

**NATIONAL ENERGY BOARD
OFFICE NATIONAL DE L'ÉNERGIE**



**Hearing Order RH-003-2011
Ordonnance d'audience RH-003-2011**

**TransCanada PipeLines Limited (TransCanada), NOVA Gas Transmission Ltd. (NGTL) and Foothills Pipe Lines Ltd. (Foothills)
Application dated 1 September 2011 for Approval of the Business and Services Restructuring Proposal and Mainline Final Tolls for 2012 and 2013**

**TransCanada PipeLines Limited (TransCanada), NOVA Gas Transmission Ltd. (NGTL) et Foothills Pipe Lines Ltd. (Foothills)
Demande datée du 1^{er} septembre 2011 visant l'approbation de la proposition de restructuration d'entreprise et de services ainsi que des droits définitifs exigibles sur le réseau principal en 2012 et 2013**

VOLUME 62

**Hearing held at
L'audience tenue à**

**National Energy Board
444 Seventh Avenue SW
Calgary, Alberta**

**November 16, 2012
Le 16 novembre 2012**

**International Reporting Inc.
Ottawa, Ontario
(613) 748-6043**

Canada

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Imprimé au Canada

HEARING ORDER/ORDONNANCE D' AUDIENCE
RH-003-2011

IN THE MATTER OF TransCanada PipeLines Limited (TransCanada), NOVA Gas
Transmission Ltd. (NGTL) and Foothills Pipe Lines Ltd. (Foothills)
Application dated 1 September 2011 for Approval of the Business and Services
Restructuring Proposal and Mainline Final Tolls for 2012 and 2013

HEARING LOCATION/LIEU DE L' AUDIENCE

Hearing held in Calgary (Alberta), Friday, November 16, 2012
Audience tenue à Calgary (Alberta), vendredi, le 16 novembre 2012

BOARD PANEL/COMITÉ D' AUDIENCE DE L' OFFICE

G. Caron	Chairman/Président
L. Mercier	Member/Membre
G. Habib	Member/Membre

APPEARANCES/COMPARUTIONS

(i)

APPLICANT/DEMANDEUR

TransCanada PipeLines Limited (TransCanada), NOVA Gas
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- Mr. C. Kemm Yates, Q.C.
- Ms. Wendy M. Moreland
- Mr. Patrick M. Keys
- Mr. Gordon K. Cameron

INTERVENORS/INTERVENANTS

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Association of Power Producers of Ontario (APPrO)
- Mr. Ian Mondrow
- Mr. David Butters

Canadian Association of Petroleum Producers (CAPP)
- Mr. Lewis L. Manning

Industrial Gas Consumers Association of Alberta (IGCAA)
- Mr. Bernard J. Roth
- Mr. Greig Sproule
- Ms. Laura K. Estep

Industrial Gas Users Association (IGUA)
- Mr. Guy Sarault

Small Explorers and Producers Association of Canada (SEPAC)
- Mr. Gary Leach

Western Export Group (WEG)
- Ms. Rosa Twyman

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- Mr. Brian Troicuk

AltaGas Ltd.
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- Mr. Christopher Bystrom

Apache Canada Ltd.
- Mr. David A. Holgate

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- Ms. Betsy R. Carr

- Ms. Rosemary Vandergrift

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- Mr. Ian Mondrow

Cenovus Energy Inc.

- Mr. Don Davies

Centra Gas Manitoba, Inc.

- Ms. Marla Boyd

ConocoPhillips Canada

- Mr. Lou Cusano

Devon Canada Corporation

- Mr. Lou Cusano

Dynegy Gas Imports, L.L.C.

- Mr. Ian Mondrow

Enbridge Gas Distribution Inc. (EGDI)

- Mr. Douglas E. Crowther

Enbridge Inc.

- Ms. Rose Marie Zanin

Enbridge Pipelines Inc.

- Ms. Rose Marie Zanin

Encana Corporation

- Mr. Don Davies

Enerplus Corporation

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J. P. Morgan Commodities Canada

- Mr. James H. Smellie

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- Ms. Debbie White

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- Mr. Alex Chulsky

Plains Midstream Canada ULC

- Ms. Suzanne Boucher-Chen

Selkirk Cogen Partners LP

- Mr. Ian Mondrow

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- Ms. Deanne Burnie

Shell Energy North America (Canada) Inc.

- Mr. Sean Meilleur

Société en Commandite Gaz Métro

- Me Éric Dunberry
- Mr. Patrick Cabana
- Me Marie-Christine Hivon
- Mr. Dave Rhéaume

Talisman Energy Inc.

- Mr. Terrance M. Hughes
- Mr. Greg Giesbrecht

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- Mr. Mark Stauff

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Union Gas Limited

- Mr. Lawrence E. Smith, Q.C.

- Ms. Patricia Planting

- Ms. Patti Piett

York Energy Centre LP c/o Veresen Inc. (YEC)

- Mr. Alan Ross

- Mr. Frank Foran, Q. C.

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- Mr. Monte S. Forster

- Mr. Colin King

British Columbia Ministry of Energy and Mines

- Ms. Angela Davies

- Mr. Richard Meyer

Ministère des Ressources naturelles et de la Faune - Gouvernement du Québec

- Mme Danie Daigle

Ministry of Energy - Ontario

- Mr. Edward Sweet

Office of the Utilities Consumer Advocate (UCA)

- Mr. R. Brian Wallace Q.C.

National Energy Board/Office national de l'énergie

- Ms. Diana Audino

- Mr. Parvez Khan

ERRATA

(i)

Wednesday, November 14, 2012 - Volume 60

Paragraph No.:

1414, line 4:

“...there is the evidence indicate that there not...”

Should read:

“...there is the evidence that indicates that they are not...”

1416, line 1:

“But if the Board says that would that mean...”

“But if the Board says that, would that mean...”

1422, line 2:

“...result of that cost-base...”

“...result of that cost-based, ...”

1431, line 2:

“...come out of the cost-base are not...”

“...come out of the cost-based are not...”

1435, line 2:

“...the Board finds that cannot...”

“...the Board finds that it cannot...”

1440, line 1:

“...is telling me don't say because...”

“...is telling me don't say that because...”

Thursday, November 15, 2012 - Volume 61

Paragraph No.:

1500, line 1:

“...of success to the RFT,...”

Should read:

“...of success to the RFD,...”

1503, line 1:

“...when I read this, say is the court here contemplating...”

“...when I read this, it says the court here is contemplating...”

1528, line 1:

“...that the Board can do that because...”

“...that the Board cannot do that because...”

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LIST OF EXHIBITS/LISTE DES PIÈCES

(i)

No.	Description	Paragraph No./No. de paragraphe
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--- Upon commencing at 8:30 a.m./L'audience débute à 8h30

2263. **THE CHAIRMAN:** Bonjour à tous. Good morning, everyone.

2264. Are there any preliminary matters this morning? Y a-t-il des questions préliminaires ce matin?

2265. Mr. Yates, please?

2266. **MR. YATES:** Yes, Mr. Chairman, I had one matter which I wanted to raise, and it relates to the APPrO Compendium of Argument that Mr. Mondrow was dealing with yesterday.

2267. I'll say first that I'm a bit slow off the mark here in the sense that I didn't come to the realization until late that some of the documents in this compendium are not on the record of the case.

2268. And the point is that I think it is well established in this Board's practice that it is not permitted to enter new evidence or to introduce new evidence in the process of argument. The APPrO compendium does that. And my position is that that is not something that should be accepted by the Board.

2269. To be specific, we have at Tab 8 of the compendium a transcript of TransCanada's telephone conference relating to Q3 results, and that conference took place on October 30th. This was discussed by Mr. Mondrow at paragraph 2023 yesterday and following.

2270. And then Tab 9 is a newspaper report from the Financial Post of October 12th, and it was discussed by Mr. Mondrow at 2028 yesterday. His discussion was to the point of -- his point about repurposing is one of the mechanisms that you can use.

2271. And I have no concern with his making an argument about repurposing, but my position is that the argument needs to be based on the evidence that is on the record, and that it is not appropriate to put additional evidence onto the record in process of argument.

2272. And I should say that it appears that this stuff is already on the record because what's happening is that as the compendiums, compendia are filed, they're being given exhibit numbers, and that's how Mr. Mondrow was referring

- to them.
2273. So the evidence, of course, ended with Volume 58 on October 4th, so technically that's not so because the affidavits in respect of the final exhibit that was filed by TransCanada, the final Exhibit B100 and the affidavits relating to B100 were subsequent to Volume 58. But this was a unique circumstance because we didn't have any cross-examination on that.
2274. But my -- well, if you go to what Mr. Mondrow had to say about these documents, he appeared to justify or seek to justify the reference to them by saying one was in the public domain, or it is in the public domain, or it is public knowledge. Public domain appears at 2023, public knowledge at 2031 of the transcript. And I would say to you that that does not make them evidence in this proceeding.
2275. So there's another aspect of the compendium which I'll make a comment about before I suggest -- before I deal with what I think we should do about it. And that is the graph which is at Tab 1 of the compendium, and here we have a graph which has been created by APPrO, but from numbers that are on the record.
2276. So that gets us to the point of where do you draw the line between counsel representing the evidence that is on the record and the creation of new evidence in argument.
2277. And I think in the past there have been rulings which have said that a graph is on the wrong side of that line; that that is the repackaging of evidence and is the actual creation of evidence. But, for example, what's behind Tab 3 of the compendium, which is simply taking numbers from three different positions in the record, the evidentiary record and putting them side by side. That's on the okay side of the line.
2278. So I think in the graph, we're in sort of a grey area about whether we are creating -- whether new evidence is being created or not.
2279. So having said all that, the question becomes what do you do about it, and what I would suggest that would be appropriate to be about it is that the Board, in its deliberations, can't refer to either the transcript that's behind Tab 8 or the newspaper report that's behind Tab 9 or to any representations that are made about that because that is new evidence.

