes, Doug, Doug Crowther.

13 MR. CROWTHER: And I'm going early because
14 Capital Power didn't file written submissions and so it may
15 be useful for the rest of the participants to know Capital
16 Power's perspective for the purposes of the discussion.

17 But I think, Doug, you take from section 44 a
18 couple of things. Firstly that the Legislature has decided
19 that settlements are a good thing. I think this addresses
20 one of the points John Petch made in his paper, that you've
21 got to be careful that you don't start doing so many
22 settlements that the public develops a perception that these
23 are all sweetheart deals. I think the Legislature has
24 resolved that question.

25 The MSA is permitted to engage in settlements.

1 That suggests to me that the Legislature decided it would be
2 a good idea for the MSA to engage in settlements.

3 I think that looking at 44(3) quite frankly is
4 a red herring. It says -- and I think canons of construction
5 I would say plain meaning, it says that the provisions in the
6 Electric Utilities Act and the Gas Utilities Act don't apply
7 when we're in enforcement proceedings brought by the MSA.
8 And I think Doug Wilson's answer is the correct one:
9 enforcement proceedings are different. They're different
10 than rate proceedings. And so there's a different set of
11 rules that can apply.

12 And I think you could also, if you wanted to,
13 try to put yourself into the minds of the MLAs, which is a
14 dangerous proposition for all sorts of reasons. Perhaps they
15 wanted you to develop the rules as you went along. And if --
16 the issue that's been posed I think, and coming back to I
17 think the point that Capital Power would like to make, is
18 that the Commission has ample power to treat these settlement
19 agreements as confidential until they are approved.

20 I think you can make a good argument -- and if
21 anybody wants me to track through, I think you can make a
22 good argument that the rules as they currently stand enable
23 you to do that, but if there's doubt about that, then I think
24 Capital Power would say that the Commission ought to be
25 adding a rule or amending its rules to make that completely

1 clear to those who may doubt that power.
2 And I think Capital Power would endorse the
3 suggestion that Gordon Kaiser made in his paper, which is
4 this is really a question of policy more than law. The legal
5 question seems to Capital Power to be answered clearly yes,
6 there is authority, statutory authority. And they would also
7 say that the Commission ought to be accepting these
8 settlement agreements on the basis of confidence because if
9 it doesn't do so you're not going to see settlements, or very
10 few of them.

11 THE CHAIR: Thanks, Doug.
12 David?

13 MR. WOOD: Doug, this was something --
14 one of the issues that I was going to address when I gave my
15 remarks on legislative authority. My view coincides with the
16 other Dougs, and that is that subsection 44(3) really means
17 that the Commission isn't confined or restricted by those
18 provisions and that you've got the authority and the
19 discretion to devise a settlement process that's different
20 from the one that's prescribed in the EUA or the GUA.

21 THE CHAIR: Thank you. Anyone else on
22 this point?
23 Continue, Doug.

24 DR. YAHYA: So let me finish this point.
25 Your point about the common law is interesting. So let me --

1 whenever I hear people say the common law I think of like
2 people invoking the Bible. It could be the Old Testament.
3 It could be the New Testament. Is it Mark? Luke? Which
4 common law are you referring to?

5 So I thought, and correct me if I'm wrong,
6 that common law -- the concept was always open court and
7 there really was very little -- you showed up to the judge.
8 You can pick 1700, 1600. Where are we at in the common law?
9 But when you showed up what you declared to be the
10 settlement, if there was any, from the event was open and
11 public. So what common law were you referring to as being
12 the limitation on the Commission?

13 MR. WILSON: Well, a fair enough question.
14 I would capture it this way: The common law in favour of
15 essentially transparency is a so-called open-court principle.
16 And there is a Supreme Court of Canada case, Sierra Club,
17 which essentially cites that at a very high level in terms of
18 public policy. It is an almost completely overriding
19 principle. However, the court also in that case allowed that
20 there would be exceptions to it. It's very important to have
21 open courts. The court there talked about how it's actually
22 linked to Charter rights, freedom of expression, and such.

23 So it's important, but it's not the most
24 important thing in all cases, as the court points out. And
25 there are some decisions following Sierra Club which etched

1 for the possibility of settlements. And I agree with my
2 compatriot Doug that that's an indication likely that the
3 legislature agrees that fostering settlements is in the
4 public interest, the ability to settle. Not on any terms,
5 but at least the ability -- the environment wherein that's
6 somewhat more likely. That's a public policy goal.

7 Now, let me ask, is that public policy goal
8 less important than the public policy goals which underpin
9 existing Rule 1 of the Commission, the grounds therein
10 whereby the Commission can grant confidentiality around
11 commercial information? That's a public policy aim,
12 protecting commercial sensitivities, the ability to do
13 business. That's on balance a good thing, within bounds.

14 Why would that be higher ranked than
15 protecting settlement negotiations? I'm asking that in an
16 open way, but I guess to me I wouldn't see that it is. I
17 think that protection of confidentiality for settlement
18 negotiations -- which, by the way, are not yet concluded
19 without Commission approval -- is the appropriate thing to
20 do. It's equally important or perhaps more important than
21 worrying about the technical information that may belong to a
22 corporation or the trading strategy of a corporation. Those
23 are also important things. No problem with confidentiality
24 for those.

25 You know, again if anybody wants to jump in,

1 I'm open and happy for that.
2 We hear from participants -- sorry, Darin.
3 Were you going to jump in?
4 MR. LOWTHER: I was going to. I'm
5 interested in how you would contrast that to an element
6 within the Fair, Efficient and Open Competition Regulation
7 where the legislature put its mind to transparency with
8 respect to preferential sharing of records proceedings.
9 That's one of the few times -- one of the few instances I
10 guess with respect to some of the things that we have been
11 dealing with recently, that the regulations of that
12 proceeding will not be public.
13 So is it, do you think, reasonable to take
14 from that that any instances where the legislature have a
15 mind that it will not be public, not be fully transparent,
16 that they would say that in those instances and not say
17 anything in the other instances?
18 MR. WILSON: Well, I guess in response, the
19 Fair, Efficient and Open Competition Regulation is dealing
20 with some very specific matters, not all matters.
21 MR. LOWTHER: No, that's right.
22 MR. WILSON: So it might not be an
23 opportunity for the legislature to speak to all matters in a
24 natural way. It's dealing with conduct supportive of FEOC
25 and things that might undermine FEOC so called, F-E-O-C. As

1 the Commission has evidenced in its decisions around
2 information sharing, that's a very sensitive area for
3 competition, the sharing of price and quantity offer
4 information.

5 Also sensitive, though, is what market
6 participants are doing internally by way of strategy and
7 other things to deal with their information sharing. I'm
8 going to suggest that one of the reasons that particular
9 proceeding is fairly cloaked and the Commission is limited in
10 its ability to more or less put everything on the public
11 record that relates to what the proceeding is because it's
12 dealing with commercially sensitive information. And that's
13 clearly in the Commission's rules, and I think fairly one of
14 the areas where -- one of the grounds on which you might give
15 confidentiality.

16 MR. LOWTHER: And I guess we have. In
17 certain -- the Commission in certain decisions has said
18 clearly with respect to commercial confidentiality that --
19 even in one of the decisions that was turned back the
20 decision outlined it wasn't a concern with commercial
21 confidentiality, and in fact that would have been approved in
22 that instance. So we tried to very clearly distinguish
23 between the two to make it clear that the commercial
24 confidentiality would have been granted in that case.

25 It's just -- the reason I raise the

1 preferential sharing of record is one instance where we got
2 express directions from the regulation that this will be a
3 private proceeding. There are many instances where we get
4 those expressed instructions.

5 MR. WILSON: I agree with you. It's a
6 useful reference point, I think, because of that. So thanks.
7 Anyone else?

8 DR. YAHYA: Can I get back to your trying
9 to distinguish -- because this is the theoretic underpinning,
10 distinguishing -- or maybe not. Maybe we can't distinguish.

11 THE CHAIR: Speak up, Moin.

12 DR. YAHYA: Sorry. So if we can solve
13 this conundrum of distinguishing between commercial
14 information and information contained in the proposed
15 settlement, then I think that's -- we've got the answer
16 essentially. So I think we're spending some time on this.
17 So one argument is that commercial information
18 there's a harm. What's the harm? If it's disclosed
19 competitors will know all about the company. Other people
20 can jump in and use the project information. There's all
21 sorts of harm just by the mere disclosure of this
22 commercially sensitive information.

23 But in the settlement, proposed settlement,
24 what is the harm in the disclosure? It's going to be
25 disclosed anyway at some point.

1 So what is, for the lack of a better word, the
2 "big deal," quote/unquote, about it being confidential at
3 this very narrow point in time? Because I don't think you're
4 proposing that -- or the proposal isn't that it should be
5 confidential forever. It's just at that moment when it's
6 being presented to the Commission for approval. That's where
7 this whole argument is. And so the question becomes what is
8 so sensitive about that moment in time. That's I think what
9 I'm trying to get a sense of.

10 MR. WILSON: Well, we tried to -- and again
11 I wholeheartedly invite others to jump in here, the market
12 participants in particular, because I think some of them have
13 spoken to it in their submissions, and it is from them that I
14 hear what sensitivity is.

15 There's no guarantee when a settlement is
16 filed with the Commission that it will be approved. I take
17 Gordon's comments that often they are, but I think the
18 Commission would be very quick to say "There's no guarantee
19 of that because we must make up our own mind." So it's
20 filed, and if filed on the public record it sits until the
21 decision, and that might take weeks, months. And if it sits
22 in the public eye it basically foments the public view on
23 what's going on.

24 Now, the settlement is offered as a proposed
25 outcome, right, and it's a package deal and basically in it

1 the market participant is giving up its rights to perhaps
2 deny, which it would have in a litigated proceeding, to
3 defend in an active way, which it would have in a litigated
4 proceeding. So the public is forming a view just based upon
5 what's there and they don't know anything else. There's
6 going to be really no further explanation for them.

7 If it's not approved, what then? That's out
8 there in the public eye and the public, I would respectfully
9 submit, will often form a view only based upon that. They
10 won't say, "Oh, well, that's just a settlement and it's
11 actually without prejudice, so if it's not approved it goes
12 away. It's meaningless. Right?"

13 For the Commission, for a court a proposed
14 settlement rejected is no longer relevant because they're not
15 relying on it anymore. If there's a further proceeding, it's
16 a proceeding de novo.

17 Well, the public doesn't have, I would
18 suggest, that approach. A lot of them do not. And that's
19 the problem for the market participant. So they have
20 essentially a public relations challenge on a failed
21 settlement potentially. And that's the big problem. If it's
22 approved, absolutely, as you say, it's made public and they
23 will speak to it, they will have a public relations message
24 around it and they will know what the issue is.

25 If it's not approved they've got that, then

1 they've got the next case. Right? And they go into the next
2 case and let's say they want to litigate and defend. Well,
3 the public will say, "Come on. You already said you did it."
4 And they can say, "Well, no, no, no. We didn't really say we
5 did it. We said for the purposes of settling we'll plead no
6 contest." The public will say, with all due respect, "That's
7 bull. You said you did it."

8 And I think -- to me, anyway, that's how I
9 view the issue for market participants, the risk that comes
10 from that. And in some ways I will put it as high as being
11 irreparable harm. You cannot contain that once it's out
12 there. It's not a problem with how the Commission would view
13 it later, it's how the public deals with it.

14 MR. CHANDLER: I really think it's important
15 to hear from the participants because this is their --

16 THE CHAIR: Liz?

17 MR. CHANDLER: -- they can speak to this.

18 MS. SORIA: And that was exactly my point.
19 Liz Soria. I'm ENMAX Energy. You've interpreted very
20 correctly at least the position of ENMAX Energy and the
21 position it would seem of some of the other market
22 participants who commented on this in the proceeding -- or in
23 this consultation.

24 I think I can say with 100 percent certainty
25 that media exposure of information can have irreparable harm

1 for a company. We've experienced that. And that has also
2 been one of the motivating factors into entering into a
3 settlement in the first place, because then you have some
4 control of what goes onto the media record.

5 So there are many reasons a company may choose
6 to settle, as we pointed out in our submission, but one of
7 them, and certainly for us perhaps, one of the main issues is
8 controlling that amount and frequency of information on the
9 public domain.

10 We have no problem with it becoming public
11 once it's a certainty, but while that jeopardy still remains
12 that it may not be approved, that is a huge risk that may
13 cause us to take our chances in a contested hearing as
14 opposed to going into a settlement.

15 So it does matter and you're absolutely right.

16 THE CHAIR: John?

17 MR. IRVING: I completely agree with what
18 Liz just said. On the issue of commercial risk versus
19 reputational risk, Powerex is a crown corporation and I can
20 tell you that reputational risk is as important as commercial
21 risk. And we are not going to want to enter into a process
22 where the end result could be that the settlement doesn't get
23 approved and what was put forward becomes public, gets in the
24 newspaper, embarrasses the government, embarrasses our parent
25 corporation, B.C. Hydro. I mean, in that circumstance with

1 that risk I would much rather litigate than settle at all.
2 THE CHAIR: John Petch?
3 MR. PETCH: Surely there's some exposure
4 to irreparable harm, media exposure in this hearing. I just
5 think of the hearing about the ducks up north in
6 Fort McMurray. It was in the media for 30 days.
7 I mean, one of the things I always thought
8 from a defence counsel point of view with a settlement is you
9 have one blast of publicity. That is one of the big
10 advantages. Now, obviously if you can get this quiet in the
11 back room settlement, that's even better.
12 If we're looking at the comparison -- and I'm
13 worried about -- and there is an effect of the media, I
14 acknowledge that completely, and it's a serious reputational
15 issue, but there's that exposure to each of the three. And
16 for some reason it seems to be we're talking about a
17 settlement, approval of settlement, confidential,
18 nonconfidential.
19 The alternative of a hearing, I suggest,
20 equally has the risk of media exposure, reputational damage.
21 At least from my experience as a practising lawyer, both as a
22 regulator and as defence counsel, the hearing is a huge one.
23 I just interject that because it hadn't been
24 mentioned as the other part of the equation.
25 THE CHAIR: Alan?

1 MR. ROSS: One issue to throw in the mix
2 as well is the issue of what is the level of confidentiality
3 that may be acceptable once you have an approved settlement
4 agreement? I've heard you say, Moin, the issue you might not
5 ever have that. Aren't there issues within an approved
6 settlement agreement, and we may get to this in the
7 discussion, which still ought to be confidential?
8 There may be issues, for example, around
9 commercially related matters, system reliability matters,
10 security related matters. And so I think to that extent
11 there may well be opportunities to redact or have sealed
12 aspects of even approved settlement agreements that may ought
13 to be listed here.

14 THE CHAIR: Yes. I think, Alan, in
15 existing Commission decisions we have recognized that.

16 DR. YAHYA: Yes, absolutely.

17 MR. ROSS: I think so.

18 DR. YAHYA: And that was the point I was
19 trying to make, is that there are -- there is a type of
20 information that will be confidential forever, if you want to
21 put it that way. That's the stuff that has the commercial
22 harm and irreparable harm, proprietary secrets, and all the
23 like, but here is -- what is unique about what we're talking
24 about here is that it's being proposed to be confidential for
25 a fixed -- it might even be a very short period of time.

1 That's what I'm just trying to get a grapple on and what's
2 the distinction between that and that.

3 Let me just pose a question back to the market
4 participants. I mean, how is this different than a criminal
5 settlement where -- I mean, you talk about reputation.
6 You're going into a criminal court and you're about to plead
7 guilty to anything from murder to possession of pornography,
8 whatever your fear of being exposed with could be, and you're
9 taking a chance that the judge may reject it.

10 THE CHAIR: Let me add to that because
11 that's a comment that I was going to make or ask of the
12 group. It's sort of a visceral reaction for me. I'm not
13 pretending to be the man on the street, but why should an
14 individual's reputation in a criminal process be valued less?
15 They could be found not guilty, but the heinous particulars
16 of the charge are in the paper, as Moin pointed out. Why
17 should that be valued less than a faceless corporation's
18 reputation?

19 Okay. Doug?

20 MR. CROWTHER: Well, I'll let Liz go first
21 because I was going to go back to the earlier point, if I
22 could.

23 MS. SORIA: In my working corporate
24 responsibility we've done research that has demonstrated that
25 the value -- the total enterprise value of a company is made

1 up of both tangible assets, balance sheets, as well as
2 intangibles, which is goodwill and reputation.

3 If you go back about 30 years, total
4 enterprise value was only about 5 percent based on that
5 reputation, that intangible, and it was 95 percent based on
6 the physical assets of a company. Fast forward 30 years,
7 we're in a position where now 75 percent of enterprise value
8 by some measures is the intangible. So actually it has
9 tremendous financial value to the company and to its
10 shareholders.

11 And so I don't know if that answers the
12 question specifically. I guess what I'm saying is you don't
13 have the same kind of financial value on an individual that
14 you do in a corporation, and I suppose the reason we're so
15 concerned with protecting that is because it has a bigger
16 impact than any fine we might be paying. So it's a thought.
17 It may not be a full answer.

18 THE CHAIR: Doug, you were next, and then
19 we'll go to Moin, who put up his card.

20 MR. CROWTHER: Doug Crowther. Let me come
21 back to the first question I think posed by Moin, which was
22 what's the big deal or what's the harm. And I thought Doug
23 Wilson did an excellent job of articulating what might be the
24 rationale of any particular market participant, but there may
25 be any other number of rationales, there may be any number of

1 other reasons why the market participant wants to engage in
2 privileged discussions to settle and then agree -- and I
3 think I'm picking up on a point that David Wood made in the
4 submission for Suncor, that the privilege probably ends when
5 you file the application, but at least you can agree that
6 it's going to be filed on a basis of confidentiality.

7 So I would answer the question, Moin, there
8 may be any number of rationales for why any particular market
9 participant might want to proceed on a confidential basis,
10 but the real harm is that if you don't do it, you're hearing
11 from all the market participants, that that's the ante to get
12 into the game. That's the quid pro quo, at least one of the
13 quids that has to be offered in order to engage in a
14 settlement.

15 So the real harm, the big deal, is that you're
16 not going to have settlements. It's just not going to
17 happen.

18 And I can't speak for any particular market
19 participant. As I say, there may be any number of rationale,
20 but the consistency, the consensus seems to be that that's
21 going to be the minimum requirement in order for settlements
22 to proceed.

23 And I don't think you can value the reputation
24 of a corporation over a person, but that again speaks to the
25 issue why is it that any particular participant expects the

1 terms of the settlement to be kept in confidence until
2 they're approved.

3 THE CHAIR: Moin?

4 DR. YAHYA: So now we're hearing two
5 reasons, and they're kind of distinct. One is the harm's
6 reputation and one is as a -- they're kind of related, but
7 it's the effect it will have on settlements, the two issues.
8 I would say to -- I'm sorry.

9 MS. SORIA: Liz.

10 DR. YAHYA: -- Liz that perhaps an
11 individual is 100 percent valued by their reputation.
12 Tomorrow if any one of us in this room had something, had a
13 blemish on our record, that would be the end of our future
14 earning potential for a long time. I would say I don't think
15 there's a distinction between individuals and corporations.
16 The question I had, though, and what I'm
17 trying to lead up to here is, another question is, is it
18 because maybe in the criminal court system the time between
19 the proposal of the settlement and the judge's acceptance or
20 rejection is very short. It's actually instantaneous. He
21 may stand up and what's the next case. The people versus --
22 or whatever -- XYZ. They get up and say, "Your honour, we
23 propose to file a settlement. This person has been charged
24 with this. Here's the proposed 30 days in jail or 30 days
25 with suspension," et cetera, et cetera, and the judge says

1 yes or no pretty much right there on the spot, but
2 99.9 percent it's a yes.

3 So is that why maybe in the public sphere we
4 are not too adverse to an open process for settlements and it
5 was the time lag that you alluded to, which could be months
6 or sitting on the public record, that might be another
7 distinction?

8 And so what I would also ask to think about is
9 if the rules of the Commission were somehow allowed for a
10 shortening, is that something else that market participants
11 and the MSA would suggest as an alternative to these
12 confidential privileges or is it really about just keeping it
13 confidential for that period of time, no matter how short?

14 MR. WILSON: Well, I don't know, I'll
15 confess, why the approach in the criminal realm is the way it
16 is. It's probably a series of or a group of reasons, and
17 what you suggested is a good argument for one of the reasons.

18 I think there's a feeling in society that
19 justice ought to be seen to be done, and particularly in
20 criminal matters, which tend in some ways from a societal
21 perspective often to be more serious. The public wants to
22 have that opportunity to see what's going on but, as you say,
23 you typically get justice a lot more quickly. Right?

24 In the criminal realm also there tends to be
25 directly affected parties. That's why you have the

1 opportunity for, you know, victim impact statements and such.
2 Very important to have that opportunity to be there and to
3 participate in it. Less so I would suggest in our
4 proceedings, the kind that we're talking about in relation to
5 section 44.

6 I think later on in our discussion we'll
7 probably get to the kind of things you were alluding to. I'm
8 supposing we will.

9 THE CHAIR: Yes, Kelly?

10 MR. SCOTT: I just want to make a subtle
11 point. It's probably not a strong argument. However,
12 remember that publicly traded firms have an onus of
13 responsibility to disclose information in a timely fashion.
14 So you create a conundrum, however long that period is. If
15 it's not going to be confidential you create a huge
16 conundrum, which is related to reputation, in the
17 organization with respect to okay, it's got the settle
18 agreement before the Board. Now, do we have to disclose this
19 publicly; and if so how and why and what do we put into it?

20 Whereas if it's confidential it's clear at the
21 end. It's going to be public. All of that stuff is linked
22 up nicely. We're not getting away with anything. It's about
23 process and meeting that requirement, which is a legal
24 requirement, as well as the other legal requirements. It's
25 tied into reputational risk.

1 THE CHAIR: Okay. I'll just make --
2 unless there's more comments on this point.
3 Alan?
4 MR. ROSS: Just one very fast point, and
5 that is the regulatory framework. The approaches by the AUC
6 are very much driven by the entities that it regulates. And
7 it regulates a unique set of industries, utilities and so
8 forth. And the approach taken in a criminal proceeding or
9 that type of adversarial proceeding, they will be ill fitting
10 for the kind of work that the AUC has to do in the kind of
11 regulatory scheme that's at play.
12 So by virtue of the fact that the AUC has the
13 ability to govern its own proceedings, has the regulatory
14 framework unique to the industry that it covers, it may well
15 be better suited to have that unique regulatory framework
16 rather than grafting on a criminal base framework.
17 THE CHAIR: I would make this observation
18 about the criminal parallel, and whether it's parallel or not
19 or applicable, that's up for debate, I accept that, but the
20 settlement is a plea bargain essentially. You go in front of
21 the judge. The agreed facts are recited and the judge asks
22 you directly, the accused, "Do you agree or admit these
23 facts?" "Yes, I do." Then it's a crap shoot. It's all
24 about sentencing then. And the judge doesn't have to give
25 the sentence, but the guilty plea remains. It is not

1 contingent. That's a big distinction between that criminal
2 sphere and what we're talking about.

3 But, in any event, Doug, please move on, or
4 Harry, if you were about to take over, and we'll move through
5 the agenda.

6 MR. CHANDLER: I think he's doing very well.
7 He should continue.

8 MR. WILSON: Thank you.
9 MR. SCOTT: You have to say that.

10 MR. WILSON: Joel, did you have a question
11 or some comment?

12 MR. FORREST: Well, I was just going to --
13 sorry, it's Joel Forrest. I was just going to make a similar
14 comment on the criminal sort of analogy, because that's one
15 that's often brought up in the context of these types of
16 cases. And the difficulty that I see is that -- and I think
17 it relates to this aspect of is there a public aspect to --
18 like a broad public aspect to the enforcement of these rules
19 or not.

20 And so I think it's important to recognize
21 that the criminal law is intended to govern, you know, how we
22 comport ourselves in society and this is a narrower subset of
23 an industry with very particular practices and literally
24 hundreds or thousands of rules that you're intended to comply
25 with. But I don't think that there is a broader public that

1 is necessarily monitoring or expecting to see justice be done
2 on these particular rules. I think that it's still a public
3 goal and yes, there is an aspect of justice that needs to be
4 seen to be done, but it is a very different circumstance than
5 the criminal law.

6 THE CHAIR: Moin?

7 DR. YAHYA: And I'll respond to myself now
8 by saying that actually -- and one of the reasons you want an
9 open process by the Criminal Code is actually to protect the
10 defendant himself or herself. Because otherwise if you had a
11 system where the courts were always closed to the public, I
12 mean, who knows what you're plea bargaining to under duress
13 or torture or star chamber like conditions, which is the
14 origin of the open-court concept, was to avoid essentially
15 the star chamber type situation.

16 So you could argue that here were the parties,
17 who are the potential analogies to the defendants, are
18 willing to venture into this or they're the ones seeking this
19 sort of confidentiality treatment, that might be the
20 countervailing point to the analogy to the criminal. Where
21 it's actually for the protection of the defendant to have an
22 open-court system.

23 THE CHAIR: Are you suggesting we go with
24 the star chamber model premise?

25 DR. YAHYA: That's what I'm hearing from

1 the ...
2 MR. WILSON: That was Doug Larder from the
3 AUC.
4 MR. CROWTHER: I'm going to change my name.
5 MR. WILSON: It's not working now, is it?
6 THE CHAIR: Back to Doug Wilson.
7 MR. WILSON: Thank you. I'm actually going
8 to get to the end of it here so we can carry on.
9 I just want to say two things. The Commission
10 has an opportunity, we would suggest, to grant this kind of
11 confidentiality and it is consistent not only with public
12 policy, it's also consistent with the practices in many other
13 jurisdictions. John's paper about the ASC I think pointed
14 out a few things, but what I took from it in part was the
15 fact that many of the settlements that the ASC enters into
16 are done at a staff level and they are given effect by
17 execution on behalf of the Commission without a public
18 hearing and the transparency comes after the fact. I do not
19 see anything inappropriate about that and I pose that as one
20 example of the jurisdictions that might give us some guidance
21 here, give the Commission some guidance in its approach.
22 And with that I think I'll turn it over to
23 David and Susan from Suncor.
24 THE CHAIR: Well, Harry.
25 MR. WILSON: Sorry.

1 MR. CHANDLER: You did want to hear from the
2 MSA first, right, so I'm prepared to take it to another
3 level. Maybe not a good place, but I would like to speak on
4 regulatory efficiency.

5 THE CHAIR: Yes.

6 MR. WILSON: Right now or do you want to --

7 MR. CHANDLER: Well, maybe I'm confused,
8 Doug, but I thought you said you wanted to change the order
9 of presentation and hear from us first. Of course we were --
10 we had two little topics here.

11 THE CHAIR: We're flexible, I think,
12 unless someone has to leave before we get to their topic.
13 It's quarter after, twenty after ten. Did you want to go
14 now, Harry, or at the end? You're slotted at the end for
15 regulatory efficiency.

16 MR. CHANDLER: I don't care. I have a few
17 things to say.

18 THE CHAIR: Why don't you go now?

19 MR. CHANDLER: Just as long as I have a
20 chance to say it. Okay.

21 THE CHAIR: Go ahead now.

22 MR. CHANDLER: Well, the first thing I would
23 like to say is to thank the Commission for this procedure. I
24 think this is great. A mature and wise way to discuss
25 issues, get knowledgeable people, smart people, and people

1 who have an obvious interest in it to just lay out the points
2 and debate them. So thank you to the Commission for doing
3 that.

4 Secondly, I would like to change my name to
5 Doug just so I could fit in better.

6 Having said that, sometimes I would speak in
7 stark terms and I guess I'm trying to draw out some reaction
8 from people. I want to apologize in advance if it appears
9 that I might be criticizing the Commission on some things, so
10 be ready for that. I'll try to live up to that billing now.

11 I guess I would like to ask how many people
12 here are not lawyers. So the reason I ask is I don't think
13 this is a purely legal issue. I think this is broadly, as
14 Doug said earlier, a public policy question. I guess we have
15 a pretty strong view that the law allows the Commission to do
16 what it wants to do in this area. I think that the point is
17 you should be driven by what is the appropriate public policy
18 as put out in the statutes that you enforce and where we're
19 at in terms of the evolution in Alberta.

20 So I've got two parts. I want to say a few
21 words, sort of preliminary words, and then I have props. I
22 was going to go up and put some sheets of paper on the flip
23 board. And they're essentially going to be propositions to
24 debate or you can accept or reject, but it sort of is meant
25 to provide a kind of logic of where the MSA is coming from on

1 this whole issue.

2 But just by way of setting the context, you
3 know, I take the point that I think probably Doug made
4 earlier, which is that this is not the traditional area of
5 regulation and there's an evolution going on, and I think the
6 Commission needs to recognize that evolution.