2280. That doesn't mean that Mr. Mondrow's point of repurposing is not something you can consider but you have to consider that on the basis of what is in fact on the record, what was in fact on the evidentiary record. So that is what -- what I would suggest is the appropriate course of action.
2281. And clearly what my concern about this is is as well is that I wouldn't want what Mr. Mondrow has done to be seen as something that others could do in the future. And that in fact the compendium -- the compendia should be limited to what was set out in your direction about compendia, which is authorities, transcripts, evidence. And the evidence is what is on the record; it is not new things to be put on the record during argument.
2282. **THE CHAIRMAN:** Thank you, Mr. Yates.
2283. Just a question before I discuss with my colleagues. Have you had an opportunity to express your concerns with Mr. Mondrow himself?
2284. Your mic, please.
2285. **MR. YATES:** I have not, Mr. Chairman, and that's why I said at the start that I'm bit slow off the mark. I mean really what I should have done was looked at this when it came in and talk to Mr. Mondrow about it beforehand. But quite frankly, I didn't come to the realization until he was making his argument yesterday, and I didn't think it appropriate at that time to object and ---
2286. **THE CHAIRMAN:** That's fine, Mr. Yates.
2287. **MR. YATES:** --- I didn't -- I'm sorry, I didn't raise it with him afterwards because I wanted to go back and make sure of what the circumstances were, so -- but I ---
2288. **THE CHAIRMAN:** The purpose of my question was ---
2289. **MR. YATES:** --- certainly I will do that. I will contact Mr. Mondrow after the adjournment today.
2290. **THE CHAIRMAN:** You may want to do that. My question was about what kind of action we take in response to your suggestion. And if you could give us a moment, please, I'd like to confer with my colleagues.

--- (A short pause/Courte pause)

2291. **THE CHAIRMAN:** Thank you, Mr. Yates.

2292. I was asking you whether Mr. Mondrow knew about this concern, not just as a matter of process and since -- given your answer, I am assuming -- we're assuming as a Board that he may have just discovered the concern if he is listening in. And as a result, we'd like to provide him with an opportunity to provide the Board with his comments. And -- I will be asking Board counsel to make sure that what I'm about to say is known to him and he can make his choices.

2293. So I would invite Mr. Mondrow to provide his comments on your concerns either in writing by 4 o'clock today, sent to the Board, and -- or if he prefers and if it can be arranged, if he prefers to call in between now and the beginning of the session tomorrow, subject to it being possible, given the magic of Ms. Randall's powers, we can perhaps have him call in to express his comments on your concerns.

2294. So I would like to have Board counsel communicate that process to Mr. Mondrow and then we'll decide on the matter after we've heard his comments and your comments on his comments, if any, after this is completed.

2295. **MR. YATES:** Thank you, Mr. Chairman.

2296. **THE CHAIRMAN:** Thank you, Mr. Yates.

2297. I think Board counsel would like to provide further assistance here, Ms. Audino, please.

2298. **MS. AUDINO:** Just one comment, Mr. Chairman.

2299. We recognize that the transcript for the proceeding may not be delivered until later today. So if Mr. Mondrow were to provide comments in writing, it might be more convenient for him to be able to do so at some point tomorrow after he's had an opportunity to receive the transcript and review it or -- no, I recognize tomorrow is Saturday, but ---

**Final argument of IGUA
Mr. Sarault**

2300. **THE CHAIRMAN:** I probably said “tomorrow” and that’s kind of a slight mistake, I’m not working tomorrow for sure.

--- (Laughter/Rires)

2301. **THE CHAIRMAN:** And I don’t want to hear him tomorrow morning at 8:30, I really meant Monday.

2302. So why don’t we leave it at that, Ms. Audino and Mr. Khan, why don’t you explore with him what’s best for him. If it means that he needs to read the transcript over the weekend and call in Monday morning, that’s fine. Or maybe he sends his comments in writing before 8:30 Monday morning and that would be acceptable to the Board if that’s the case.

2303. **MS. AUDINO:** Okay. And we will update TransCanada's counsel as well.

2304. **THE CHAIRMAN:** Yes. We don’t think that final argument will end Monday afternoon, so I think we have a bit of flex there to resolve this matter.

2305. Thank you.

2306. Is there any other preliminary matter this morning?

--- (No response/Aucune réponse)

2307. **LE PRÉSIDENT:** Sinon, nous sommes prêts pour vous, Maître Sarault, pour la plaidoirie de l'Association des consommateurs industriels de gaz.

--- **FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR MR. SARAULT:**

2308. **Me SARAULT:** Alors, bonjour, monsieur le président, mesdames les commissaires.

2309. Alors, j'ai préparé évidemment des notes personnelles d'argumentation que j'ai remises à Madame Randall et au sténographe. J'ai -- les notes sont en anglais. Alors, pour l'essentiel, ma plaidoirie va être majoritairement en anglais. Cependant, il est possible comme souvent on ne peut résister à la tentation que je transfère dans la langue de Molière pour certaines remarques hors texte.

Final argument of IGUA
Mr. Sarault

2310. Alors -- for purposes of a better understanding of what's awaiting us in terms of my final argument, the contents is divided into seven chapters or sections, if you will. The first section, Number A -- or letter A, capital A, will provide you an introduction and background as to where we're coming from in order to end up in this hearing room today.
2311. The second section, B, will provide an analysis as to whether TransCanada's proposal will bring a long-term solution to the current tolls crisis and there will be two subsections in this Section B. B1, are TransCanada's proposed tolls just and reasonable; and B2, will TransCanada's restructuring proposal bring a viable long-term solution to the problems at the origin of the current tolls crisis?
2312. Then we'll turn a third section, Section C, reviewing the tools available to the Board over and above TransCanada's RP.
2313. Then in a Section D, fourth section, we'll go over IGUA's specific proposals and there's three of them; subsection D1, IGUA's long-term proposal; subsection D2, IGUA's interim proposal for 2012 and 2013; and D3, possible solutions on a go-forward basis.
2314. In the fifth section, capital E, I'll cover the question as to whether IGUA's proposals are in conformity with the applicable regulatory standards. And there are three subsections in this section on regulatory standards. First, in E1 we'll cover the regulatory compact that so many people talked about in these proceedings; in E2 I will talk about underutilization and used and useful. And in E3 I'll cover the question as to whether TCPL may have been compensated in the past for the risk of underutilization.
2315. In the sixth section, "F", I will provide an overview of IGUA's position on certain other issues raised by the RP, and finally, in Section G, I will provide our conclusion summarizing the key messages that we want to convey to the Board for purposes of its deliberations on this Application.
2316. I am reasonably confident that this argument will address most, if -- but not all of the issues identified in the Board's list of issues that were of particular relevance to IGUA, bearing in mind that we have focused our attention, as you know very well, on certain issues such as underutilization and used and useful, and we have not taken position on all aspects of the RP.

2317. I've also tried to be succinct. My notes cover 63 pages in fairly large characters allowing a 55-year old like myself easy reading for purposes of my delivery. I have also added a few handwritten notes yesterday and the day before that I thought necessary from TransCanada's final argument, most notably, their comments on regulatory compact and the jurisdiction of the Board to effect or order what they call an asset write down.

2318. I provide numerous references, both in the paragraphs themselves that I will convey to the Board in Footnotes that I understand will be automatically incorporated into the transcript, but I also added a few verbatim quotes from the exhibits or the transcripts that I have found to be of particular relevance.

2319. Alors, c'est comme ça que c'est organisé. Alors, vous allez savoir comment on progresse au fur et à mesure que nous allons avancer dans mes notes.

2320. Alors, commençons par l'introduction et le "background" historique derrière le dossier.

A. INTRODUCTION AND BACKGROUND

2321. Perhaps the best introduction describing the current crisis situation on TransCanada's Mainline as well as the context in which TransCanada's Application was filed can be found in the opening statement -- B-25 -- of the Mainline's President, Mr. Lohnes, at the opening of the hearing on June 4, 2012.

2322. And I'm at page 2 of 8 of his -- and these references are all Adobe references, obviously, and I quote:

"We have asked the Board to approve a restructuring of our Canadian natural gas pipeline business and services, and to approve final tolls for our Mainline for 2012 and 2013.

Why have we made this Application? It is because we believe that it is crucial to enhance the long term economic viability of the Mainline and the Western Canada Sedimentary Basin as a whole. The recent dramatic changes..."

2323. And those are his words:

"...in the natural gas business environment in North America

have created a situation where that viability is at risk."

2324. Now, these are his words again:

"The Mainline is essential to the Canadian natural gas industry and TransCanada is seeking to achieve through its proposals in this Application, material reductions..."

2325. Not reductions, material reductions:

"...in the costs of transportation from the WCSB to ex-basin markets."

2326. So this excerpt from Mr. Lohnes' opening statement is very important in two ways: First, it confirms the seriousness of the Mainline's tolls crisis, as well as the need to bring material, significant reductions in its transportation tolls.

2327. Secondly, it confirms that TransCanada's Application does not merely purport to obtain the approval of final tolls for the Mainline for 2012-2013, but that it is also asking the Board to approve a fundamental restructuring of its business and services.

2328. In our opinion, this second aspect of TransCanada's Application is crucial for purposes of the decision to be rendered by the Board.