7 Essentially the fundamental framework, as I
8 understand it in Alberta, in the Alberta electricity market,
9 is that it's meant to rely on effective competition to do the
10 heavy lifting. And that's the regulation. That's the
11 primary regulation that should take place. And that's
12 because of a policy decision that competitive markets can
13 work in this area.

14 So to bring along the baggage from natural
15 monopolies and heavy-duty public convenience and necessity,
16 fair and reasonable and all that, I suggest is not
17 appropriate.

18 And I would just like to refer to no greater
19 authority than the chair of this Commission, who I believe
20 said the same kind of thing in the last annual report. And
21 I'm quoting from Willie Grieve who says that:

22 The AUC believes that where regulation
23 is necessary, we can be better focused,
24 create incentives to improve the
25 efficiency of regulated industries and

1 ensure that the incentives inherent in
2 newly-competitive markets deliver
3 benefits to Albertans. We believe in
4 employing a multidisciplinary approach,
5 applying sound regulatory, economic and
6 legal principles to build innovative
7 regulatory solutions that better serve
8 the public interest. We believe it is
9 our public duty to lead the development
10 of these new, innovative and efficient
11 approaches.

12 I think that that's important and I think that that's
13 what's required here because this is a relatively new area.
14 And settlements and predecision confidentiality is
15 fundamental to that new area, in my view.

16 So I would say that the Commission then needs
17 to adjust its regulatory techniques to a new paradigm, and
18 that's what this is. The Commission should be thinking about
19 creating structures and incentives to promote
20 self-regulation, self-reporting, speed and certainty rather
21 than continued detailed, somewhat intrusive regulation, which
22 is more relevant, in my view, to the old world of natural
23 monopolies. It's quite a different -- you know, rate cases
24 and all that, it's quite a different matter from enforcement
25 proceeding.

1 And, you know, I guess I would say
2 fundamentally the highest calling of the Commission should be
3 the promotion of FEOC and not procedural purity. I think
4 that it is -- I'm taking it up -- as the Friendly Giant said,
5 "Look way up, look way up." And to me it all starts -- it all
6 starts with the basic public policy of orientation that
7 should be followed.

8 I did bring props, and here's one prop. It's
9 called Letting Go: Deregulating the Process of Deregulation
10 by Alfred Kahn, who wrote economics of regulation and is in
11 the forefront. Let me say right at the start this handy
12 title on the book is not directed at this particular issue,
13 but what it does speak to is, in the view of Kahn, the
14 unfortunate tendency of regulatory boards in the United
15 States to try and mandate outcomes rather than set up the
16 structures and the incentives that allows competitive markets
17 to work. So I think it is appropriate.

18 So that's my little preliminary. And then
19 what I would like to do is put some sheets on the board and
20 then see what you think about it.

21 This is meant to be a stream of logic. Can
22 people see that? These are very simple points, and I see
23 these as kind of public policy points. This is directed at
24 the issue of regulatory efficiency.

25 Litigation is expensive. I'm putting that out

1 as a proposition. Does anybody disagree with that? I think
2 that's understood. It's expensive to the parties. It's
3 expensive to the regulatory body of the Commission.
4 Sometimes you go there, but if you don't have
5 to go there why wouldn't you want to avoid that? Why
6 wouldn't you want to save the costs involved in that?
7 The second point: Litigation will be
8 substituted for settlements. There's a missing word there.
9 It will be substituted for settlements if market participants
10 cannot expect predecision confidentiality.
11 THE CHAIR: Why is that a given, Harry?
12 There's lots of reasons that you want to settle.
13 Confidentiality may be one of them. What about a good
14 settlement is better than a bad decision from the decision
15 maker? There's a certainty. You know what you've agreed to.
16 You know what you can live with.
17 MR. CHANDLER: There's a certainty from what?
18 THE CHAIR: From litigation. If
19 confidentiality is the only -- is that the big reason why you
20 would litigate, because you can't get confidentiality? I
21 mean, I'm just posing -- I know the parties here are all --
22 most of them are in favour of this approach, but that
23 certainly isn't what drives settlements in other venues, for
24 example.
25 MR. CHANDLER: Well, let's take that piece by

1 piece. So litigation is more certain. Is that the view of
2 the people around the table?
3 THE CHAIR: No. Litigation is less
4 certain. Settlements are certain.
5 MR. CHANDLER: Right.
6 THE CHAIR: They have a greater degree of
7 certainty than litigation. That's worth something.
8 UNKNOWN SPEAKER: As opposed to confidentiality.
9 MR. CROWTHER: Doug, I don't think that -- I
10 don't think Capital Power is suggesting that confidentiality
11 is the only driver to settle, which is the proposition you're
12 advancing. I don't think that's the case at all.
13 THE CHAIR: I thought that was the
14 proposition Harry was advancing.
15 MR. CROWTHER: No, no. He's saying that
16 there will be fewer settlements or you'll have litigation
17 substituted if confidentiality isn't granted, but that's not
18 the driver for settling.
19 MR. IRVING: It's a factor.
20 MR. CROWTHER: It's a factor in settling.
21 MR. CHANDLER: I would -- in my view and my
22 experience it's the grease -- it helps that to happen.
23 And if you don't have a settlement, if you
24 don't have pre-decision confidentiality, if there's a chill or
25 if there's an exposure and parties are not willing to settle,

1 what's the MSA going to do? We're obviously having
2 discussions or conversations because there's an issue,
3 there's a breach. We're not going to walk away from it and
4 say, "Okay, you don't want to settle." We're going to have
5 to take it forward. And when you take it forward, you know,
6 there is significant costs.

7 MR. CROWTHER: And litigation -- let's
8 understand what litigation means, Doug. As I understand it,
9 maybe I'm wrong, but what I -- the vision I have in my head
10 is that that means that the MSA is going to have to
11 prosecute, and my client can sit there and quite rightly
12 remain mute.

13 So it's really a case of the MSA is telling
14 you that in order for Harry to do his job more effectively he
15 needs to be able to enter into settlements, and if
16 confidentiality is the grease that makes that happen, or
17 helps it happen, at least in some cases, that's important
18 because otherwise he's going to be sending Doug over to the
19 Commission all the time to prosecute.

20 You're not going to get admissions from my
21 client. They're going to have to prove their case. That's
22 what litigation means. It's not like a typical civil
23 litigation contest.

24 MS. SORIA: May I just sort of make a
25 comment on the premise that settlements are certain? They

1 are more certain than litigation, but the whole point here is
2 if you don't have absolute certainty that your settlement
3 that you've entered into is going to be approved, then you
4 want it to be confidential until you've reached that point,
5 and that's the issue with the confidentiality of the
6 settlement.

7 MR. KAISER: It seems to me that's the crux
8 of the problem. You don't do that much in settlements, in
9 rate cases, I guess, but in those jurisdictions, in Ontario
10 and B.C., where settlements occurred in 95 percent of the
11 issues in all rate cases, yes, the negotiation is absolutely
12 confidential. The settlement agreement goes to a panel and
13 it's invoked.

14 So the question actually arises what's
15 different about you? Because it's certainly -- this
16 confidentiality, Harry, that you're looking for does not
17 exist in B.C. or Ontario and that lack of confidentiality in
18 the review thing has no impact on retarding because what
19 people want is they'll make a deal because they know we can
20 live with this and we can get it. But, God, if I have to
21 trust that panel member up there, who the hell knows what
22 he's going to say, I'll take the deal. That's the driver.

23 Now, it may be that the difference is
24 reputation. And it seems to me if you believe that, if you
25 believe, and you obviously do believe, I'm not going to make

1 deals with these people without this confidentiality
2 requirement.

3 Let's say you're right for the sake of
4 argument. There's only three options here: a complete in
5 camera hearing, a complete public hearing, or a hybrid
6 hearing, such as the OSC has, with a public hearing but the
7 settlement agreement remains confidential until approved and
8 if not approved it stays there. There are only three
9 options. It seems to me the only justification for moving
10 what I'll call the OEB, which is a public hearing in Ontario,
11 is the hybrid because nobody wants to conclude any kind of a
12 deal.

13 The only justification is if we could somehow
14 convince ourselves that the whole process in this world that
15 you live in is going to grind to a halt. There will be no
16 deals.

17 And then as Doug Crowther said, this is really
18 a public policy issue. You're right, it's not about law. I
19 mean, the law -- we can deal with the law. We have to deal
20 with the public policy. The public policy issue is, number
21 one, settlements are in the public interest. Nobody is
22 questioning that.

23 The question it seems to me is your number
24 two: Is confidentiality necessary to get the settlements.
25 Well, sure the parties want it. And you can arguably say to

1 the Commission do you really need -- do you really care? Do
2 you really care if the settlement agreement -- well, we'll
3 have a public hearing and anyone can show up. And if they
4 can make a case before the Commission "I need to see this
5 settlement agreement," the Commission will rule on it.
6 If the Calgary Herald shows up and says "I
7 need to see this settlement agreement that ENMAX," well, you
8 can deal with it. It's either in the public interest or not.
9 Or the Commissioner of Competition shows up.
10 You can create a structure which has some
11 flexibility in it. You don't have to have an ironclad rule,
12 but it's really a public policy issue. And I think the basis
13 of it is your very strong view that this confidentiality is
14 necessary, at least until a decision is made by the
15 Commission one way or the other --
16 MR. CHANDLER: That's the only
17 confidentiality we're looking for.
18 MR. KAISER: No, I understand that.
19 MR. CHANDLER: My very strong view is based
20 on dealing with participants here and elsewhere. It's just
21 fundamental if you're going to have settlements and have
22 settlement agreements.
23 THE CHAIR: Darin, you had a comment?
24 MR. LOWTHER: It's a question, I guess.
25 Would it be helpful to take the confidentiality and actually

1 divide it into the elements? There's clearly a
2 confidentiality between yourself, the MSA, and the market
3 participant to entering into a settlement. There's a
4 different confidentiality that might exist between the
5 parties to the settlement and the Commission, who is going to
6 approve it.

7 So if expecting confidentiality could be split
8 into those two elements, and I don't think anyone's
9 suggesting the first one, is it something that would
10 facilitate and enable settlements to take place? It's the
11 second of the confidentiality.

12 MR. CHANDLER: I don't follow you. I don't
13 see where that's --

14 THE CHAIR: I think I'm on the same point
15 as Darin is. And I know we're bleeding into some of the
16 topics that we allocated. That's okay. You can play it by
17 ear and we can see where some of these topics go.

18 Harry, I think it's this notion that
19 everything that you and the market participant discuss should
20 be cloaked with confidentiality. But when you make up a
21 five-page settlement agreement, why does that have to be
22 confidential? So it's the difference between those two sort
23 of areas that demand confidentiality and maybe don't demand
24 confidentiality. Why is the bare bones content of the actual
25 settlement agreement, why should that be as confidential as

1 everything as the horse trading that went on in advance?
2 MR. LOWTHER: The give and take, the
3 balance.
4 THE CHAIR: Which was, to be clear, we
5 don't want to look at that stuff at all.
6 MR. CHANDLER: I have an answer, but
7 there's --
8 THE CHAIR: Sure.
9 MR. FORREST: It's Joel Forrest. I mean,
10 we're getting to the point where the settlement agreement
11 contains the things like the admissions, the agreed statement
12 of facts that got you to a point where you were willing to
13 settle. And so if you say well, make all that public, then
14 there's not much left.
15 And so it's that period of time where you say
16 I'm going to keep that confidential until I have some
17 certainty that what we have been working towards, and it may
18 have been for some period of time, is actually going to be
19 accepted because I might choose to act differently if I don't
20 have some reasonable expectation that what we've come up with
21 is going to be accepted.
22 THE CHAIR: Down at the -- I forget who --
23 we'll go with David first and then Doug.
24 MR. WOOD: I've got a bit of a different
25 perspective than Joel on what's left if you disclose the

1 settlement agreement. I think there's a lot left. There's
2 all of the horse trading that gets you to the point where you
3 agree on what agreed facts you're going to put out there. I
4 don't think anybody, including the Commission, is suggesting
5 that that stuff would ever be disclosed or public.

6 You know, the settlement agreement itself is
7 the result of sometimes a lengthy and fractious negotiating
8 process and I think there's a lot more behind the settlement
9 agreement than everybody agrees is very important that it not
10 be disclosed.

11 MR. CHANDLER: Right. But I think your
12 question was sure, and that's not going to be disclosed, but
13 it's the agreement that gives parties concerns.

14 Douglas?

15 MR. WILSON: Yes, thank you. I actually --
16 I think I'm more on Joel's side than David's side on this.
17 To me I struggle to distinguish between the settlement
18 communications leading to a proposed settlement and the piece
19 of paper or electronic document that contains those
20 communications in their most current form.

21 The settlement is not concluded. This is not
22 a civil case where the parties can go into court and
23 basically, you know, terminate the litigation by their own
24 agreement. It's a proposed settlement. It's a
25 communication.

1 That document, if it's physically signed by
2 the parties, for example, is sent by one to the other and by
3 the other back to the other, their counterpart. Signatures
4 are put on. It's a proposed way to settle. It is not
5 concluded. To me those are still communications. That's
6 simply reflecting the current state of the agreement.

7 Again on the basis of that I don't see a
8 reasonable or sensible distinction or practicable distinction
9 between the communications and the horse trading that got to
10 the exchange of that document. There may have been earlier
11 documents going back and forth, lots of written
12 communications. There could be oral communications. Who
13 knows? I don't see the benefit, for the purposes we're
14 dealing with today and the discussion we're having today, I'm
15 not sure we should rest it upon, you know, yes, that's
16 privileged but this document isn't. What's the big deal? It
17 is a big deal.

18 MR. FORREST: Can I just jump in for a
19 second because I don't think I was maybe clear in what I
20 said? I wasn't suggesting that what's left should somehow
21 not be confidential or not be subject to privilege. I think
22 it ought to be. It's just that what gets filed with the
23 Commission and what becomes the public document is the
24 application, which includes the settlement. Once sort of the
25 final version of where all those negotiations got you to are

1 sort of out in the open, it's out.

2 So I just wanted to be clear that I wasn't
3 suggesting that the rest of it, there was nothing left and so
4 therefore it didn't matter whether it was either privileged
5 or confidential.

6 THE CHAIR: I understood. You were saying
7 what you just repeated.

8 Moin?

9 DR. YAHYA: Two quick points. One is it
10 sounds to me, Harry, you're making an all things being equal
11 type of bracket there, that the margin, that
12 confidentiality -- the margin increase, litigation as opposed
13 to -- so you're not making it absolute, are you, you're sort
14 of making a marginal argument?