2329. So this is a two-folded Application and this is very important to keep this in mind when we do an analysis of what's on the table, not only by TransCanada, but also by the other intervenors.

2330. The nature and origin of the problems at the source of the tolls crisis referred to by Mr. Lohnes are also well described in his opening statement and that's at page 3 of 8, lines 10 to 22.

2331. Here again, I think it's worth reminding ourselves what he actually said:

"In 2007, Mainline receipts at the Alberta/Saskatchewan border were 6 Bcf a day. In 2011, they were 3.2 Bcf a day."

2332. And I will add to this that, for 2012, they are now projected to be 2.4

Bcf a day minus 60 percent versus what they were in 2007.

"What has caused the change? It resulted from a combination of events. New, developing basins in the United States -- particularly Rockies gas and Marcellus Shale gas -- have been connected to the domestic and export markets that the Mainline has historically served with gas from the WCSB. Demand has increased in existing intra-Alberta markets, reducing the supply available to the Mainline. New markets for WCSB gas are developing offshore, driving western LNG export projects. Gas prices have collapsed, leading to decline in supply development in the WCSB.

The effect has been a dramatic increase in Mainline tolls. Calculated using the traditional cost of service methodology, the annualized Empress to Southwest Zone toll would have increased from \$0.86 a gigajoule in 2007 to \$2.07 a gigajoule in 2011."

2333. This is an increase of 141 percent. That's my words, not his.

"Mainline toll increases are projected to continue in the near term under the status quo cost allocation, toll design and services."

2334. IGUA agrees with much of this brief description of the nature and origin of the Mainline's tolls crisis. It is 100% true that there has been a significant reduction in the Mainline's throughput since 2007 and that these reductions have caused significant increases in TransCanada's transmission tolls, which had and continue to have the detrimental effect of encouraging shippers to exit the Mainline and explore other options.

2335. However, this description should also mention the significant reduction -- contribution that the out of control and unpredictable tolls themselves have had and continue to have on declining Mainline throughput.

2336. However, these concerns are not new to IGUA. Indeed, as early as on February 21st, 2007, in a letter addressed by IGUA's then President, Mr. Murray Newton, to the Chair of the Tolls Task Force [*See: Exhibit C-4-9-3, Appendix 1 to Mr. Newton's evidence of March 9, 2012*], IGUA opposed the proposed 2007-

2011 Mainline tolls settlement for, inter alia, the following reasons.

2337. And in Footnote 1, I provide the reference of this letter which is an exhibit -- an appendix, rather, to Mr. Newton's evidence, and I quote:

"The 5-year term is a concern because of the lack of clear re-opener provisions if there are significantly changed circumstances during the term of the Settlement. Paragraph No. 6 of the Settlement's 'Overview' section is a 'material change of circumstances' clause which limits parties to a right to negotiate if a material change of circumstances occurs during the 5-year term of the Settlement. In IGUA's view, the Settlement should not preclude parties from asking the National Energy Board ('Board') to address the consequences of any material changes in circumstances that might occur during the term of the Settlement. Any party should be at liberty to ask the Board during the term of the Settlement to remediate upon a material and unexpected change of circumstances."

2338. It was perhaps prophetic at the time.

"The Board's Guidelines for Negotiated Settlements contemplate there must be adequate information on the public record to enable the Board to understand the expected toll impact of any Negotiated Settlement. In this context, IGUA believes that the document prepared by TransCanada [to] the TTF showing the comparative revenue requirements and the illustrative Eastern Zone toll effects of the Settlement for the 2007 to 2011 Test Years should be produced on the public record."

2339. And later on, he adds:

"...several parties have relied on these illustrative tolls when assessing the Agreement and their respective positions."

2340. It was perhaps a very good idea at the time to request those illustrative tolls.

**Final argument of IGUA
Mr. Sarault**

2341. We all know that, following these concerns expressed by Mr. Newton, TransCanada did file, as Tab E of its Application for Approval of a Negotiated Mainline Settlement and 2007 Mainline Tolls, a table showing illustrative Eastern Zone tolls anticipated for the years 2007 to 2011 inclusive, pursuant to which the average toll would revolve around a stable level of \$1.03 a gigajoule.
2342. You'll remember that during my cross-examination of Panel 1 in early June of this year, I asked TransCanada to file a table of the actual Eastern Zone tolls that were, in fact, charged to the users compared to those indicated for illustrative purposes back in 2007.
2343. According to this table which was filed as Exhibit B-29, here is the comparison between the final Eastern Zone tolls in effect during the 2007 to 2011 period, versus those produced for illustrative purposes back in 2007.
2344. And here in paragraph 7 of my argument notes, I provided full reproduction of that table. I would ask the stenographer to be kind enough to reproduce it in the transcript.
2345. But it will suffice to -- just to give you a couple of figures, in 2008, the final tolls were already at \$1.40 a gigajoule versus the illustrative tolls of \$1.017. In 2010, they were at \$1.638 versus illustrative tolls of \$1.42 and, in 2011, they were at \$2.243 compared to \$1.059 for the illustrative toll.
2346. So we see that as early as in 2008, just one year into the negotiated settlement, the tolls had already increased by close to 40% and that, thereafter, they continued to increase and remained volatile for the duration of the Settlement Agreement.
2347. And during this entire period, five years, the costs associated with these material reductions in the Mainline's throughput, resulting in these very high and volatile tolls, were entirely 100 percent borne by the tolls payers.
2348. IGUA cannot insist enough on the fact -- on the seriousness of the financial prejudice that these high and volatile tolls cause to end-users such as IGUA's members. Indeed, most industrial gas users operate energy-intensive industrial operations where energy costs represent a significant cost centre for their companies.
2349. For a large industrial gas user, every 1 cent a gigajoule increase in

- TransCanada's Mainline tolls represents an incremental annual cost of approximately \$100,000 that comes right off its bottom line.
2350. As noted, TransCanada's currently approved -- I mean in 2011 -- toll of \$2.24 a gigajoule for the Eastern Zone was then -- because we're now in 2012 -- was then \$1.21a gigajoule higher than it was in 2007.
2351. For a large industrial gas user consuming 10 Bcf annually -- and there are several of them -- this represents an increased transportation cost in excess of \$12 million every year. That's a lot of money.
2352. Industrial gas users cannot pass through these increased gas transportation costs to their customers because the price of their own products and services are set in the competitive marketplace. *[See Mr. Newton's Amended Written Evidence, C4-10-2, Answer 15]*
2353. And I provide the reference to Mr. Newton's evidence as to the origin of these statistics.
2354. A similar prejudice is caused to other Canadian and American gas consumers who rely on the TransCanada Mainline for their upstream transportation. Residential, commercial, agricultural and transportation sector gas consumers as well as gas-fired power producers also bear the full brunt of TransCanada's tolls.
2355. To the extent TransCanada's tolls are higher than they ought to be due to underutilized or excess capacity, this represents, in our opinion, an unfair and inappropriate wealth transfer from North American gas consumers to TransCanada's shareholders.
2356. Indeed, we must not forget that, according to Mr. Otis' latest calculations, the impact of this excess capacity on the Mainline's revenue requirement is no less than one half billion dollars every year. *[See Mr. Newton's Amended Written Evidence, C4-10-2, Answer 16]*
2357. TransCanada's out of control transportation tolls have prevented industrial gas users from realizing the full benefit of today's low gas prices. With gas commodity prices trading between \$2.00 - \$3.00 a gigajoule range, TransCanada's annual transportation cost can represent as much as 40 percent of the total delivered gas cost.

2358. The total "all-in" delivered gas cost is a function of both the unregulated commodity price -- which is set by the market -- and the regulated portion of the total delivered gas cost, which includes the cost of gathering, transportation, storage and distribution services.
2359. Industrial gas users support market pricing where market forces determine gas commodity prices. Therefore, it is important that the remaining critical components of the total delivered gas bill be closely regulated -- regulated to ensure consumers' interests are protected. *[See Mr. Newton's Amended Written Evidence, C4-10-2, Answer 17]*
2360. IGUA's members have decided to participate actively in these proceedings because they are very concerned about how rapidly rising and volatile Mainline tolls create huge uncertainty for all industry participants. Volatile swings in Mainline tolls also cause a real prejudice to the Canadian economy and prevent -- prevent proper business planning by our industries.
2361. IGUA's members are very concerned about the prospect of yet future rate shocks for the remaining Mainline customers caused by further firm volumes exiting the Mainline as a result of uncertain and out of control tolls. *[See Mr. Newton's Amended Written Evidence, C4-10-2, Answer 12]*
2362. During his cross-examination at the hearing of September 25, 2012, Mr. Otis described as follows the impact of TransCanada's high tolls on IGUA members and the market as a whole -- and I provide here an excerpt from paragraphs 25746 , 25747, 25748 and 25749 of the transcript of September 25th, 2012 -- and what he's explaining is that what's important to market participants is the landed price in markets east of Toronto that are now getting to the point where they are much higher than what they are in neighbouring regions.

"25746. So when you say: "How do we measure the impact of TransCanada's tolls on the -- on IGUA members or on the Gaz Métro's market or other markets?", it's the fact that the landed price in markets east of Toronto are now getting to the point where they are much higher than what they are in neighbouring regions.

25747. And so as Mr. Newton mentioned, a customer having to make a choice between establishing himself in Quebec or in New York State, will go to New York State. If it's only based on

energy prices, will go to New York State.

25748. A customer who has the flexibility to move his production around from Quebec to another plant will do so. So that is the impact.

25749. The impact is on the competitiveness of gas prices in the market.”

2363. So he continues by suggesting that a customer having to make a choice between establishing himself in Quebec or in New York State will go to New York State. If it's only based on energy prices, he will go to New York State and a customer who has the flexibility to move his production around from Quebec to another plant will do so. So that's the impact.

2364. So this is an important point, I feel, because some of TransCanada's witnesses have suggested that the crisis may not be that serious after all because commodity prices are low.

2365. So on the whole, customers might not be as adversely affected as we would want to suggest but, at the end of the day, that's not what the market sees when making investment decisions as to whether to stay here in Canada or go elsewhere because, all else being equal, if commodity prices are about the same in Canada as they are in the United States, transportation will make the difference.

2366. So it's still very, very important.

2367. And all this while, during the entire period of the Settlement Agreement, five years, TCPL continued to earn and even exceeded its allowed return on equity, calculated on the basis of the automatic adjustment formula in force during those 5 years. And on this point, we refer to the following excerpt from Dr. Booth's evidence on behalf of CAPP.

2368. And that's in Footnote number 6 and I provide the entire excerpt but, for the five year period covered by the settlement agreement, here is what he says:

“In the case of the Mainline in 2007 the over-earning increased to 0.67% and then jumped to 1.2% in 2008; 1.85% in 2009, and 1.68% in 2010. Despite the use of the Board's ROE formula for determining the ROE, which leads to allowed ROEs in the 8's in both 2009 and 2010 the Mainline earned over 10% indicating the extensive historic 'padding' in its

operations.” [See C2-6-18, page 21/220]

2369. This is very important because you have to put this in parallel to the tolls that the users were called upon to pay during this very same period. So as you can see the crisis did not affect the investors in TransCanada’s Mainline.
2370. So they did very well, to say the least. And in our opinion, this situation is blatantly unfair and violates the most fundamental goals of protection of the public interest underlying the very essence of the regulation of natural monopolies.
2371. We strongly believe that the “dramatic increases” -- to use Mr. Lohnes’ own words -- in tolls that we’ve seen during this five-year period cast a serious doubt as to whether the current Mainline’s tolls can still be considered as just and reasonable.
2372. Despite this, IGUA was very surprised to learn from my cross-examination of Panel 1 that TransCanada does not share that view and that it feels that its tolls are still just and reasonable at this very high level.
2373. And here I’ve provided verbatim excerpt from Volume 2 of the transcript, paragraphs 1412, 1413 to 1417 inclusive. And these are the paragraphs in which I ask Mr. Lohnes if he considered that the current toll of \$2.07 referred to in his opening statement, which was 141 percent higher than what it was in 2007, was just and reasonable in his opinion. And the answer was yes. *[See transcript of June 5, 2012, vol. 2, #1412-1417]*
2374. I was very disappointed by that unfortunate answer and I still have great difficulty understanding how we can come to that conclusion in the face of such harsh numbers. I was even more surprised to hear the comments made by Mr. Yates in his final argument on Wednesday, when he stated that:
- “In TransCanada’s view, the Status Quo remains a viable alternative, and [that] the tolls that would result from [the] approval of the Status Quo would be just and reasonable tolls.”*
2375. You have that in Volume 60, paragraph 1354.
2376. Just to give you one example, the 2013 illustrative status quo tolls

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indicated for the path between Empress and the Eastern Zone -- at the table found at page 84 of the throughput revision, B40, is \$3.03 a gigagoule. This is what we're talking about.

2377. This is what Mr. Lohnes and Mr. Yates now tell us are just and reasonable tolls. And in their opinion, these Status Quo tolls are so good that Mr. Yates tells us that they would be preferable to, and I quote:

“...approval of any [any] of the other proposals that have been made by the intervenors.”

2378. Without exception. That's at paragraph 1355.

2379. I'm sorry, but in terms of attitude, I find that most unfortunate because we're talking about, you know, unsustainable tolls. I mean, \$3.03, let's get real here.

2380. Despite these unfortunate statements, TransCanada must have felt somewhere that there was nevertheless something wrong with its Status Quo tolls in that, following negotiations in 2010, both within and outside the scope of the TTF, it reached an agreement with CAPP, and then filed, on December 9, 2010, an “Application for Approval of Mainline Interim 2012 Tolls and Alberta System Interim 2011 Rates” which, in TransCanada's opinion, would bring significant changes to its depreciation, cost allocation, and rate design methodologies that would allow material reductions to its transmission tolls versus the status quo rates at the time.

2381. They would not have done that if they had felt that their Status Quo tolls were so just and reasonable at the time.

2382. In paragraphs 15 and 16 of the application then filed with the NEB, TransCanada described as follows the nature and origin of the problems of the origin of the large increases in its transmission tolls between 2007 and 2010; that's two years ago.

2383. Here's how they described the problem:

“In recent years, firm contract levels and overall throughput on the Mainline have decreased significantly and tolls have increased significantly. Over the past five years, Mainline

long-haul contracted volumes have decreased by approximately 70%. While costs have also decreased over this period, they have decreased at a slower rate. As a result, the Eastern Zone 100% load factor Firm Transportation [...] Toll has increased from 93 cents a gigajoule [...] to \$1.63 a gigajoule in 2010 and the Southwest [...] [equivalent] Toll has increased from 80 cents a gigajoule in 2006 to \$1.36 in 2010. This increase and greater volatility in tolls is primarily attributable to the reduction of firm long-haul contracted quantities and reduced throughput.”

2384. Well, I’m sorry, but I do not take this as the description of what TransCanada itself considered at the time as just and reasonable tolls.

2385. And as to the causes, if we go to paragraph 16 of their application of two years ago, they talk about problems that are essentially the same as we’ve talked all along in these proceedings.

“- competition [for] new sources of supply [namely shale gas,] (particularly Marcellus shale)...;

- declines in Western Canadian production due to a number of factors including low gas prices;”

2386. We talked about that as well.

“- development of new pipeline infrastructure in response to [...] development of new sources of supply;

- lower than previously anticipated gas demand in eastern markets resulting from the continuing global economic downturn;

- increased gas demand [in] Western Canada;

- competition [from] existing and incremental Western Canadian supply;

- ongoing uncertainty related to the Mackenzie and Alaska pipeline projects;

- a shift in contracting practice on the Mainline from FT service towards Interruptible Transportation [...] and Short-Term Firm Transportation [...] services; and;

- a shift in contracting practice on the Mainline away from long-haul transportation towards short-haul transportation services.”

2387. This is a description from two years ago. That hasn't changed. It is described in section 1.3, once again, of Changes in the Business Environment of the October 31, 2011 version of the current applications' executive summary, and it's the same thing that Mr. Lohnes described or summarized in his opening statement. *[See B5-6, pages 4 to 7]*

2388. And I would add, that in addition to the problems identified by TransCanada itself, IGUA strongly feels that the very high level of the tolls themselves, as well as their extreme volatility -- those are two big problems -- also constitute a powerful deterrent driving shippers away from the Mainline and therefore causing significant reductions in throughput.

2389. If the status quo 2010 tolls that we've just described were considered to be too high, those that were in force at the time of filing of the current restructuring application in September 2011 were even worse.

2390. Indeed, the situation then prevailing as to TransCanada's current tolls is explained very well in the following excerpt from Exhibit B5-7, being the revised October 31st, 2011 version of section 2 describing TransCanada's pipeline systems.

2391. So we're in October 31st, 2011, and I quote:

“TransCanada currently charges final tolls approved by Order TG-007-2011 that are set at the level [that] the Revised Interim 2011 Tolls approved by Order AO [-- and I give the number of the order]. The Revised Interim Final 2011 Tolls in place after March 1, 2011 include an Eastern Zone Toll [...] of 2.24 [...] and a Southwest Zone Toll [...] of 1.89...”

2392. Those tolls are still very high indeed.

“On April 29, 2011, TransCanada filed an application for approval of Mainline Final 2011 Tolls with the Board.”

2393. Here again, we go on and they explain that these final 2011 tolls applied for included an annualized Mainline final 2011 tolls for the Eastern Zone of \$2.45/GJ and a Southwestern Zone Toll of \$2.07/GJ.
2394. Given these explanations, it's clear that the final Eastern Zone toll of \$2.24/GJ indicated for 2011, in Exhibit B-29, corresponds to the revised interim final 2011 toll approved -- in 2011 it became final afterwards.
2395. If the toll had been calculated on the basis of the 2007-2011 negotiated settlement methodology, the final 2011 toll for the Eastern Zone would have been \$2.45, not 2.24 as indicated in B-29. This goes on to show you how -- you know -- out of control the tolls have become.
2396. Given this background -- and I think it's compelling, we're talking about figures here. We submit that the first two preliminary questions that the Board should answer for purposes of its decision on this application are the following: First question; will the proposed tolls resulting from TransCanada's application be just and reasonable such as to prevent a further deterioration of the current tolls crisis?
2397. Second question; will TransCanada's RP bring a viable long-term solution to the problems described as being at the origin of the decline in its throughput and the increase in its status quo rates observed over the last few years?
2398. In the next section of my final argument we will review TransCanada's proposal in order to find the answer to these two questions. If, at the end of this analysis, we come to the conclusion that the answer to both questions is no, we believe that the Board will have no choice other than to consider alternative or additional solutions if a permanent resolution of TransCanada's toll crisis is to be achieved.
2399. C'est le vieil adage qu'on dit en anglais: If it ain't broke, don't fix it; but if it is broken you have to consider something.
2400. Alors, c'est pour ça que nous croyons qu'il est nécessaire, avant

d'explorer d'autres solutions, de se poser la question: Est-ce que la proposition de TransCanada va fonctionner; oui ou non?