15 MR. CHANDLER: Right.

16 DR. YAHYA: But the second point, and this
17 goes back to the point that Gordon was making, it seems to me
18 there is an unspoken issue here in the room, which is the
19 reputation that you see in a sense.

20 And the question I pose for the parties is
21 suppose we were fast forwarding ten years from now and
22 suppose the AUC had approved every settlement that had been
23 brought forward by the MSA, would your answer be any
24 different? In other words, if you had an almost 99.9 percent
25 certainty that the Commission would approve every MSA

1 settlement, would you then not make confidentiality the issue
2 you are making it right now?
3 MS. SORIA: I guess I'll respond. At one
4 of the -- there's two public interest principles that play
5 here, one being the fact that the AUC does have a role in
6 protecting the public interest, as well as the other one
7 being promoting settlement. ENMAX believes that the AUC
8 should always have the opportunity to reject a settlement and
9 it matters that they're not just a registrar. So that is one
10 of the options that is there.

11 If they have a meaningful role to protect the
12 public interest, then even if their history has been, you
13 know, 99.9 percent approval or 100 percent approval, this
14 could be the first, you know, time in 15 years when this is
15 not going to be approved. And because we respect the
16 jurisdiction of the Commission, that's why we're worried
17 about what they might do and why we would want that
18 confidentiality until they actually finally do say it's okay.

19 So I think the other way they just become a
20 registrar.

21 THE CHAIR: I don't want to put you on the
22 spot, John Petch, but when you and your market participant
23 made a deal that the staff couldn't do and you brought it to
24 your commissioners for approval, what happened in terms of
25 confidentiality or of the number of deals you got to make?

1 What's your sort of general take on this proposition?

2 MR. PETCH: If you don't have a settlement
3 what you then have is the hearing alternative, and then it
4 was up to counsel to decide what admissions in the hearing
5 context they were prepared to make. Our staff was always of
6 the view if they could shorten the hearing they should do so.
7 It was just logical.

8 But those admissions once made are made and
9 there's no confidentiality attached to them. Those
10 admissions are part of an exhibit at the regulatory hearing.
11 It's similar to the criminal parallel or analogue that we've
12 talked about earlier. You know, someone's -- those
13 admissions are binding and then whatever results from that
14 follows. But it's not kind of like I'll show you yours (sic)
15 if you'll show me mine (sic) kind of proposition.

16 And I guess I would -- just thinking of
17 section 44, governing settlement it is, where the approval,
18 it doesn't talk about the way you see considering tentative
19 settlements. I suppose if the agency wants to do that, it
20 doesn't say you can't, but in terms of a legislative
21 necessity it's for settlements to be approved, then I guess
22 there's a -- certainly moving forward from what the ASC
23 experience is.

24 We certainly found that after there were a
25 number of years of hearings there were a lot of settlements.

1 So in terms of whether or not the lack of confidentiality
2 would change that, I would say a much bigger driver is what
3 the outcome of a hearing process is and the reputational
4 impact of that.

5 THE CHAIR: Harry, I don't want to cut you
6 off but is this a good place to take a break? The court
7 reporter has been doing it almost two hours. Should we take
8 a ten-minute break? Thanks.

9 (ADJOURNMENT)

10 MR. CHANDLER: Donna said I wasn't speaking
11 loud enough, so I'm going to try to correct that problem. So
12 let me try and recapitulate. I should be sitting down there.
13 I don't want to be the professor, but it just helps me to try
14 to get the points I'm trying to make across if they're up
15 there. Maybe it makes it easier for you to make comments
16 too.

17 So what I'm trying to say when going through
18 the stream of logic is in our view settlements are good.
19 We're here in favour of settlements. We're not here in
20 favour of confidentiality, predecision confidentiality, but
21 that happens to be a means to an end which we think is -- the
22 end is extremely important for a whole set of reasons that
23 we'll talk about in a moment.

24 You know, I think most participants in the
25 proceeding have talked about the importance of predecision

1 confidentiality in some manner, some quite strongly, some
2 maybe less strongly, but I think that is sitting out there.

3 So I'm taking you through the stream of
4 settlement stuff and why it's good. We've been there. And
5 I'm also going to suggest -- and this in some ways builds on
6 Gordon's point. This says litigated decisions are not
7 necessarily better than settlement decisions. Which camp do
8 you want to fall into?

9 You know, I think that's almost being
10 facetious, frankly, from my point of view. I think, as
11 Gordon pointed out, there is a great deal of flexibility that
12 you can have in settlement decisions. And if your raison
13 d'etre is the promotion of FEOC, as is the raison d'etre of
14 the MSA, then there are many things that you can do which are
15 innovative that address the issue immediately. If it's a
16 rules breach, if it's a lack of a formal inhouse compliance
17 program, that could be corrected. That can be stipulated in
18 a manner and that can be addressed quickly and immediately.

19 And I think that that's important. This is a
20 competitive market. It's a fast pace -- it's an entity of
21 fast pace where you can move on. Things happen. You can
22 correct it, and you can correct it in a structural sort of
23 way so they're less likely to happen in the future.

24 So, you know, many people have told me when
25 you're into litigation you're into different issues. You're

1 into dealing with most of you here, right, who are going to
2 pick up narrow points of law. You're going to go different
3 ways. It is -- unfortunately, in my experience, it doesn't
4 necessarily go to the heart of what you want to do, which is
5 provide a signal, provide a communication that this is the
6 expectation in a competitively -- workably competitive
7 market. Here are your obligations and, you know, this is --
8 let's move on and deal with it.

9 MR. IRVING: Can I make a point?

10 MR. CHANDLER: Yes.

11 MR. IRVING: I would say that differently.
12 I think that settlement decisions are better than litigated
13 decisions in almost every case. The question is can you get
14 a settlement that you can live with? But if you can actually
15 negotiate something that allows you to take the risks and
16 it's all known and you can live with those risks and make
17 that decision, then you've removed the wild card of the
18 tribunal making a decision that you don't like, going off on
19 a tangent, doing something that you think is wrong, something
20 you have to get reviewed. I mean, you've taken all that
21 away.

22 The issue is always can you get a settlement
23 you can live with. But if you can, it's better than
24 litigation.

25 MR. CHANDLER: Okay.

1 MR. KAISER: Harry, can I make a different
2 point that's just related to that? I'm just looking at a
3 paragraph that is in all the settlement agreements now with
4 the OSC. It's the last paragraph. And it said: (As read)
5 Both parties will keep the terms of
6 this settlement agreement confidential
7 until it approves the settlement
8 agreement. At that time the parties
9 will no longer have to maintain
10 confidentiality. If the Commission
11 does not approve the settlement
12 agreement, those parties must continue
13 to keep the terms of the settlement
14 agreement confidential unless they
15 agree in writing not to do so or if
16 required by law.
17 Now, remember this is a public hearing. The
18 settlement agreement is in confidence under the terms of this
19 paragraph. However, anyone can come along, any man, woman,
20 or child can come along to that public hearing and get up and
21 say, "I want to see the settlement agreement." And the
22 Commission will say, "Well, tell us what your interest is,
23 Mr. Larder" or whoever. You make the case and they will make
24 a decision on a case-by-case basis. And I would say this to
25 Doug: What's wrong with that? How does it hurt the

1 Commission?
2 THE CHAIR: Gordon, this is -- I may flip
3 this over to you, Moin, but --
4 DR. YAHYA: As long as it's a question.
5 THE CHAIR: This is a case-by-case
6 decision on whether the public has access to an application
7 in front of the Commission. So it goes to the basic
8 principles, I think. That would be my initial response.
9 Depending on how the Commission falls on the
10 weight that it gives to those two competing principles. If
11 it falls on the efficiency of settlement, sure you can do it
12 case by case. You eliminate, though, the other principle, if
13 the public has access to what's in front of us from the
14 beginning.
15 MR. KAISER: Right. That's the difference.
16 One is a presumption that it's a public hearing, everything
17 is public, and the other is a presumption it's a public
18 hearing where certain documents are confidential until a
19 party makes disclosure, makes a case.
20 THE CHAIR: You don't know what triggers
21 the interest of the -- I know it's amorphous -- the public.
22 But if they can't even see it in the first place they may not
23 have any consciousness of what's going on in front of us so
24 it's not public. They can't get it from our system. So
25 that's the end of their -- they don't even have any interest

1 to begin with.
2 MR. LOWTHER: We have an example in a
3 specified penalty proceeding where there was a request for
4 confidentiality regarding certain aspects and practices that
5 were employed by the PPA owner and the PPA buyer, and that
6 was the subject of -- and it was dealt with on a case-by-case
7 basis where who is entitled to the information in the
8 proceeding because there are parties other than simply the
9 PPA buyer, who was the subject of the alleged contravention.
10 There was another party, the owner, that actually had
11 reasonable operational responsibilities pursuant to the PPA.
12 So in that case it was dealt by the panel on a
13 case-by-case basis to say the presumption is you could come
14 but there will be certain elements, and then you decide which
15 parties have an appropriate interest and would be able to see
16 that information.
17 THE CHAIR: But again I'll go over to our
18 commissioners. There's the basic proposition I think that
19 Gordon is putting, is what's wrong with on a case-by-case
20 basis? It's confidential until somebody shows why you should
21 disclose it.
22 Moin?
23 DR. YAHYA: Well, since I don't answer
24 questions I'll pose a question to the parties in the room and
25 to the MSA. What is wrong with Gordon's third way, if you

1 will? Because we've been hearing two stark contrasting
2 positions and I'm curious as to your reaction to this sort of
3 third hybrid option.

4 MR. KAISER: Well, it seems to me, not to
5 answer my own question or anything, that the argument that
6 Doug just made, just to make it a little more concise, it
7 seems to me the only argument against the presumption of
8 confidentiality -- you know, it's a question of whether the
9 presumption is to be presumed public or to be presumed
10 private. There's only one -- everyone agrees that
11 negotiations are private, right, so there's a question
12 whether there's a presumption that the agreement is
13 confidential or a presumption that it's public.

14 And I think the only argument -- the public
15 interest argument I could see is the one that Doug's putting,
16 which is well, there will be notice in either case. And I'm
17 not arguing that the OSC has proper notice, two days' notice,
18 just on their website. You know, let's say the Alberta says,
19 "No, we're going to have proper notice. We'll fix that
20 promptly."

21 The only question would be is the public
22 actually -- is there going to be actual public interest
23 participation; because that's what you're relying on. The
24 reason this is no problem in a rate case is you got all these
25 26 intervenors funded out of the public purse. I mean, there

1 will be lawyers there lining up for their paycheque
2 regardless of whether they have anything to say or not. We
3 have no questions that there's public interest in a rate
4 case. You don't need to be concerned about that.

5 The problem here is nobody else shows up and
6 the Commission says, "Well, this is looking like a star
7 chamber. How do we make sure that the public has proper
8 notice?" To me that's the question.

9 MR. FORREST: Maybe I could jump in and that
10 will cover off some of my obligation to discuss the two-step
11 process.

12 I guess from a market participant perspective
13 we would start off from the position of saying that we would
14 like to be in a position to extend the confidentiality of the
15 settlement until it becomes certain.

16 In our remarks we did say that we were in
17 favour of the two-step process basically on the understanding
18 that that level of confidentiality was something that -- at
19 least up until now the AUC has said, "No, we're not prepared
20 to do that." And we would see the two-step process as
21 getting partway there. And that's sort of the basis for
22 where we started from in terms of comment.

23 So I think -- to a certain extent some of the
24 questions that I might have had about the process have been
25 partially answered because I think I had as many questions as

1 I did answers. I think it does help -- or the description of
2 the OSC process in my mind got partway to having greater
3 understanding of things like rules. Having the opportunity
4 to have a Commission member sort of present for some of the
5 settlement discussions I think leads to greater understanding
6 of the context around some of the rules, because we've
7 experienced this in the past where there are difficulties
8 with the rules and interpretation of the rules themselves.

9 And so to a certain extent one of the
10 questions was what are the rules around the discussions that
11 you would have at step one. Is it a very open conversation
12 in which you can basically have a discussion about anything
13 relevant to that potential breach of the rule or not? I
14 think that the more open and broad ranging sort of discussion
15 the better in terms of understanding of the context.

16 But in terms of keeping confidentiality of the
17 settlement until it has been approved is obviously better
18 than, from our perspective, saying that you have to take your
19 chances, because I think that's the point at which you really
20 have to start to chill, especially as the stakes increase.

21 So I would see that there's a bit of a sliding
22 scale in terms of the seriousness of offences or breaches of
23 rules, where at the low end you're probably going to have
24 people say, "Well, it's not worth fighting about the
25 confidentiality and the consequences aren't that great." But

1 as that -- sort of those consequences to reputation and
2 things like that increase, obviously that confidentiality,
3 the requirement of it, the degree to which it sort of
4 provides the grease to get a settlement on the issues --
5 because confidentiality isn't the issue. It's just one of
6 the things that's required in order to get the issues
7 resolved.

8 So I'm not sure that that was a particularly
9 coherent sort of description of the two-step process, but it
10 kind of reacted to some of the discussion that we've heard
11 today.

12 I guess when I hear "Well, what's wrong with
13 it," I'm not sure that there's anything wrong with it other
14 than that we would prefer to have sort of full
15 confidentiality, but it's not bad in that it's a step in the
16 right direction, that you have some degree to which you can
17 understand that there won't be full public disclosure of this
18 until it's something that has been approved. And I think
19 that that's sort of the objective here.

20 THE CHAIR: Joel, I think I know your
21 answer, but assume a serious breach of contravention. Are
22 you saying that the settlement conference, the two-stage
23 approach, would not give you sufficient certainty so as to
24 eliminate the desire for confidentiality once it's filed with
25 the Commission?

1 MR. FORREST: I think that it would provide
2 some degree of certainty.
3 THE CHAIR: But sufficient to eliminate
4 your desire for confidentiality when you file the agreement?
5 MR. FORREST: I guess we're probably talking
6 about -- the desire to have the confidentiality would still
7 be there. I think it really would depend on the specifics of
8 the case and the settlement that you had reached. I think
9 directionally yes, it would create greater comfort, that
10 despite the fact that it might be made public at the point at
11 which you file it, you would have more confidence.
12 I guess to the extent that that
13 confidentiality can be extended, even into the filing of the
14 settlement for the purposes of the hearing, and it would
15 require somebody showing up, somebody who has an interest in
16 order to make it a public document, I think that that would
17 be a preference.
18 MR. CHANDLER: You know, I want to drive on
19 on why settlements are important and how confidentiality
20 contributes to that, but I have to think that there are
21 creative ways, whether it's two-step or -- it's not my view
22 of not even having the two step of addressing that. I'm not
23 really going to speak to this, but I would say this, Gordon:
24 It just seems to me again it's another case of this is a
25 different regulatory domain than rate cases, where perhaps

1 you need 1,000 points of light to help the Commission reach
2 the right decision and there are many parties obviously
3 directly affected and they need an opportunity to say their
4 piece.