2401. Alors, ça m'amène à ma section B:

B. WILL TRANSCANADA'S PROPOSAL BRING A LONG-TERM SOLUTION TO THE CURRENT CRISIS?

2402. Avec ma première sous-section:

B.1 Are TransCanada's proposed tolls just and reasonable?

2403. In order to determine whether TransCanada's proposed tolls are just and reasonable, we suggests that it is appropriate to compare them to the tolls that they purport to correct or reduce. Indeed, if TransCanada's proposed tolls are at the same or higher -- same level or higher than those that they purport to correct in the first place, they will not resolve anything. I think that's pretty obvious.

2404. So on June 29, 2012, TransCanada did file, as Exhibit B-40, its revised 2012 throughput forecast, providing the basis of a revised forecast of Mainline throughput as well a new -- as new proposed final tolls for 2013. That's what's on the table right now.

2405. The Board will certainly remember from my cross-examination of Panel 6, on July 13, 2012, that's Volume 25, that we reviewed the revised throughput projections, indicated in Exhibit B40, versus what they were in October 2011.

2406. During the course of this cross-examination, we learned that TransCanada now projects the following additional -- additional reductions in the total Mainline Western receipts over the 2012-2016 horizon.

2407. For 2012, we go from 3.4 Bcf/day to 2.4, a reduction 1 Bcf/day, or if you prefer, 29.4 percent.

2408. For 2013, we go from 3.8 to 2.6, a reduction of 1.2 Bcf/day or 31.6 percent.

2409. For 2014, we go from 4.1 Bcf/day to 2.8 Bcf/day, a reduction of 1.3 Bcf/day or 31.7 percent.

2410. For 2015, we go from 4.3 Bcf/day to 3.1 Bcf/day, a reduction of 1.2 Bcf/day or 29. -- 27.9 percent, sorry.
2411. And for 2016, we go from 4.5 Bcf/day to 3.6, a reduction of 0.9 Bcf/day, representing 20.0 percent. *[See transcript of July 13, 2012, vol. 25, par 28,295 to 28,321]*
2412. So at the conclusion of this line of cross-examination, TransCanada's witnesses agreed that these additional reductions are significant. *[See transcript of July 13, 2012, vo.25, par. 28,323 to 28,325]*
2413. These significant revisions in the Mainline's throughput projections, only eight months after the filing of TransCanada's throughput study on October 31st, 2011, also cast a serious doubt as to the pipeline's ability to accurately forecast future flow rates, which should be a huge source of concern to the Board in assessing the chances of success of the restructuring proposal.
2414. Quite naturally, there is no question that these additional throughput reductions for the five-year period, from 2012 to 2016, are bound to bring an upward pressure on the Mainline's transmission tolls.
2415. By way of exception, however, we learned during my cross-examination of Panel 6 on July 16, 2012, that's Volume 26, that this will not be the case for the year 2012, essentially because the 2012 interim tolls in place are high enough to cover the restructuring proposal revenue requirement for 2012. *[See Transcript of July 16, 2012 - Volume 26, paragraphs 28512-28526]*
2416. This non-effect on 2012 rates of the \$100 million drop in revenue is perfectly understandable when we compare the 2012 interim tolls approved by the Board to the equivalent final tolls initially proposed for 2012, on the basis of the initial October 31st, 2011 throughput study in this case:
2417. So the interim 2012 toll of \$1.89 for the Southwest Zone is significantly higher, by 50 percent, than the final 2012 toll in the range of about 100 -- \$1.26/GJ proposed in the October 31st, 2011 filing for Enbridge and Union delivery areas -- Southwest Delivery Areas I should say.
2418. The interim 2012 tolls of \$2.24/GJ for the Eastern Zone is significantly higher, by about 50 percent once again, than the final 2012 toll in the range of

- close to \$1.50 proposed for Enbridge, Union and GMi's Eastern Delivery Areas, as per the October 31st filing.
2419. So for 2012, what we can see here is that the interim tolls are high enough to cover the revenue requirement and that's why there were no increase in proposed final tolls.
2420. The picture became even worse when the time came to discuss the new proposed final tolls for 2013. The Board will certainly recall that the following examples were discussed during my cross-examination.
2421. For GMi's Eastern Delivery Area, the proposed tolls goes from the initial \$1.38/GJ as per the October filing, to \$1.81/GJ in June 2012, which is an increase of .43 cents/GJ or 31.1 percent. That is significant.
2422. For the new TQM Eastern Delivery Area, the proposed tolls goes from \$1.68/GJ as per the initial proposal, to \$2.12/GJ as per the June 2012 revision. That is an increase of 44 cents/GJ or 26.2 percent. *[See Transcript of July 16, 2012 - Volume 26, paragraphs 28512-28526]*
2423. Here again, at the closing of this line of cross-examination, TransCanada's Panel 6 witnesses had to agree that these additional increases were significant in relative terms. *[For the discussion on this, see the transcript of July 16, 2012, vol. 26, par. 28568 and ff]*
2424. Indeed, if you look carefully at the new 2013 final tolls proposed as per the June revision, B40, you can realize that they are not only significantly higher, by around 30 percent on average, than those initially proposed for 2013 as per the October 2011 filing, but that they are also higher than the 2010 status quo tolls, which in December 2010 were considered by TransCanada itself to be so high as to justify the filing of its application at the time.
2425. By way of example, we can make the following comparison between the new final tolls proposed for 2013, as per the Exhibit B40, versus the equivalent status quo 2010 tolls judged to be too high by TransCanada itself at the time.
2426. The new 2013 tolls in the range of \$1.50, now proposed for Enbridge and Union southwest delivery area are almost 16 percent higher than the 2010 Southwest Zone toll of \$1.35 referred to in paragraph 15 of TransCanada's

Mainline Interim Tolls Application of December 2010.

2427. The new 2013 tolls, ranging from \$1.73 a gigajoule to \$1.81 a gigajoule, now proposed for Enbridge, Union and GMI's Eastern Delivery Area are more than 12 percent higher than the status quo 2010 equivalent Eastern Zone toll of \$1.64, also referred to in paragraph 15 of TransCanada's Mainline Interim 2012 Tolls Application.
2428. That toll -- that Eastern Zone toll of \$1.64 a gigajoule is the same toll that we find in Exhibit B29, which was provided, following my request, to compare the actual tolls -- status quo tolls to the illustrative tolls that were provided in 2007.
2429. The very high toll of \$2.12 a gigajoule now proposed for the new TQM Eastern Delivery Area for 2013 is almost 30 percent higher than the status quo 2010 Eastern Zone toll of \$1.64 a gigajoule that I've just talked about.
2430. And I would like here to add an additional comment arising from Mr. Yates final argument. It's very possible that the final, final tolls to be proposed for both 2012 and '13 could end up to be higher than those described in Exhibit B40, for which I've just given examples.
2431. Indeed, during his argument on the 2011 flow through elements at section 15 of Volume 60 of the transcript, that's paragraphs 1342 to 1351, Mr. Yates clearly indicated that the level of the approved 2000 final tolls was 18 cents a gigajoule less than the annualized tolls for which TransCanada had applied and that reflected in the terms of the 2007-2011 settlement. That's in paragraph 1345.
2432. And that's true. You'll remember that when I talk about the interim 2011 tolls that they're very high but they're still lower than the final tolls applied for by TransCanada on April 29, 2011.
2433. And in paragraph 1350, Mr. Yates suggests that Board cannot approve anything other than the amounts contained in the 2011 final tolls application -- so the higher tolls -- be included in the 2012 revenue requirement. So all depending on exactly how this revenue shortfall will be recovered, it's possible that the final 2012, and perhaps 2013 proposals, could be even higher than what we see in Exhibit B40.
2434. So the scenario that I've just described to you, as to the 2013 proposal

- being higher than the 2010 Status Quo tolls could be even worse than what I have described.
2435. So during the ensuing portions of my cross-examination of TransCanada's Panel 6 on July 16 -- that's Volume 26 -- I tried desperately to obtain adequate answers as to whether TransCanada has made any serious analysis of the impact that these new higher tolls proposed for 2013 will have on the market, with a view to determining whether they can realistically bring a viable long-term solution to the current tolls crisis. *[This discussion can be found at paragraphs 28570 to 28661 of the transcript of July 16, 2012 (vol. 26)]*
2436. For my part, following a careful review of this discussion during the preparation of my notes for this final argument, I have been unable to find any answer remotely looking like a serious analysis of this question.
2437. TransCanada's witnesses insist a great deal that even these higher tolls proposed for 2013 are lower than they would otherwise be if we were to use the status quo tolls. And that answer came up many times during the hearing. While this may be true, it does not answer the fundamental question as to whether these significantly higher proposed tolls, not the status quo, will provide a long-term solution to the current tolls crisis.
2438. All else being equal, one does not have to be a rocket scientist to realize that it is not by proposing final tolls higher than those already judged to be too high in 2010, that TransCanada will bring a permanent solution to its problems.
2439. Indeed, it should not be forgotten that the nature and origin of TransCanada's problems described in the Executive Summary of the Restructuring Application are exactly the same, almost word for word, as those described in paragraph 16 of TransCanada's interim 2011 tolls application filed on December 9th, 2010.
2440. The only difference being that, in 2011, the throughput was lower than it was in 2010 and the resulting tolls again higher than what they were a year before. Now, the only thing we can see from the revisions filed in June 2012, is that the situation is continuing to go further south, not the other way around.
2441. If you read carefully the written evidence *[See B1-19, Appendix C4, A33 and A34]* filed by Mr. John Reed in support of TransCanada's initial filing in

September 2011, and I insist in September 2011, he was then using very cautious language in his opinion as to whether the reduction in Mainline tolls then resulting from the restructuring proposal would make them competitive.

2442. First, in his answer A33, at page 34, and I quote:

“The reduction in the Mainline long-haul tolls will increase the netback to producers and the competitiveness of the Western Canadian Sedimentary Basin to eastern market Mainline paths. In addition, as shown in Table 5, certain short-haul tolls will also be reduced [by] 25 percent and 35 percent increasing the competitiveness [increasing the competitiveness, choice of words] of the eastern market area Mainline paths.”

2443. And then in the following answer, 34, even more important: Question:

“Is the solution being proposed by TransCanada workable?”

2444. Answer:

“I believe that the comprehensive package of services and toll design changes being proposed by TransCanada in the Application has...”

2445. And look at how many words he used:

“...has a reasonable prospect of working to enhance---”

2446. That’s a lot of words.

“--- the long-term economic viability of the system and the competitiveness of the WCSB. As just discussed, the changes being proposed produce a material reduction in the tolls to downstream Mainline markets, providing an opportunity to prevent further erosion in utilization ---

2447. Five or six words.

“--- as well as positioning the Mainline for greater revenue generation, and thus lower tolls and increased load attraction

potential.”

2448. Mr. Reed is a very intelligent expert, and I respect him very much, and nowhere in these experts -- in these excerpts rather, can we find a clear statement that TransCanada's then proposed rates would be competitive as opposed to more competitive -- that's a choice of words -- or that they would bring anything more than a "reasonable prospect of working to enhance the long-term viability of the System". So, therefore, no guarantee whatsoever that the then proposed rates would be low enough to prevent a further deterioration of the current tolls crisis.

2449. Those are Mr. Reed's words and they were well chosen. He speaks well and he writes well.

2450. Now, what language do you believe that Mr. Reed would have used had he written his opinion and his prophecy not on the basis of the September filing, but on the basis of the June 29th, 2012 filing, which brings further reductions in throughput of 30 percent and even higher proposed tolls?

2451. What would he have said were he called upon to repeat the same opinion?

2452. Obviously, the "prospect" of success of TransCanada's RP is obviously worse than it then was; it's not better.

2453. So going back to the first question that we were attempting to answer: "Will the proposed tolls resulting from TransCanada's Application be 'just and reasonable' such as to prevent a further aggravation of the current tolls crisis?"

2454. The answer is obviously "no", the figures are there. So it brings me to my second question.

B2. Will TransCanada's restructuring proposal bring a viable long-term solution to the problems at the origin of the current crisis?

2455. **MR. SARAULT:** As I told you -- and that's B2 -- will TransCanada's restructuring proposal bring a viable long-term solution to the problems at the origin of the current crisis?

2456. And I've already discussed these problems as they were described in 2010, as they were described in the Executive Summary to this Application, as

they were described in Mr. Lohnes' opening statement.

2457. And the first category of problems deals with supply. And this is taken from the Executive Summary of the Application, Exhibit B5-6.

2458. We are told that:

“Western Canadian production has fallen by 3 billion cubic feet per day (Bcf/d) over the last several years, and is currently at a level that is below the bottom of the range forecast by TransCanada in 2004. Notwithstanding an anticipated mid-term recovery from non-conventional gas, forecasts of production show a decline in supply over the long term.”

2459. So these words are important.

2460. Second supply problem:

“New infrastructure has made Rockies gas and the liquefied natural gas (LNG) available in markets traditionally served by the Mainline.”

2461. Third problem:

“New shale gas production in the US has emerged more quickly and strongly than anticipated, and there are now robust forecasts of future US shale gas supply in proximity to domestic and export markets historically served by the Mainline.”

2462. Fourth problem:

“Shale gas is being developed in Canada in proximity to eastern markets that have historically been served exclusively or predominantly through [Western Canadian] [...] sources and Mainline services.”

2463. So this first excerpt tells us that, as of October 2011, TransCanada's forecast of Western Canadian production did show a decline in supply over the long term. Well, it so happens from the throughput revisions filed in June of this

year, Exhibit B40, that this decline in supply became much more quickly than anticipated in October 2011.

2464. Indeed, the Board will remember that, during my cross-examine of Panel 6 on July 13th -- Volume 25 -- I asked TransCanada's witnesses to summarize and quantify the reasons for the additional 30 percent reduction forecasted in throughput for the years 2012 onward.

2465. Here are some of their answers. And I reproduce here, monsieur le sténographe, paragraph 28326 to paragraph 28334 of the Volume 25 of the transcript. But here are some the salient aspects of their answers: production shale gas has increased -- was higher, demand was lower and supply of shale gas was higher. And because prices were lower, production fell.

"28326. MR. SARAULT: I realize that this may have been discussed briefly with some other intervenors but, if you were to summarize and quantify the reasons for these additional reductions, what would you say?"

28327. DR. LANGFORD: I would say it starts with natural gas prices being an awful lot lower than what was anticipated in the 2011 TSO. They are lower because the economy did not do as well as we had anticipated; supply was a lot higher, primarily shale gas but not just shale gas, shale gas supply was higher.

28328. MR. SARAULT: M'hm.

28329. DR. LANGFORD: More emphasis on associated gas with drilling for oil and more emphasis on liquids rich natural gas exploration and development. Demand was lower, supply was higher, weather contributed as well as a one-time event, weather had an extremely -- or a substantial downward influence on prices over this period.

28330. So those are some of the things that all conspired -- of course in the same direction -- to cause us to lower -- primarily the driver being supply in the basin. So the lower -- the primary effect here is lower prices because of the things I talked about.

28331. MR. SARAULT: So they're -- brings to lower supplies because they produce less because ---

28332. DR. LANGFORD: Yes, yes.

28333. MR. SARAULT: --- the prices are less attractive?"

28334. **DR. LANGFORD:** *Yes. And there again -- and I said to someone I think yesterday or whenever that if -- unfortunately, what we're doing here -- if we're off 10 percent on our WCSB supply forecast, that kind of translates to maybe 25 percent error in throughput and that's because throughput is, in essence, a residual."*

2466. And Mr. Langford concluded in paragraph 28234 by saying -- and I quote:

"Yes. And there again -- and I said to someone I think yesterday or whenever that if -- unfortunately, [that] what we're doing here -- if we're off 10 percent on our [Western Canadian] [...] supply forecast, that kind of translates to maybe 25 percent error in throughput and that's because throughput is, in essence, a residual."

2467. So it hasn't improved.

2468. Further along, during the same cross-examination, I asked TransCanada's witness to specify the relative importance of the unanticipated supply reductions in comparison to other possible factors. And I provide here verbatim excerpt from paragraphs 28357 to 28363 of the Transcript Volume 25 once again.

"28357. MR. SARAULT: In your October 2011 throughput study B5-13, at pages 12 and 13 of the printed version, you do say, and I quote:

"Throughput on the Mainline is also impacted by the following factors:"

28358. *It's Item 2.4 at the bottom of page 12.*

"Demand in the Mainline's traditional eastern Canada domestic markets."

28359. *Now we've learned that that may have been impacted by warmer weather. And also you mention, and I quote:*

"Competing supply in the Mainline's traditional eastern Canadian markets:"

28360. *And you mention the:*

"Dawn area supply: volumes of gas available to be imported from Michigan to the Dawn area through

non-TransCanada pipeline capacity in this corridor (current capacity and expansions) and the volumes available to this capacity from interconnecting pipelines (GLGT, Vector, other) and their supply sources (WCSB and US supplies);"

28361. *And a second competing supply factor you mention, and I quote:*

"Niagara/Chippawa supply: volumes of gas available to be imported at the Niagara and Chippawa points;"

28362. *Now, in your update of June 29 of this year, Exhibit B40, is it possible that these other factors could have played a role in the further reductions in your projected throughput?*

28363. **DR. LANGFORD:** *Yes, as I said, I believe the overwhelming influence was the supply change but these would also have played a role."*

2469. And what you see here is that the other factors came into play but they keep telling us that the overwhelming influence in the decline was the supply change, but other factors may also have played a role. And that's more specifically in paragraph 28363 that we find this response by Dr. Langford.

2470. So if we look carefully at the Mainline's Western receipts now projected over the 2012 to 2020 horizon, at page 11 of the Revised Throughput Study, B40, we can see that the volumes now projected for 2020 are only of the order of 3.6 Bcf/day, which is only slightly higher than the actual 3.4 Bcf/day for 2012, and well lower than the 4.3 actual Bcf/day that we have for 2009.

2471. Bearing these figures in mind, it is difficult to imagine how the supply problems described in the aforementioned excerpt of the Executive Summary of the Application will improve over the middle to long term horizon.

2472. So, following a careful review of the mass of information contained in the record for this case, I have been unable to find any evidence allowing us to be more optimistic on the supply side of the equation.

2473. More specifically, I have been unable to find any indication that will change anything to the current robust forecasts of future U.S. shale gas supplies in proximity to the domestic and export markets historically served by the Mainline. And I'm only taking one example.

2474. The second category of problems referred to in the Application deals with markets and I quote:

“Export markets in the US Northeast that have been served in part through long haul contracts on the Mainline have been dramatically eroded by new supplies located in closer proximity to those markets.”

2475. Second problem:

“Increasing intra-Alberta market demand continues to reduce the [Western Canadian] [...] supply that is available for transportation on the Mainline.”

2476. And then add:

2477. *“This trend is forecast to continue in the long term. [...] Potential Pacific coast LNG exports would absorb a substantial amount of [Western Canadian] [...] supply.”*

2478. Here again, we can see that the factors described by TransCanada are strong market trends that are forecast to continue and perhaps even accelerate over the long term.