5 What we're talking about is an enforcement
6 environment where -- I hate to say it, but it seems to me
7 there should be a little bit of deference given to the MSA
8 because the MSA has a public interest mandate, has a public
9 interest role to play. So it's not like a rate application
10 where you're going to go for whatever you can get or
11 whatever. You have parties who are adversarial in interest,
12 one of whom has a public interest requirement or mandate, and
13 then you go to a Commission who has a full right to say
14 "That's not enough information. I can't properly decide on
15 this issue." So that may not satisfy everybody here, but it
16 seems to me it's an important -- it is a distinction that
17 should be made. It's a different kind of process.

18 Having said that I would now like to drive on
19 on the settlement stuff. So I think we talked about the
20 litigation decision and how good or bad they may be.

21 I think this is -- the next point I make here
22 is if settlements are chilled, and I'm making the argument
23 following the logic, which you may accept or not, but if
24 there is less likelihood of the MSA reaching settlements with
25 parties because of this predecision confidentiality issue,

1 then part of the structure that we put in place, the MSA has
2 put in place, in keeping with the group here and the
3 legislation is self-reporting, and I think self-reporting is
4 an important mechanism in a modern competitive market
5 environment. It obviously saves resources; right?

6 I mean, if participants can understand that
7 it's in their interest to have proper programs in place, to
8 identify issues and they know that there's the possibility of
9 favourable treatment, there's the possibility of forbearance,
10 that's an incentive. That's an incentive for them to be on
11 their toes and play the game, try and promote fair,
12 efficient, open and competitive markets.

13 Again if you follow the logic, it seems to me
14 that if there's a chilling on self-reporting, well, we don't
15 really know what's going to happen, it's going to be a
16 litigation or whatever, then the enforcement agencies, the
17 AESO, and us obviously have to devote more resources to
18 monitoring detection.

19 Quite frankly that's not an ideal solution.
20 It's much easier for a company that recognizes its
21 responsibilities in the market to address that in a
22 comprehensive systematic fashion. So this is very much a
23 second best outcome, and I think it would be -- it's an
24 undesirable outcome.

25 THE CHAIR:

Harry, can I just ask you, on

1 the self-reporting, are you able to comment generally on the
2 frequency of the stats on this particular aspect of your
3 overall enforcement?

4 MR. CHANDLER: I don't have the actual
5 numbers here, but I know that for example we're going to put
6 out a report, an annual report, on compliance 2010 shortly.
7 So, for example, there's a 40 percent increase in matters
8 that we dealt with in 2010 over 2009. A lot of that is
9 because of self-reporting. That's the kind of stuff that we
10 can certainly address in our written submission. I mean, I
11 think it goes to that point.

12 When you have that --

13 THE CHAIR: I want to challenge you a
14 little bit. So whatever the baseline is for self-reporting,
15 the current approach by the Commission is it's not
16 confidential. So if you're getting your fair share of
17 self-reporting with the current regime, which is no
18 confidentiality, do you derail one of your points?

19 MR. CHANDLER: I think we're on the
20 precipice. This is kind of an issue that we really
21 confronted and engaged now in 2009, 2010. You know, maybe in
22 ten years' time this could be a different situation, but
23 right now I think there are question marks in the minds of
24 the market participants. How is it going to go? Is this
25 going to unfold as --

1 MR. KAISER: Now, when you say
2 self-reporting do you mean that parties voluntarily come
3 forward and say, "Harry, I made a mistake. I contravened
4 rule such and such?"

5 MR. CHANDLER: Yes.

6 MR. ROSS: I'm just going to make a quick
7 point, Harry. It's more something you've raised, and that is
8 deference to the MSA, because I'm not sure I quite caught
9 that. I mean, it troubles me a little bit to think of
10 deference to the MSA in the context of it being a
11 prosecutorial type of body, and what does that mean in terms
12 of AUC decision making versus deference to the MSA and its
13 ability to come to a settlement agreement that is acceptable?
14 Maybe I misheard you, but maybe you could just speak on what
15 your interpretation of MSA deference is.

16 MR. CHANDLER: Maybe that's the wrong term,
17 but I guess all I was trying to say is by comparison to other
18 type of regulatory -- the traditional regulatory proceedings
19 you have in a sense a public interest advocate who has a
20 public interest that is foremost in its mandate.

21 So I think that that -- it's up to the
22 Commission to give -- or the parties to give whatever weight
23 you want to give to that, but that's a fact. We are
24 different from other parties who have a purely private
25 interest.

1 MR. KAISER: It seems to me one of the
2 problems, and I guess the two-hearing stage was an attempt to
3 address this, is that deference or not you have all the facts
4 in this world. You got all the facts. The Commission that's
5 approving the settlement agreement has limited facts it seems
6 to me.

7 So my question to you, is part of the problem
8 the sort of lack of confidence, if you will, that the parties
9 have that the Commission will approve the settlement
10 agreement and therefore the angst over the confidentiality,
11 can that be solved to some degree by providing the AUC with a
12 more fulsome fact base, or not? I know there was one case
13 where they sent interrogatories to you and that was not a
14 happy experience for anyone. Is the information flow still
15 part of the problem?

16 MR. CHANDLER: Well, I think what you want to
17 do is have a concise, succinct agreement on the facts but
18 addresses all the points that the Commission needs to take
19 into consideration in finding a decision. There is guidance
20 on that in terms of the criteria and specified penalties, for
21 example, and the more guidance that comes from the Commission
22 the better. I mean, it can be a bit of an iterative process,
23 but this goes to this issue of -- I was addressing regulatory
24 efficiency in another way but, I mean, I think it is quite
25 true there is what Doug has called proportionality.

1 So the example you talk about is an agreement
2 of settlement on a \$500 penalty for a breach, which had to be
3 put to the Commission that way because it didn't fall within
4 one of the rules under specified penalty. You know, then
5 having to respond to interrogatories on market impact and
6 things of that nature, which to me make no sense really. You
7 know, you're talking about a parking offence and -- yes, I
8 think it would be -- that's part of the mind shift that I
9 think is important for the Commission.

10 THE CHAIR: On that small sort of -- I
11 will describe it as small. I don't know how small it would
12 be, but wouldn't one approach to that situation, Harry, be we
13 got to include more rules under the specified rule regime
14 because if they're all coming in in settlements for \$500
15 there should be a specified penalty.

16 MR. LOWTHER: The flip side, however, is I
17 guess trying to convey to the Commission the work you did to
18 come up with the \$500 number. And so the preliminary work
19 that's done would conclude that no, there wasn't a market
20 impact. There wasn't anything there other than this small
21 transgression, which is why often it is for \$500 as opposed
22 to if it's silent there's nothing to indicate to the
23 Commission that those steps have been done to essentially
24 cross those things off.

25 MR. CROWTHER: But with respect -- sorry,

1 Darin, I didn't mean to interrupt.

2 MR. LOWTHER: An impact to the market or
3 impact to public market participants is something that could
4 be quite important to the people around the room here; if
5 this small transgression caused a change in pool price or if
6 this small transgression impacted your particular unit such
7 that it was dispatched down.

8 So it's almost a chicken and an egg in the
9 sense that you don't know where you started to determine to
10 come up with the \$500 because the 500 isn't in the matrix,
11 it's something you borrowed from the matrix. And so it's
12 trying to piece all those things together. But for the
13 Commission, who wants to understand and has questions as to
14 is the \$500 appropriate, well, it would be appropriate if
15 there were no market impacts, it didn't impact public people.
16 But if there were market impacts or it impacted somebody else
17 to the tune of \$100,000, then \$500 may not be the right
18 number.

19 So where do you start in that cycle? This is
20 the question.

21 THE CHAIR: Doug?

22 MR. CROWTHER: Well, actually -- I will park
23 the comment -- if you will come back to me because I would
24 certainly like to see Harry get through the rest of his
25 stuff.

1 MR. CHANDLER: I'm essentially through, but
2 let me just add the additional wrinkle. As you well know,
3 Darin, that particular irritant of course involved a rule
4 that had subsequently been embraced in this best by penalty
5 regime. So it was a curiosity on the part of the Commission
6 to ask about a regime that was now passed. So it would have
7 been a \$500 issue. I mean, it was something that the
8 Commission had accepted. It was the type of rule that fit
9 well into that kind of expeditious process.

10 So two points. There is a responsibility for
11 the parties, and particularly for the MSA, to provide
12 adequate information for the Commission to discredit its
13 responsibilities. There's no question about it.

14 I think there is also a requirement or a
15 desire -- I have a desire for the Commission to treat things
16 in a proportional manner. It goes to the overarching
17 principle of what this is all about, is providing a fair,
18 efficient, and openly competitive market and finding the most
19 efficient means to do it.

20 THE CHAIR: Thank you very much, Harry.
21 Both you and Doug have prompted very good discussion on a lot
22 of the topics. We'll still -- I'm going to get to you, Doug.
23 We'll still go through the allocations. As I say, use your
24 own judgment as to whether we've talked enough about the
25 issue or not. We will go through the line-up.

1 Doug Crowther.
2 MR. CROWTHER: Thanks, Doug, and I'll try to
3 be brief. But, it seems to me from just the last discussion,
4 I don't think notice -- we've heard a lot about notice. I
5 don't think notice is the issue. I think the Commission
6 could issue a notice, publish it broadly, distribute it as it
7 wishes and make certain that anybody who had a legitimate
8 interest in the proceeding was able to attend the hearing.
9 And I don't think anything about confidentiality would
10 constrain the Commission from doing that because presumably
11 the notice could even identify the alleged contravention, who
12 the party was, all that kind of stuff. I don't think --
13 certainly I haven't heard anyone around this table, I may be
14 wrong, suggesting otherwise. So I don't think notice is the
15 issue.

16 I don't think open court is really an issue
17 either. I may not be reading it correctly, but I read the
18 Sierra Club decision from the Supreme Court of Canada as
19 making a distinction between open court, which I think is a
20 fundamental principle -- it's making a distinction between
21 that and access to all of the evidence. I quite frankly
22 think we're more into the realm of whether anybody who walks
23 in the door should have access to all the evidence under
24 certain circumstances. If I'm reading the case correctly, I
25 think the Supreme Court of Canada has said that not in every

1 case must every party have access to all of the evidence. So
2 I suggest we should keep that in mind.

3 I wouldn't characterize this as a third option
4 because I hadn't understood that there was a suggestion that
5 there should necessarily be an assumption by the Commission
6 that every settlement agreement is going to be accepted on a
7 confidential basis. I would have thought -- I think Capital
8 Power would be accepting of the proposition that in each case
9 the MSA on behalf of itself and the counterparty of the
10 settlement agreement must convince the Commission that
11 confidentiality is appropriate in this particular
12 circumstance. This particular case. So I hadn't seen it as
13 a third option. I didn't think we were establishing a
14 presumption of confidence. I guess that might be nice, but I
15 don't think that that's necessary.

16 As I read the decisions that I assumed had
17 prompted this discussion, the Commission has said, "We're
18 just not comfortable with granting confidentiality for these
19 reasons." So I didn't see this as a third option.

20 The Commission can always hear arguments as to
21 why confidentiality shouldn't be granted or can hear
22 applications by a party that, given its particular
23 circumstance it ought to be allowed into the tent because it
24 has a particular interest. It has an interest that must be
25 protected.

1 So again this notion of open court and access
2 to all the evidence, any party should presumably be able to
3 come to you in any case and say, "We need to see that because
4 our circumstances justify that." I don't think again anybody
5 is suggesting that the Commission should be precluded from
6 considering those kinds of applications on a case-by-case
7 basis.

8 I think the Commission -- to pick up on a
9 point that we discussed just near the end here, the
10 Commission can always deny the application if, for instance,
11 it's not satisfied that there's sufficient evidence or
12 information to justify the penalty that's being proposed. I
13 think that that would have been, quite frankly, a better
14 approach than issuing information requests to the MSA.
15 Simply saying, "You know what? You haven't convinced us for
16 the following reasons that this is the appropriate penalty in
17 this case. Next time you come we want you to have this,
18 this, and this addressed in the settlement agreement" and
19 send them back to the drawing board. I would have thought
20 that that was the more appropriate approach.

21 And lastly, on the two-stage process, I think
22 Capital Power sees that as a poor second choice. And it
23 seems to raise some interesting questions. Again picking up
24 on a point that was made in the Petch paper about the public
25 perception of sweetheart deals, I'm concerned that you might

1 even have a greater perception of that if you know that
2 you've got a commissioner who's been sort of in the secret
3 handshake discussions and then ends up -- at least under one
4 model, ends up essentially as the cheerleader for the
5 settlement agreement as a member of the subsequent hearing
6 panel. That from my perspective creates all sorts of issues
7 of optics, if not concerns about bias, et cetera, et cetera.
8 So I think that if the two-stage process -- I
9 take the point that -- and I think even that Joel was
10 suggesting that you would see it as a second choice in the
11 sense that it gives you some certainty -- a greater degree of
12 certainty that what's being cobbled together as a settlement
13 is more likely to find favour with the Commission, but that's
14 a second choice because certainly maintaining this
15 confidentiality until the settlement agreement is approved is
16 a much more effective approach.

17 MR. FORREST: Right. I would agree, yes.
18 THE CHAIR: Thanks, Doug.

19 Who is here from Suncor? We've opened up the
20 two-step process and what I'm suggesting is we continue with
21 that discussion. We're out of order in terms of who is going
22 to speak to what. Are you the guys that deal with that?

23 MR. WOOD: Oh, yeah.
24 THE CHAIR: Okay. Joel, you had the
25 two-step --

1 MR. FORREST: I did. I'm not sure that I
2 have anything else to say other than what I had sort of
3 before. I think it's a fair characterization that our first
4 choice would be to maintain confidentiality, as Doug was just
5 describing, but that if the two-step process -- if for some
6 reason the Commission were to say "We're just simply not
7 going to entertain requests for confidentiality that would
8 extend through the process until the settlement agreement
9 sort of finalized," then it's sort of a next best approach,
10 from our perspective, and that it achieves some of the goals
11 of confidentiality that we would be looking for.