2479. And following a careful review of the mass of information available in the record for this Application, I have been unable to find any evidence allowing us to be more optimistic as to the market side of the equation.

2480. Quite the contrary, some of the evidence filed into the record seems to indicate that some of these problems could further deteriorate over the long term. And I'll give you two examples that struck me out of the mass of information that we got.

2481. First example: On June 5, 2012, a press release was filed as Exhibit B28 announcing that TransCanada has been selected by Shell and other partners to develop a multi-billion dollar natural gas pipeline to Canada's West Coast. According to this press release, the product to be carried on this new projected pipeline would come from B.C.'s production basins as well as from elsewhere from the Western Canada Sedimentary Basin.

2482. If this project materializes, there is no question that the additional flows of gas towards LNG projects located on Canada's West Coast would bring corresponding reductions in the Mainline's deliveries towards the Eastern Canadian Markets.
2483. Second example: The document filed as Exhibit B83, on September 17, 2012 outlining British Columbia's natural gas strategy is very clear as to the province's intention to increase its exports of B.C. LNG, which are scheduled to begin at the first large commercial LNG export facility, schedule to open near Kitimat by 2015. There is no question that this government strategy will increase the potential for -- the potential for Pacific Coast LNG exports to absorb of Western Canadian supply.
2484. So which leads me to our third category of problems described in the application, which is contract practices, and then I quote:
- "- Annual firm contracts are not being renewed. Shippers are using discretionary services, which are essentially firm for most of the year due to available capacity, in their place; and*
- Two-thirds of remaining contracts are short-haul, which generates significantly fewer billing determinants."*
2485. In passing, I would like to say that contrary to some popular belief, these changes in contract practices all started to occur well before the production of shale gas from Marcellus began. It is therefore totally inaccurate to make a direct link between these changes in contracting practices and the emergence of shale gas from Marcellus.
2486. Here again, on contract practices, the evidence presented at the hearing as to the future outlook of the Mainline does not give rise to optimism, quite the contrary.
2487. You'll remember that during the cross-examination of TransCanada's Panel 6 on July 16, 2012, that's Volume 26, by APPrO's attorney, a document was filed as Exhibit C1-31, confirming that an open season offer launched by Union in March 2012, with respect to a new extension project, offering transportation service from Union Gas Parkway compressor station to a new interconnect with the TCPL system near Maple, Ontario.

2488. In the same document, we also learn that Union Gas was then also conducting a concurrent open season on the Dawn to Parkway system for service as early as in late 2014.

2489. During their cross-examination, the same day, by APPrO's attorney, TransCanada's witnesses acknowledged that this project would continue to increase shifts from long-haul to short-haul in the contracting practices of shippers in the Eastern Canadian market. *[See Transcript – Volume 24, paragraphs 27021-27023]*

2490. During their cross-examination on the following day, by myself, IGUA's attorney, another document was filed as Exhibit C4-17, confirming the launch, by TransCanada itself, of an open season of its own on March 30th, 2012, summarizing the project as follows, and I quote:

"TransCanada PipeLines [...] has received new requests for firm transportation capacity to connect natural gas supplies originating in the Marcellus supply region to Canadian and US Northeast markets. In support of these requests, TransCanada is pleased to announce a new capacity open season [...] on its Canadian Mainline for firm transportation service from Niagara and Chippawa, as well [...] from other receipt points on the integrated TransCanada Mainline, to all delivery points including points east of Parkway such as Iroquois/Waddington, GMI, EDA and East Hereford."

2491. End of quote.

2492. Here again, it's very clear from this excerpt from Exhibit C4-17, and this was admitted by TransCanada's witnesses during their cross-examination, that this new service, also scheduled to come in force in late 2014, which has now been postponed to 2015, could further contribute to aggravate the magnitude of the shift from long-haul to short-haul in the contracting practices in Eastern Canada.

2493. It is also worth mentioning that this document shows that TransCanada cannot escape the harsh realities of the market and its own behaviour runs contrary to one of the declared objectives of this restructuring proposal. *[See Transcript – Volume 25, paragraphs 28416-28422. During her testimony on the MAS panel, Mrs Pielt of Union indicated that Union's own open season (C1-31)*

for the extension of their system from Parkway to Maple was suspended because TCPL is now offering the service. She also said that Union intends to be a shipper on TCPL's project. She also confirmed that TransCanada's project will come into service in 2015 and not in 2014 as initially planned. See transcript, vol. 56 paragraphs 29645 to 29660.]

2494. In Footnote 19, I provide certain excerpts from the evidence from Mrs. Piett, of Union, indicating that some portions of Union's own season -- open season offer were suspended because TransCanada is now offering the service.

2495. More importantly, during his testimony on behalf of IGUA, on September 24 and 25, 2012, that's Volumes 51 and 52, Mr. Bernard Otis confirmed that IGUA is currently participating in the hearing on Gaz Métro's latest supply plan for the next few years. And that, according to the evidence in the record before the Régie, Gaz Métro would have confirmed its intention to move 100 percent of its transportation capacity from Empress to Dawn, would effect now to November 2014 as per the postponement.

2496. Here again, this latest development will no doubt contribute to significantly reduce the long-haul volumes to be transported on TransCanada's Mainline system over the coming years. *[See Transcript of September 25, 2012 – Volume 52, paragraph 25741]*

2497. So this is -- this development, I mean the evidence in the record as to contracting practices is troubling to say the least. I mean, there's no room for optimism once again.

2498. So the only overall conclusion that we can reach with respect to the two preliminary questions that we feel should be addressed by the Board for purposes of its decision on this application, is that:

2499. First, even though it is true that the final tolls proposed by TransCanada for 2013 are lower than they would otherwise be pursuant to the status quo methodology, there is absolutely no evidence in the record that these proposed tolls will be competitive enough in order to resolve the current crisis.

2500. Second, we have seen that these new final 2013 proposals are higher than the equivalent 2012 Status Quo tolls that TransCanada itself considered to be too high when it filed its application in December 2012. So if the 2010 Status Quo tolls were not just and reasonable, as we believe, then the new final 2013

- proposed tolls are not either.
2501. Third, while TransCanada's own description of the underlying problems at the source of the current crisis has not changed since the initial filing in December 2010, there is no evidence in the record that the measures proposed in TransCanada's restructuring proposal will, individually or collectively, bring a viable solution to those very serious problems.
2502. Quite the contrary, the evidence in the record rather seems to indicate that the vast majority of these problems are here to stay for the long-term and that, in certain cases, the situation is worse today than it was in 2010. The recent shift from long-haul to short-haul, announced by Gaz Métro and the other Eastern LDCs over the next few years, constitutes a good example of such further deterioration of the situation.
2503. The major deficiency of TransCanada's RP lies with its total failure to address the core problem at the root of the current tolls crisis, which is the very significant underutilization of its Mainline facilities, mostly on the long-haul routes.
2504. While it may be true that not all intervenors seem to be willing to address this problem immediately within the framework of this current application, IGUA respectfully submits that it is not the only intervenor to propose that strong measures be undertaken urgently for a resolution of this situation.
2505. The written evidence filed by Mr. Newton, on behalf of IGUA, as well as his testimony at the hearing on September 24 and 25, 2012, are crystal clear to the effect that there is an urgent need to do something within the context of this very application.
2506. As Mr. Newton pointed out at the hearing, we believe that APPrO's submission, as well as the Eastern LDCs evidence filed in the name of the Market Area Shippers are directionally to the same effect, even though they may propose different solutions.
2507. Let me give you some examples. If we take excerpts from APPrO's opening statement, Exhibit C1-36, very explicit as to what needs to be corrected on an urgent basis. Paragraph 16 of their opening statement:

"The first step, in APPrO's view, is to get the cost base right."

2508. Paragraph 17:

"To APPrO that means determining what costs reasonably support the services currently provided to TCPL's current FT shippers, and ensuring that tolls for these services reflect those costs, no less but no more."

2509. As -- Paragraph 25, now:

"As or more critical is a decision that will immediately and materially [materially] lower Mainline tolls."

2510. And then they have two bullets:

"- APPrO's members [cannot] wait 3 or more years for lower tolls. They are needed now, or the economic viability of these power generators will be compromised. For example, we have yet to consider or determine 2012 final or 2013 interim tolls. These are major issues in the real, commercial world in which our members live."

2511. Second bullet in paragraph 25:

"- This Board should not let that happen. That is not in the 'public interest', nor is it 'just and reasonable'."

2512. End of quote from APPrO's opening statement.

2513. In their main written evidence, the Market Area Shippers explained as follows why they believed the changes proposed by TransCanada are not appropriate nor justified. And I quote:

"Simply, MAS does not believe that toll methodology is the cause of TransCanada's competitiveness concerns. The fundamental problem with the Mainline's competitiveness is that current throughput cannot sustain the Mainline's cost structure." [Exhibit C56-8-2, page 17/40, lines 24-26]

2514. End of quote.

2515. Similarly, at the very first page of their alternative proposal, filed as Exhibit C56-8-3, the Eastern LDC's explain as follows why TransCanada's restructuring proposal is not an adequate remedy to the problems facing the Mainline, at lines 19 to 21. And I quote:

“TransCanada’s Restructuring Proposal does not address the fundamental issue of the excess capacity on the Mainline and the associated costs passed onto shippers as a result of this excess capacity.” [See C56-8-3, page 1, lines 19 to 21]

2516. End of quote.

2517. I'd like to open a parenthèse here. You know, there's no question that public interest in our view, is a major consideration for purposes of the Board's any rate decision. And I remember your exchange -- and I'll come back to this later -- with Mr. Yates as to the greater good for the greater number of people, that you had yesterday. And it was a very sound exchange of views, I found.