12 THE CHAIR: Do others have some comments?
13 Doug Wilson?

14 MR. WILSON: Thanks. I echo the comments
15 that these guys over here made. The question that perturbs
16 me about the concept of the two-step approach here, and I
17 think Gordon's paper raised the issue also, is it's not on
18 all fours with the Ontario model. You know, OSC on one side,
19 party on the other. Here we have three parties involved.

20 What perturbs me is how do we get to the
21 Commission to get this feedback, practically speaking? I
22 mean, generally speaking you can't just walk up and expect to
23 chat to Moin or anyone else about a particular issue. You
24 probably have to instigate some kind of proceeding to
25 facilitate that, I'm speculating. I know the Commission will

1 be creative and innovative.
2 So if you have to commence something in order
3 to have that discussion, what is that? And if that's not
4 public, it kind of begs the question for me why would we
5 create a process of a two-step nature if it allows for a
6 nonpublic discussion with the Commission? Why not just go
7 more directly at it and in Rule 1, in Rule 14 say that one of
8 the grounds for confidentiality, subject to the Commission
9 agreeing, is essentially the settlement privilege, or more
10 closely privilege. That seems to be much more
11 straightforward.

12 So again this is a work in progress and I'm
13 all in favour of creating solutions. It seems to be a longer
14 and more complicated approach than what we could get to more
15 straightforwardly by just putting it in the rules that you
16 can ask for it. And whoever wants to ask for it can and
17 those for whom privilege doesn't matter as much, those for
18 whom that public exposure predecision doesn't matter so much
19 won't worry about it. Others will take the opportunity.

20 THE CHAIR: Okay, thank you.

21 Cairns?

22 MR. PRICE: Cairns Price. I completely
23 agree with that last point. And I think sort of an
24 overarching issue here too is the question of whether or not
25 the public interest can be achieved without a fully

1 transparent process. And I think the answer to that -- and I
2 guess I would say in cases where the legislature doesn't
3 require a private hearing, such as in the case of
4 preferential sharing of information.

5 But where it's not clear I would say the
6 answer to that is yes. And so when we get into the issue of
7 can we just recognize settlement privilege as confidential,
8 recognizing that the public interest can be achieved in that
9 context without a full public hearing, then why further
10 complicate the issue by doing something -- by creating a
11 two-step process, which also doesn't provide full
12 transparency.

13 THE CHAIR: Thank you.

14 John?

15 MR. IRVING: I won't repeat what others
16 have said here, but we agree completely with Capital Power
17 and TransCanada and all of those comments for the reasons
18 stated, that the two-step process is -- I wouldn't call it a
19 poor second choice. I think it's the wrong choice. And the
20 right way to go is to have confidentiality continuing right
21 through until the approval.

22 THE CHAIR: The wrong choice because of
23 the bias issue that Doug Crowther raised? Would that be in
24 your thinking, or one of the reasons it's wrong?

25 MR. IRVING: Well, the poor choice

1 problem -- the reason I think it's a poor choice is that I
2 understand that if it's rejected -- it's the risk of
3 rejection and then something becoming public. And I
4 understand that in the second -- although you're more
5 comfortable having the two-step process that you're going to
6 get to approval it's not certain.

7 And so the uncertainty of what may happen if
8 at the second stage it's rejected and then becomes public I
9 think is prejudicial, if I understand the process correctly.
10 And that worries me a great deal.

11 And so I would much rather have one process
12 where it's maintained -- confidentiality is maintained right
13 through the process. And if it turns out that there is no
14 approval, then you're back to square one and you can go back
15 and try and negotiate a new deal or you can go the litigation
16 route, but that would be our preference.

17 MR. FORREST: I guess I had understood that
18 the confidentiality of the settlement agreement itself, at
19 least under the OSC model, is one where the confidentiality
20 would be maintained. And it specifically addresses that if
21 it's a failed attempt at achieving approval that it maintains
22 that confidentiality. I'm assuming that you would then be
23 sent back to fix it or come up with something more acceptable
24 and that the only way that it would become public is for some
25 interested party to come up and establish some valid reason

1 why they ought to be able to see the settlement agreement
2 itself.

3 MR. KAISER: That's correct.

4 THE CHAIR: That's legislatively
5 sanctioned as opposed to adoption of a policy by the
6 Securities Commission in Ontario.

7 MR. KAISER: I'm not sure about that.

8 THE CHAIR: I thought that was the case.

9 Liz?

10 MS. SORIA: So I'll just argue on the side
11 of the two-step process, and not because it's actually
12 necessarily the process that ENMAX Energy would advocate.
13 We've sort of gone on a principle basis. So if a two-step
14 process could reach the principle we're espousing, then that
15 would be great.

16 But I think I just want to pick up on the
17 point that John just made, that there is a benefit in that
18 process in increasing the certainty that the settlement will
19 end everything and that it will be approved. I think there's
20 some value in that.

21 Of course if we're talking about the value of
22 that versus the value of the confidentiality, yes, I would
23 pick the confidentiality of being the more important issue,
24 but I think the other one is still a very valid issue in
25 terms of efficiency and part of the cost factor that goes

1 into whether you want to bother to get a settlement at
2 50 percent of the time. You're not going to get to the end
3 point and you may just skip it entirely.

4 THE CHAIR: Others? Yes, John.

5 MR. PETCH: Thanks, Doug. Just two small
6 points, and one is that there's a value in jurisprudence and
7 so I'm not sure in this two-step process if a settlement is
8 rejected whether it contemplates a decision coming out. I
9 would think in terms of market participants and making it
10 public knowing on what basis a settlement agreement is
11 considered inadequate, there's some value in terms of
12 precedent and in terms of the AUC decision making and I
13 think -- I'm not advocating a particular decision, but I
14 think that's something that warrants consideration.

15 The other is if one does go to a two-step
16 process -- I just mention this because the ASC clearly has
17 thrown it out. If you have sort of a one-off situation it is
18 not such a big deal. By one off I mean the MSA is bringing
19 forward one of the offending parties.

20 But if you have one of these disasters where
21 there is a large number of respondents, I think some of
22 that -- in terms of avoiding later arguments in terms of
23 potential enforcement proceedings, the parties who want to
24 settle would have to understand that they would have to bring
25 not only consents on their part, but consents from all other

1 parties so that the -- there are only nine members of the
2 AUC. You could easily burn through your available members to
3 hear an enforcement proceeding in the matter and have bias
4 complications.

5 So I think there's some issues about the
6 waivers that would be needed in the multiparty situation so
7 as to avoid those further complications. That's maybe a
8 comment on the mechanics, but I thought it would be useful.

9 THE CHAIR: Alan?

10 MR. ROSS: Just a very quick comment on
11 AltaLink's position, which is one maybe which is supporting
12 regulatory efficiency. They have leaned in favour of a
13 registered settlement process, not unlike the Canadian
14 Competition Tribunal and a little bit, as I understand it,
15 and correct me if I'm wrong, maybe like others in the United
16 States, where there are other examples of the submission of a
17 settlement agreement and then by the terms of statute it then
18 becomes an order.

19 Part of AltaLink's position has been that
20 that's consistent with section 5, particularly 5(a), of the
21 EUA and this notion of minimizing cost of regulation and
22 ensuring efficiency. So its position is that by having a
23 registered settlement process or a streamline process that
24 you're more in keeping with the fundamental principles within
25 the EUA.

1 THE CHAIR: And that would require a
2 legislative change from the current statute; correct?
3 MR. ROSS: That's correct. That is not,
4 as I understand it, currently covered by legislation. So
5 that would require a change to the statute.
6 THE CHAIR: I would like to put to the
7 group this. Let's just assume that we have a two-step
8 process and we're in the second step and the settlement
9 agreement is filed and it is kept confidential, but we hold a
10 live hearing. I mean to date I don't believe we've actually
11 held a live hearing on an MSA enforcement action or
12 settlement. So that might create a bunch of questions as
13 well.
14 But assume it's a live proceeding and a guy
15 from the Herald walks in. Or anybody walks in. They're just
16 the public. And of course the terms of the settlement are
17 being discussed. The Commission may be asking some
18 questions. So there it is. Is that palpable? Is that on?
19 Or in the event of a live proceeding is it in effect an in
20 camera hearing pending the outcome: approval or denial?
21 So the document isn't on the public record,
22 the agreement isn't on the public record, but the public show
23 up, a live hearing.
24 MR. WILSON: It's a great example, which I
25 think raises the horse out of the barn issue, and it's one of

1 the things that I was never clear on around the OSC Rule 12
2 approach, you know the public hearing, but if it's not
3 approved it's kept confidential after.

4 I don't think you can allow parties access to
5 a confidential document with a reasonable expectation that it
6 will remain confidential if not approved. I mean, it's
7 essentially out there. It's just an observation.

8 THE CHAIR: Okay. Liz, you have to leave,
9 I know.

10 MS. SORIA: Sorry, Doug, and everybody for
11 doing this. I just got a call from the day care saying my
12 son has an earache, I have to go and pick him up. My husband
13 is in South America so I don't really have another option. I
14 will get there first.

15 So I'm just going to really burn through my
16 two topics very quickly and distribute the information I
17 have, and I think I can do this very quickly, and then I'll
18 be gone. I'll actually take one of each of these and pass
19 them around. We've actually touched on most of these topics
20 already so it won't be a big discussion, at least for me
21 presenting it, and then you guys will continue.

22 So I'll start with the first one on my list,
23 which is public interest, and we've certainly had a lot of
24 discussion about that. What I've done here and what you're
25 receiving is I've just excerpted the comments from

1 everybody's submissions that seem to touch on those topics.
2 And forgive me if I've not excerpted comments you would have
3 liked me to have included. I've done my best at that.

4 And then what I've done is I've kind of
5 grouped them in a few areas and then put some bullet points
6 underneath the topic just to say what I think the conclusion
7 of the group is.

8 So on public interest then, and that's the
9 long form that's going around, generally I think there's
10 clear consensus in the group that there is a need to balance
11 public interest in promoting settlements against the public
12 interest in transparency. I don't think there was much
13 debate around that.

14 Then there was the topic of criteria, how you
15 determine what's in the public interest and not. So it's
16 just to strike that balance it seems that regulatory agencies
17 establish a criteria to guide them in determining when a
18 particular decision -- or a settlement agreement would be in
19 the public interest. Again I didn't see a lot of debate on
20 that.

21 Then we get to the concept of confidentiality
22 of settlement discussions, settlement documents, and
23 settlement proceedings. So there's public interest in
24 agreement that settlement discussions should be confidential.

25 Then just on the next page there seems to be

1 consensus as well that the Commission should hold a hearing
2 to approve a settlement agreement, that only the parties to
3 the settlement should be parties. I guess that's subject to
4 anybody who can raise standing.

5 There's no consensus, I think, as you'll see
6 from our earlier conversation, on the degree of
7 confidentiality, if any, to record the settlement agreements
8 and related information. We had arguments on both sides.

9 And there hasn't been a real clear consensus
10 on the appropriate public notice and access to the
11 proceedings, if any.

12 So those are the two areas where I think
13 discussion is required.

14 I know I'm taking you very quickly through
15 this. I will then just pass on to the rejected settlement
16 topics, and I've done the same thing here. So as a general
17 statement there is a sense that rejection of settlements
18 could effect regulatory efficiency and certainty for the
19 parties and that rejected settlements should not affect
20 parties negatively. So there seems to be general agreement
21 on those points.

22 On the confidentiality of settlement
23 discussions and documents -- this comes up in the rejected
24 settlements area as well as in public interest -- there is a
25 clear agreement that the settlement discussions and documents

1 should be inadmissible in any proceedings. So whether it's
2 public or not is one thing, but they certainly shouldn't be
3 used in any subsequent proceeding once a settlement has been
4 rejected. But there's no consensus on the degree, if any, to
5 which the settlement agreement should be kept confidential.
6 So again that goes back to the same point in the other topic.

7 Finally there's some process comments that we
8 had on rejected settlements, and there seems to be clear
9 agreement that any commissioner who is involved in reviewing
10 the settlement agreement or in settlement discussions should
11 be disqualified from any subsequent hearing in the same
12 matter.

13 So again I've drilled it down to where the
14 real discussion lies, I think, and I think we've already seen
15 that in the discussions so far.

16 I'm afraid I have to excuse myself. So that's
17 a drive-by consultation. Thank you very much.

18 MR. LOWTHER: Thank you very much for
19 coming.

20 MS. SORIA: Yes, and thanks; and I
21 apologize.

22 THE CHAIR: Let me pick up on John Petch's
23 earlier point. Is there a strong disagreement, for example,
24 that in the event the Commission rejects the settlement that
25 there shouldn't be a decision, that there shouldn't be a

1 rationale for the rejection? Does anybody believe that if
2 you reject it that's it, the one liner, denied?
3 MR. SCOTT: I guess that's not very
4 helpful for either the party that's trying to do the
5 settlement agreement or the MSA. It's an option.
6 MR. ROSS: Aren't you more likely to get
7 appealed as well on the grounds of lack of reasons
8 essentially?
9 THE CHAIR: Any other comments on that
10 particular point?
11 MR. FORREST: I guess the only thing I would
12 add is that the reasons would probably not have to be lengthy
13 or disclose much in the way of sort of confidential type
14 information.
15 THE CHAIR: Yes.
16 MR. FORREST: But that it would -- I mean,
17 to be helpful they might just say it was insufficient in
18 certain areas or there was a lack of information. You know,
19 that type of guidance, which would then at least provide some
20 redirection for parties to cure those deficiencies.
21 THE CHAIR: On the same kind of point, and
22 I think it -- I forget who it was that raised this, we have
23 on occasion, maybe one occasion, issued these information
24 requests to the MSA after filing a settlement. Someone made
25 the argument if it's more efficient just reject it.

1 So is there a view among the participants here
2 today that just a pure rejection of why we're rejecting it is
3 preferable to us trying to complete the record, which is kind
4 of what those IRs do? We are in that mode of course on the
5 rate side and facility side. You always try to complete the
6 record so that the applicant doesn't have to start over
7 again. This is usually a couple of issues that they haven't
8 quite covered sufficiently for us.

9 Any views on that in terms of preference?

10 MR. ROSS: Well, my ultimate state of
11 view is that if you come forward to the AUC with an
12 incomplete record with the MSA then it shouldn't be the
13 parties or the AUC's role to try and connect the dots. But
14 if you have an incomplete application, you ought to be turned
15 back and sent home.

16 THE CHAIR: Differences or otherwise?

17 Kelly?

18 MR. SCOTT: I think I'm agreeing. It
19 seems to me it would be more efficient for the AUC and the
20 parties involved if you just sent it back and told us to fix
21 it, fix this. Put the onus on us to fix it.

22 MR. KAISER: I think too the corollary of
23 that is that if you think the applications are incomplete and
24 it's a continuing problem, I mean, you have a tool to fix
25 that, which is a filing guidance.

1 THE CHAIR: Yes.
2 Doug Crowther?
3 MR. CROWTHER: Again it's probably one of
4 those instances where you make a hard and fast rule that's
5 going to create problems so it can probably be addressed on
6 an individual basis.
7 However, I think the Commission would probably
8 already appreciate that asking information or posing
9 information requests to the MSA, they put the MSA in a
10 difficult position in the sense that the parties after, let's
11 just assume, lengthy and difficult negotiations have agreed
12 exactly on what information it is that they're prepared to
13 share with the Commission. I think you're probably in a
14 situation where the MSA then, in order to respond to most
15 likely information requests, is going to have to go back to
16 the counterparty of the settlement agreement and get its okay
17 to putting additional facts on the record.
18 Now, I take the point that there may be
19 information requests that are directed solely to the MSA's
20 assessment of the harm and all that kind of thing, but I
21 think it becomes potentially problematic.
22 But having said all that, I probably should --
23 under all your rules, you can waive your specific rule in any
24 circumstance where you think it makes sense to do so.
25 THE CHAIR: Anyone else?

1 All right. I know lunch is coming, but does
2 anybody mind if we let Suncor go through their topics and
3 then let's just assess where we are?

4 MR. WOOD: Do you want us to go through
5 both of them or just the first one?

6 THE CHAIR: Go through both of them.

7 MR. WOOD: Okay. Well, the first one
8 that we've been assigned is legislative authority. I won't
9 say much on that. The reason we're all here is because of
10 section 44 of the Utilities Commissions Act, which says three
11 things:

12 Number 1, it says that the MSA can enter into
13 settlement;

14 Number 2, it says that they have to be filed
15 with approval under section 51;

16 And number 3, section 44 says that the
17 legislated guideline governing settlements under the EUA and
18 the GUA don't apply.

19 As I indicated before, I agree with Doug
20 Crowther and Doug Wilson that the effect of that third piece
21 is that the Commission is free to devise a different
22 procedure and has the flexibility to come with a procedure
23 that it thinks is most appropriate for considering
24 settlements under section 44.

25 The authority to do that of course comes from

1 section 76 of the AUCA, which gives the Commission very broad
2 rule-making authority. What it says is that the Commission
3 may make rules governing any manner or person within its
4 jurisdiction.

5 Now, as was indicated before, AltaLink
6 indicated a preference for a registration-type process and,
7 as Doug Crowther correctly suggested, I think, that would
8 require a legislative change because under section 53 of the
9 AUC Act the settlement must go to a hearing at the present
10 time under the current legislation. That's really all I've
11 got to say on legislative authority.

12 THE CHAIR: Let me ask you this, David, to
13 pick up on John Petch's point. The wording in that section
14 doesn't say tentative settlements, it says settlements. So a
15 fully formed settlement is what the provision contemplates.

16 Any merit to that kind of approach? It
17 doesn't say tentative or contingent, it says settlement.

18 MR. WOOD: Well, it says settlement
19 agreement. It says that the MSA may negotiate a settlement
20 with a person and may enter into a settlement agreement with
21 a person. Certainly as between the MSA and that person I
22 don't think it's a tentative settlement agreement, and in
23 fact I certainly wouldn't recommend to any of my clients that
24 they enter into a tentative settlement with the MSA. The
25 only contingency that I would be prepared to accept is that

1 it has to go to the Commission for approval.

2 So to that extent, as between the MSA and the
3 market participant, it is not a tentative settlement in the
4 sense that it's subject to change at the whim of either the
5 market participant or the MSA. It is only subject to
6 Commission approval.

7 THE CHAIR: But it doesn't bind the
8 Commission to a fully formed and committed and binding
9 settlement.

10 MR. WOOD: Well, I don't think it speaks
11 to that either way in that particular section.

12 THE CHAIR: All right.

13 MR. WOOD: Now, the second topic that
14 we've been asked to address is settlement privilege. I'm
15 sure that we all know somebody who plasters the words without
16 prejudice on every piece of paper that leaves their office.
17 I certainly know many of those people.

18 Of course the foundation of settlement
19 privilege is that it is intended to protect and cloak with
20 confidentiality bona fide settlement discussions and in most
21 cases also a settlement agreement.

22 Now, the first part, maintaining confidence
23 over the settlement discussions, is probably as close to
24 inviolable as you get. There are a very limited number of
25 exceptions to that and confidence over the actual settlement

1 discussions is almost never overridden.

2 The second part, maintaining confidence over
3 the settlement agreement, generally speaking settlement
4 privilege cloaks the settlement agreement as well as the
5 discussions but there are a number of instances where
6 settlement agreements have to be disclosed. There are
7 certain kinds of settlement agreements in civil litigation
8 that have to be disclosed and then where settlement
9 agreements by law must be approved.

10 So, for example, in the civil litigation
11 realm, if you are entering into a settlement with a minor or
12 what are euphemistically termed persons under a disability,
13 which means all kinds of things, you have to get those
14 settlements approved, and that is done on the record. That's
15 not done confidentially, except in exceptional cases.

16 The second broad instance in which settlement
17 agreements are on the public record and are disclosed
18 publicly is in what's been referred to as plea bargains. The
19 discussion here has focused on Criminal Code violations, but
20 really it's much broader than that. There are thousands of
21 provincial offences in which plea bargains are routinely made
22 and accepted. Without suggesting that that is a perfect
23 analogue for what we are talking about here, that is an
24 instance where settlement agreements are disclosed publicly
25 and in open court.

1 So to sum up on settlement privilege, you've
2 got really two aspects. You've got the aspect of the
3 settlement negotiations themselves and you've got the
4 settlement agreement. Really the point I want to make is
5 that there are really no hard and fast rules that I suggest
6 binds the Commission here in terms of deciding whether
7 settlement agreements have to be confidential or have to be
8 public.

9 THE CHAIR: But this is a little different
10 conclusion than some of the earlier discussion, if I
11 understand correctly, that you cannot distinguish between the
12 content of a settlement agreement and the negotiations and
13 horse trading that led up to that agreement? They're one in
14 the same for the purposes of invoking settlement privilege?

15 MR. WOOD: Well, I put it a little
16 differently. I would say that settlement privilege is broad
17 enough to cover both of those, but in terms of exceptions and
18 exclusions they are treated somewhat differently.

19 THE CHAIR: Any further comment on this
20 concept and the points that we've discussed so far?

21 I know I said we would assess where we are,
22 but it strikes me that next in the order of things,
23 registered settlements, AltaLink; privilege exists until
24 settlement is approved, TransAlta; private settlements
25 conference, two-step process, we've covered off much of that

1 in discussions to date. To the extent that those who are
2 going to speak to them can just fill in any gaps that we've
3 overlooked we could complete that before we eat. Or if the
4 view is let's just pound through this stuff, there's really
5 not much else, we can do that and then eat after.

6 Can we get the registered settlements
7 privilege exists until settlement approved and two-step
8 process, which was pretty much dealt with off the table now?

9 MR. ROSS: Registered settlements I can
10 speak to fairly quickly. We've discussed it in the need for
11 a statutory amendment. I mean, broadly what's driven
12 AltaLink's view on that is that settlement agreements
13 themselves remain confidential, and that is an approach to be
14 able to do that. There's a regulatory efficiency piece which
15 AltaLink sees has come into play, and a decent precedent from
16 the Canadian Competition Tribunal. I think that's where
17 they're at.

18 THE CHAIR: All right. Privilege exists
19 until settlement approved.

20 MR. PRICE: Sure. Cairns Price. And I
21 guess I could also invite ATCO Power and Capital Power to
22 jump in as need be as their points on this issue are aligned
23 with TransAlta.

24 So as Doug has mentioned, we've dealt with
25 this issue extensively already so what I'll attempt to do is

1 provide sort of a summary as well as some particular points
2 from TransAlta's perspective.

3 Our position is this option, settlement --
4 essentially settlement privilege exists until a settlement
5 agreement is approved by the AUC is the preferable option,
6 and this could be under new rules or as a matter of
7 Commission practice, assuming the current rules don't permit
8 the Commission to grant privilege confidentiality, which they
9 don't explicitly permit. Although there is some debate as to
10 whether or not that could be achieved.

11 From a high level this is the most reasonable
12 means to encourage the use of settlement agreements and the
13 use of section 44. And quite frankly TransAlta's position is
14 that the disclosure of settlement agreements prior to AUC
15 approval would act as a disincentive to attempts at
16 settlement and the settlement process would ultimately break
17 down, especially in the context when there's a lot at play,
18 as Joel had mentioned. We would agree that it is a bit of a
19 sliding scale approach. Certainly if the settlement process
20 were to ultimately break down we would see this as not in the
21 public interest.

22 There are numerous adverse consequences of an
23 unapproved settlement agreement being on the public record.
24 These have been outlined by other parties in their written
25 comments as well as today at the round table. ATCO Power

1 extensively deals with this issue and refers to the concept
2 of blatant unfairness, which TransAlta would agree with.
3 ENMAX deals with this issue. The MSA extensively deals with
4 this issue and the submissions of Doug Crowther on behalf of
5 Capital Power today also addressed this issue.

6 So without getting into that detail too much,
7 TransAlta would agree with the public relations jeopardy
8 concern that arises. ATCO referenced additional compliance
9 issues, such as securities laws, that would require companies
10 to make disclosure to the public in a timely manner. This
11 would have an implication.

12 But also there's the ability to obtain a fair
13 public hearing in the event that a settlement agreement is
14 not approved. This ability is compromised by privileged
15 information being placed on the public record.

16 And then as mentioned too, the two-step
17 process lacks transparency also and market participants would
18 remain subject to these adverse consequences, essentially if
19 an unapproved settlement agreement is put on the public
20 record.

21 So in summary, TransAlta acknowledges the
22 Commission's desire for transparency in its processes.
23 However, we agree with the MSA, and particularly how the MSA
24 focuses its discussion on reasonable transparency versus
25 complete transparency. In our view the public interest can

1 comment. The topic is called settlement privilege and we
2 talk about privilege and we talk about confidence. I think
3 Mr. Kaiser has addressed this somewhat in his paper, that
4 confidentiality is one thing and privilege is another. And I
5 guess I would just say with respect to settlement privilege,
6 when I look at a case, the privacy commission, the Blood
7 Tribe. It's a very recent Supreme Court of Canada case which
8 says that privilege is now a matter of legal rights.
9 And so completely leaving aside the ability of
10 the AUC and the MSA to regulate its own processes and seal or
11 not seal, make things confidential, as a commentator I just
12 doubt its ability to extend the class of privilege. Since
13 it's a legal right, I think that's now something that can
14 only be done by statute and perhaps by the courts. Maybe
15 only by the courts when you talk about privilege.
16 THE CHAIR: I'm not sure I follow that.
17 Are you saying that the Commission, for example, would not in
18 law be able to say this is not settlement privilege?
19 MR. PETCH: I don't think that the
20 Commission could rule that it's privileged. I don't think
21 you could create a legal privilege that could be asserted
22 effectively against a third party.
23 THE CHAIR: What would the right be that
24 we would be creating?
25 MR. PETCH: The privilege of the

1 settlement agreement. Because in terms of my reading of the
2 law --

3 THE CHAIR: I thought you said that case
4 stood for -- that there is a right to have those things
5 privileged.

6 MR. PETCH: No. Well, in fact that case
7 deals with solicitor/client privilege and it says that
8 solicitor/client privilege can't be eroded by legislation.
9 So it's a legal right. I would even argue it's a Charter
10 protected legal right.

11 But I think the law -- and I was curious in
12 terms of Mr. Wood's presentation. I think -- and I agree
13 with what I took to be Mr. Kaiser's conclusion, that the
14 privilege, we're talking about privilege and such, either a
15 privilege or an immunity from disclosure only applies to the
16 settlement negotiations, and once there's a concluded
17 settlement it doesn't go beyond the negotiations.

18 MR. KAISER: I think what I said there -- I
19 think I accept what was said earlier, that it's a question of
20 just how far settlement -- I think you made the point that
21 it's pretty clear that it covers the negotiations, in some
22 cases it may cover the actual agreement.

23 But I think this Blood Tribe case is very
24 interesting because you remember the Federal Court said to
25 the Tribunal -- the Tribunal just wanted to look at the

1 documents to see whether the privilege was justified, whether
2 the solicitor/client privilege. And the court said no, you
3 can't even do that. And then the Supreme Court of Canada
4 upheld the Federal Court on that.

5 So, I mean, that's pretty clear authority that
6 whatever discretion tribunals, and I think I've said this in
7 my paper, whatever discretion tribunals think they have under
8 their rules, I mean, you wouldn't have any chance of saying
9 there's no solicitor/client privilege in hearings before us.
10 And I think the argument might be made with settlement
11 privilege as well. It's just a question of how far
12 settlement privilege goes.

13 If it was clear in the law that settlement
14 privilege included the agreement, this would be over, in my
15 view. I mean, I don't think this board or any other board
16 has any ability to get into what is legitimately covered by
17 settlement privilege. It's just a question of how far
18 they'll go.

19 THE CHAIR: You're always happy to make
20 new law, Gord.

21 MR. KAISER: I think Harry screwed it up
22 because what Harry did is he argued confidentiality and you
23 guys said, "Well, how could it be confidential because you
24 have no claim of confidentiality if it's approved and yet
25 you're claiming confidentiality that's not proved? That

1 argument doesn't make any sense," which was true, but what he
2 was really claiming was settlement privilege. And on that
3 basis I suspect you would have had a different opinion.
4 THE CHAIR: All right.
5 Others?
6 I had one comment on yours, Cairns. You said
7 that if rejected, if the agreement had remained or was on the
8 public record that that would compromise the fairness of a
9 future proceeding.
10 MR. PRICE: Right.
11 THE CHAIR: And specifically a future
12 proceeding in front of the Commission?
13 MR. PRICE: I mean, it could. I recognize
14 that other parties have suggested there would be different
15 commissioners in the future proceeding, but I believe that
16 just by the very fact that that information is on the public
17 record and then there was a future consideration of that
18 issue, I believe there's a possibility that market
19 participants could be compromised.
20 THE CHAIR: A pointed question. Were you
21 suggesting that our commissioners -- different commissioners
22 would not be able to disabuse themselves of the fact that
23 there was some proceeding earlier in which statements were a
24 fact or it was not contested?
25 MR. PRICE: So that -- it is a pointed

1 question. That's not our primary concern. Our primary
2 concern would be public relations.

3 THE CHAIR: So you get a fair shake in
4 front of the Commission?
5 Moin?

6 DR. YAHYA: Related to the question you
7 just asked, I had heard at the beginning of this, and I
8 forget who made the point that there was also a concern that
9 there might be implications for other hearings -- not
10 necessarily the Commission but maybe some other parties --
11 but throughout this morning I did not hear anybody discuss
12 this. So I wanted to give whoever brought that up the
13 opportunity to bring it up at least here in this discussion.
14 That was when you just asked John.

15 So was there a concern? And if there was, if
16 that concern had been expressed, I would like whoever had
17 that to put it on the record right now -- or on the record,
18 or on the discussion that there is a concern that there are
19 other proceedings that might be jeopardized if this thing is
20 public and then rejected.

21 MR. CROWTHER: I don't know who raised it,
22 but that's certainly a concern for Capital Power. One of the
23 things I found most interesting about the Kaiser paper was
24 the discussion of how settlement agreements in many other
25 forums include express provisions, as I take it indeed the

1 concerns that prompted Suncor to suggest that parties should
2 always be allowed to effectively plead no contest. I mean, I
3 share Doug Crowther's concern. And it would certainly be
4 more comfortable if it were enshrined in either the AUC Act
5 or the EUA or the GUA that admissions made for the sole
6 purpose of settlement were inadmissible for any other
7 purpose. In the absence of that I think it is an open
8 question.

9 THE CHAIR: Moin?

10 DR. YAHYA: Yes. So I would just like to
11 hear some specifics on what exactly would this other
12 proceeding be. I've heard now class action. So this would
13 be a class action by whom claiming what?

14 MR. CROWTHER: I won't speak to class action
15 because that's way, way far removed from what I do on an
16 every-day basis, but I would have thought even in a civil
17 action, for instance -- I don't know what the alleged
18 contravention might be. But let's suppose that you could use
19 that to file a cause of action that the pool price had been
20 effected and therefore you had a loss of profit and so on. I
21 mean, I don't know. I haven't given it a lot of thought, but
22 I had understood that that would be a concern.

23 I suppose there might be an issue as well
24 before the competition authorities, depending on competing
25 jurisdictions and all sorts of things like that, but I

1 haven't addressed my mind to specific issues. Others
2 probably have.

3 MR. ROSS: Just a quick point. It's a
4 concern to AltaLink as well. I think one thing they had in
5 mind was Competition Tribunal related proceedings of an
6 interjurisdictional nature. Their submissions don't get into
7 that depth, but there may well be something to that in their
8 submission.

9 THE CHAIR: Doug Wilson?

10 MR. WILSON: I actually would just echo
11 David's comment. I think this in many ways for me goes more
12 to the importance of allowing the no contest approach, or
13 something akin to that, as opposed to an explicit admission
14 of contravention. I think it's the no contest that protects
15 the parties better from collateral proceedings or any
16 implication in a collateral proceeding.

17 You know, the analogue -- partial analogue is
18 a finding of guilt in a criminal proceeding can be used in a
19 civil proceeding. At least that's my understanding. I don't
20 think we want to go there at least. I would take the view
21 that it's not going to facilitate settlements and use of
22 section 44 for parties to face the prospect that coming to a
23 settlement in one proceeding is very likely going to
24 implicate them or have implications elsewhere.

25 THE CHAIR: Moin?

1 DR. YAHYA: But do we know for sure? I
2 mean, we are now speculating about something that's happening
3 in another jurisdiction, the Competition Tribunal or civil
4 courts. Do we know for sure that no contest would for sure
5 not be admissible over there? I mean, that's why I'm still
6 trying to focus on what a specific example would be. Because
7 we know what we can do here, the Commission and the MSA, but
8 can we for sure say yes, if somebody came in here and said "I
9 plead no contest" that that would actually guarantee that
10 over at the Court of Queen's Bench, the Competition Tribunal,
11 wherever, that that would not be admissible?

12 MR. WILSON: I don't know. I think --
13 well, it won't guarantee it. I think it's more likely that
14 you are protected from that collateral implication under a no
15 contest regime than you are under an explicit admission of
16 contravention.

17 DR. YAHYA: So maybe if somebody is going
18 to submit a written submission you might want to turn your
19 mind to looking at that issue. I'm just throwing it out
20 there.

21 THE CHAIR: We'll break for lunch. We
22 have -- and we've touched on these more or less, but after
23 lunch we have admissions, information outlined in AUC
24 Rule 13, subsequent use of settlement information, and we've
25 dealt with the last one. Harry dealt with that.

1 So let me ask this firstly: Not to undermine
2 the work that the people who are going to give us a little
3 presentation on these, but if you think that we've covered
4 off those topics already sufficiently then we'll just have
5 lunch. If you don't think we have -- and in particular the
6 parties who are presenting don't think we've hit the notes
7 that you wanted to convey, then of course we'll complete
8 those topics.

9 So let me go down the list. TransCanada on
10 admissions.

11 MR. KOCSAR: I could just speak to that
12 briefly right now, some comments that we had prepared. If
13 you want to do that right now.

14 THE CHAIR: Five minutes or less?

15 MR. KOCSAR: Definitely. I mean, just in
16 going through the materials it looks like no one has come out
17 in favour of requiring explicit admissions. You know,
18 obviously the current practice is quite deliberate I think in
19 terms of a no contest. You have an agreement on facts. The
20 MSA forms its view as the regulator. The market participant
21 acknowledges that.

22 I mean, there's a procedural protection almost
23 in that and that the market participant is aware of where
24 this is going and is agreeing on the proposed outcome.

25 But the question I think is for just setting

1 aside the admissibility in other forums, is more than that
2 required. The legislation under section 56 of the AUCA says
3 the Commission may make an order if it is of the opinion that
4 there's been a contravention of a rule or a requirement.

5 I think the facts that are submitted are far
6 more informative than any form of admission. Even if there
7 was an explicit admission, I think the Commission would still
8 have to look at those facts. So I don't know that an
9 explicit admission really does anything in terms of
10 efficiency or in terms of closing off the dispute. That's
11 TransCanada's opinion.

12 I think that it's really unnecessary for
13 parties after they've gone through this whole exercise to
14 actually publicly pronounce judgment on themselves. I think
15 the facts speak for themselves.

16 THE CHAIR: Thank you. Any response?

17 Okay. TransAlta, Rule 13. Were there points
18 you wanted to make that we haven't covered off?

19 MR. PRICE: I don't have much to add
20 there. I guess I would just say that when the MSA settlement
21 applications are filed Rule 13 speaks to the relevant
22 information being outlined and included. So there is some
23 permissiveness or there's an ability to not necessarily have
24 to file everything. And I think that goes to the MSA's
25 position that -- and TransAlta agrees with that position,

1 that it's reasonable and appropriate to take account of the
2 matter at issue when determining the extend of process.
3 So that's all I would add for that point.

4 THE CHAIR: We're moving quickly so I'll
5 invite any comment before we get to lunch, if you have any.
6 Seeing none --

7 MR. LOWTHER: If the information that is
8 provided relative to those factors isn't sufficient for the
9 Commission to in its review deliberations regarding the fine,
10 do you have any thoughts with respect to how that should be
11 addressed or how might that be addressed?

12 MR. PRICE: I recognize that issue is
13 dealt with before and I think there's trade-offs both ways.
14 It does become a complicated situation when you're doing IRs
15 and then having both parties have to answer and the fact that
16 the agreement has to be opened up again.

17 And I believe there are disadvantages also to
18 just outright rejecting it. So I don't really have anything
19 more to add on that. I think that that issue is quite well
20 summarized in the MSA's comments.

21 And again I would just -- I think that it
22 would be beneficial to try to find a solution that keeps
23 regulatory efficiency in mind.

24 MR. ROSS: I just want to add something
25 on behalf of AltaLink in the context of IRs generally. Not

1 in respect of IRs within the settlement process itself but
2 within the specified penalty process, irrespective of any
3 settlement that takes place. There has been situations where
4 there have been parties seeking to have IRs sent to the MSA,
5 and those requests have been denied. And part of the problem
6 I think that has come out of that is the potential for
7 incomplete hearings. So that's something that AltaLink has
8 brought into its submissions. Not specifically in the
9 settlement agreement context but in the overall specified
10 penalty process.

11 THE CHAIR: Okay.

12 MR. LOWTHER: I'm just trying to figure out
13 what the most efficient way would be. We've tried some
14 avenues, looking for others. One that was brought up was
15 rejecting the application and sending it back. I'm not
16 certain that's the most efficient way. So I'm just trying to
17 glean ideas, I guess, as to you're in a situation where you
18 want some more information, how do you best do it.

19 MR. ROSS: Minimum filing requirements
20 might take you substantially to that.

21 MR. LOWTHER: And we've done that in the
22 case of preferential sharing of records. We did a
23 consultation with market participants and we posted it on the
24 website minimum requirements for filing your applications for
25 preferential sharing of records. For the most part it worked

1 well. Even with that, though, despite those being on the
2 website publicly available, there still were parties that we
3 had to follow up with questions. They either missed one or
4 didn't adequately address it such that we had to ask a
5 question.

6 THE CHAIR: Alan, do you have anything to
7 add to the subsequent use of settlement information?

8 MR. ROSS: I can go quickly over about
9 three or four points that AltaLink has, much of which I think
10 has been covered in the discussion already.

11 I just want to reinforce that it's AltaLink's
12 position that neither common law nor public policy, much of
13 the discussion today is very policy driven, is that access to
14 all materials which relate to a proceeding must be made
15 public, and in particular access to settlement related
16 information.

17 Number two has been discussed in a number of
18 ways this morning. Confidentiality is critical in order to
19 achieve settlement, to have a frank, open discussion, and
20 without it there is a potential chilling effect. And the
21 ability to subsequently use settlement information in
22 AltaLink's view would lead to a potential chilling effect.

23 Thirdly, we talked a bit this morning about
24 some of the uniqueness of the ground covered, that
25 MSA-initiated proceedings are unique in an AUC practice.

1 There's a particular sensitivity in terms of, in particular,
2 commercially sensitive information and reputational
3 information.

4 Fourth, if the Commission doesn't approve a
5 settlement, and this is I think a new point that hasn't been
6 raised, the MSA still has significant discretion in respect
7 of specified penalties. So the specific concern that
8 AltaLink has is you have this settlement information within
9 the control of the MSA. Is there another kick at the can
10 through the use of this or subsequent use of this settlement
11 information?

12 And so one of the recommendations that
13 AltaLink has put forward is that there ought to be clear
14 mechanisms to limit the ability of the MSA to use information
15 disclosed as part of the settlement proceedings.

16 And, finally, there was a broad-based
17 discussion here today that AltaLink supports, that market
18 participants enter negotiations, in this case for conditional
19 settlements, on the basis that no AUC approval means that
20 parties are no longer bound by the AUC's jurisdiction over
21 the settlement and essentially the settlement is exhausted.

22 I want to take that back very briefly to
23 settlement information and say there's jurisdiction -- or
24 essentially there's jurisdiction over the settlement
25 proceedings, over the ultimate settlement agreement, but

1 there is a jurisdictional issue that then becomes exhausted,
2 in AltaLink's view, once that settlement becomes polled by
3 the parties and there ought not to then be corollaries or
4 ought not to then be a use for the MSA of that information.
5 So it's a jurisdictional point that AltaLink has with this.

6 THE CHAIR: Doug Wilson?

7 MR. WILSON: Quickly two things: One to
8 Cairns' discussion and Darin's questions around how to get
9 information. I think there is a balance required there.
10 It's absolutely true, I think, that the Commission needs
11 adequate information. We can debate what's adequate.

12 If the Commission is inclined to go to a
13 minimum filing requirement, we think they should go there
14 carefully. AUC Rule 13 I think makes fairly clear that not
15 all of the factors therein are applicable in all
16 circumstances.

17 And I guess I would also suggest that if you
18 have a minimum filing requirement, and let's say the issue is
19 market impact, that the parties, the MSA and the other
20 settling party, be essentially allowed to respond that it's
21 not applicable. Essentially meaning in our view it's not
22 applicable, but we would then at least be giving the
23 Commission that view that you need not worry about that.
24 Hopefully that would be sufficient.

25 The problem is, and we have pointed this out

1 in our written submissions, the settlement agreement is based
2 upon agreed facts largely. There's some opportunity for each
3 party to put in their own views. If the Commission wanted
4 evidence on impact, market impact, the market participant is
5 not in a position to give that and they therefore, in our
6 respectful view, are not able to agree to that as an agreed
7 fact. So therefore on what basis can that market impact
8 information go before the Commission?

9 You know, that was part of the challenge we
10 faced in the interrogatory process we had. We're in an
11 imperfect world, for sure. So I think we need to tread
12 carefully around the idea of minimum filing requirements or
13 other things like that which are going to essentially force
14 the parties to bring forward information they may not be able
15 to bring forward.

16 The other thing, and it goes to the comment
17 about -- I think it was AltaLink's comment that Alan raised
18 about the concern that the MSA might use information garnered
19 as part of a settlement agreement negotiation for the
20 purposes of an issuance of a notice of specified penalty. We
21 agree that that would be inappropriate, but I guess the
22 safeguard is the reality is that we get our information
23 pursuant to our investigative powers. Our experience is that
24 the settlement negotiations come after the information is
25 gathered, and it's at that point that we get into the

1 discussion about what are we going to do, which in my view is
2 really where the settlement negotiations starts.

3 So if we failed in a settlement attempt, you
4 know whether before the Commission or just privately, the
5 information upon which we would issue a notice of specified
6 penalty would be information garnered pursuant to our
7 investigative powers and information gathered by the AESO,
8 possibly.

9 So there's a protection against use of
10 settlement negotiation information. And of course we should
11 always remember the participant can basically dispute and
12 cause a Commission process. And I think there would be an
13 opportunity there to test the MSA's evidence and essentially
14 where it came from.

15 So that's it. Thanks.

16 THE CHAIR: Anybody else?

17 Well, let's have lunch. And if you can't
18 stay, that's fine, but let's wrap it up then. Darin has
19 indicated to you there will be a letter going out for some
20 final comments on these issues. We're not looking for you to
21 repeat or reinvent your initial comments to date, but if
22 there's something arising out of this discussion that you
23 don't think you featured enough and you want to comment on
24 it, by all means. We want to hear from you.

25 So I want to thank all the participants today.

00136

1 I think it's been a terrific discussion and have something to
2 eat now. Thank you.

3 (PROCEEDINGS ADJOURNED AT 12:40 PM)

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5 PROCEEDINGS CONCLUDED

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