2518. The people who are telling you that TransCanada's proposal does not address the fundamental problem of underutilization, APPrO and IGUA are end-users; they're the ones paying those tolls at the end of the line.

2519. And the LDCs -- we're talking about Union, we're talking about Enbridge and we're talking about Gaz Métro, these people, even though they pass on these transmission costs in their rates to end-users, nevertheless represent a significant, significant portion of the market served by the Mainline.

2520. I would venture as far as to suggest that it's over 75 percent. So you have end-users and local distribution companies, very serious people telling you, look, this restructuring proposal doesn't do the job, and it doesn't do the job because it doesn't address the fundamental problems.

2521. We have different proposals. I mean our proposal is not the same as the Eastern LDCs, it's not the same as APPrO. The same basic message is being conveyed to the Board by people representing those who paid the tolls at the end of the line. So this is very important to us.

2522. So to come back to my text, IGUA strongly feels that the moderate

- tolls savings generated by TransCanada's restructuring proposal are essentially short term oriented and that they entail the real risk that the situation could further deteriorate over the middle to long-term horizon if throughput does not increase on the Mainline.
2523. IGUA is particularly concerned with TransCanada's depreciation proposal, which has the effect of shifting the recovery of millions of dollars of costs to future generations of users. Indeed, if throughput does not increase, as we would all hope, the recovery of these deferred costs will only make a very bad situation even worse.
2524. On this point, IGUA not only disagrees with, but is also concerned with the views expressed by CAPP in its opening statements that TransCanada can win back long-haul volumes with tolls at the level proposed in the restructuring proposal and that it should be provided the opportunity to do so. *[See CAPP Opening Statement, filed as C2-21-2, page 3/10, item a)]*
2525. Indeed, CAPP seems to be oblivious of the major throughput reductions, together with the significantly higher resulting proposed tolls for 2013, filed by TransCanada on June 29th of this year. IGUA is that much more concerned with CAPP's position in that its own alternative proposal also provides for cost deferrals, the TSA and off-ramps that keep TransCanada whole as to its costs and therefore open the door to shifting the recovering of millions of dollars of costs to future generations of users. *[See CAPP Opening Statement, filed as C2-21-2, page 3/10, item d)]*
2526. It is IGUA's view that CAPP's alternative proposal is fundamentally flawed in that it rests upon two basic assumptions, neither of which is supported by the evidence, namely: lower annual Mainline costs, and higher Mainline throughput. If neither of these assumptions materialize, as we believe, irreparable damage could be caused to the Mainline.
2527. Assuming that the Board shares IGUA's concerns as to the failure of TransCanada's restructuring proposal to bring a viable solution to the current crisis, IGUA believes that these concerns may trigger into play the following scenario raised by you, Mr. Chairman, in your last question to the Mainline's President, Mr. Lohnes, on the last day of the appearance of TransCanada's Panel 10, that's Volume 44 of the transcript.
2528. And I do provide in my notes and I would be grateful to the

stenographer to provide this excerpt. It's paragraph 17219 to 17228 inclusive.

"17219. Assume, Mr. Lohnes, that the Board affirms in its reasons for decision that it has acquired in this hearing, I'll call it 'a sense of urgency', but not in the sense of urgent but the sense of urgency -- I'll use the phrase in its common meaning -- about the initiation of changes beyond that which TransCanada believes is necessary. Say that we believe more action is needed. Say that in our reasons we say we disagree with you, that only the RP will suffice.

17220. But assume we decide to give you the benefit of the doubt deliberately in our reasons and we would say, for instance, that we wouldn't want to push distance of urgency because the company either has no willingness or perhaps in the capacity to handle such changes that would be necessary in our view.

*17221. Assume further that, when you come back in two years or something, the Mainline has been taken to a place worse off than it is today, what would you expect the Board to do then?
(...)*

17227. But in two years, if we're wrong and we're back, then we would bring a proposal forward to you at that time to, as best we can, deal with that situation.

17228. If we receive information from you that -- and advice as to your concerns about the potential for success, we will carefully watch the sign posts as we implement. And if it's important, if there's a view with the information we've got from the Board that we need to get back to the Board at a faster pace, we will certainly do that."

2529. And this where you say -- let's say -- assume for purposes of discussion that we disagree with you that we feel that perhaps the RP will not suffice.

2530. And we nevertheless give you the benefit of the doubt in -- deliberately in our reason, and we would say for instance that we wouldn't want to push distance or urgency because the company either has no willingness or perhaps the capacity to handle such changes that would be necessary in our view.

2531. Assume further when you come back in two years or something, the

Mainline has been taken to a place worse off than it is today. What would you expect the Board to do then, and Mr. Lohnes said that they would come back and propose something. But it was not specified during this specific exchange. Which brings me, I believe, appropriately so, to my next subject.

**C. THE TOOLS AVAILABLE TO THE NEB OVER AND ABOVE
TRANSCANADA'S RESTRUCTURING PROPOSAL**

2532. On the assumption that's it's not going to work, that we have legitimate concerns as to the RP's prospects for success, what are the tools available to the Board over and above TransCanada's restructuring proposal.

2533. And I'm very close to halfway, so we're doing well.

2534. As I just stated, the aforementioned excerpt from Mr. Lohnes' response to the Chair as to what should be done in the event of failure of the restructuring proposal was not explicit as to what exactly could be contemplated by the company.

2535. But in my next paragraph, I reproduce another excerpt from your discussion with Mr. Lohnes. And this time, and I would be grateful to the reporter to reproduce these excerpts. It's paragraph 17066 to 17068.

*"17066. **THE CHAIRMAN:** You really anticipated my next question, Mr. Lohnes, because that's exactly what you said, of course, at 15079 which is on the screen now, the first paragraph, and that's what you said, quote:*

'So that's a situation where we have just and reasonable tolls, but the marketplace won't allow us to charge enough to recover our costs, so it's determined there are stranded assets.'

17067. 'Is determined' is the passive voice. If you use the active voice, who would determine that those assets are stranded? Who are the decision-makers who say "We now have stranded assets"? Who are the people -- the persons making that determination?

*17068. **MR. LOHNES:** In my view, we would suggest they're stranded and, then, we would come to the regulator as we've discussed with -- and I think Mr. Reed has discussed live situations where that's occurred where we've come to the regulator with a plan on how to deal with the stranded assets*

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or a securitization plan being one example of that.” [See transcript – Volume 44, paragraphs 17066 to 17068]

2536. And I will close with Mr. Lohnes’ answer as to what could be done:

“...we would come to the regulator as we’ve discussed [...] and Mr. Reed has discussed live situations where that’s occurred where we’ve come to the regulator with a plan on how to deal with the stranded assets or a securitization plan being one example of that.”

2537. This is not Guy Sarault or Murray Newton talking; this is Mr. Lohnes.

2538. As we all know, securitization is one component of the solutions proposed by IGUA and APPrO in this case. It is certainly my intention today to expand in detail as to what exactly is proposed by IGUA and where securitization fits in our solution.

2539. For the moment, however, I submit that it is appropriate to remind all of us that securitization is not an exotic concept that IGUA or APPrO pulled out of a hat but it is a viable solution that TransCanada itself is not opposed to, all depending on the circumstances.

2540. So, if we come back to your exchange again, the same day, Volume 44, with Mr. Lohnes, as to the possibility of securitization, and I reproduce here paragraph 17116 to 17118 inclusive of Volume 44 of the transcript. Mr. Lohnes told us:

“17115. MR. LOHNES: From a business perspective, [...] it was clear that the just and reasonable tolls would not generate clear -- would not generally clear the market---”

2541. This is a scenario that he’s then contemplating.

“--- then we would look to one of the other cost recovery mechanisms, whether it's a taxation, exit fee, securitization mechanism, something like that.”

“17117. THE CHAIRMAN: We'll call a break soon, Mr. Lohnes. I've got a bit more. In fact, I won't estimate how much

*more I have, but we'll take a break for 10 minutes soon.
17118. But I want to remind you that we're past that transition
where securitization is a step before the ultimate risk. I think
the evidence is clear from you on that, that you think of the
ultimate risk and securitization -- finally came out right for a
change -- is something in between.” [See transcript – Volume
44, paragraphs 17116 to 17118]*

2542. What we conclude from these exchanges is that TransCanada itself does not exclude the possibility of exploring measures such as taxation, an exit fee or a securitization plan, perhaps as an intermediate step before the materialization of the ultimate risk of stranded assets, Armageddon as some people called it, which Mr. Lohnes seems to define as a situation of just and reasonable tolls not being able to clear the market.
2543. While it is true that there is a lot of material emanating from TransCanada and its expert witnesses criticizing IGUA’s securitization proposal, we strongly believe, and respectfully submit, that this scenario must be contemplated if the Board considers, like we do, that TransCanada’s revised forecast volumes and resulting proposed tolls cannot support its cost structure and that they are no longer viable in the current market conditions.
2544. In the particular context of these proceedings, the concept of securitization first came up in the written response filed by TransCanada to NEB’s IR 1.1, as further explained in its response to NEB’s IR 3.1.
2545. At paragraph 73 of my notes, I reproduce the excerpt from page 4 of Exhibit B8-2, which is the response to NEB 1.1, in which TransCanada raised, for the first time, the prospect of securitization and I would be grateful to the reporter to reproduce to the same extent.

“Threats to a system’s viability, whether from continued use of the traditional model, or from deviations from this model, are relevant to the toll-setting process, as are extraordinarily high tolls. In extreme circumstances where continued use of the traditional model has been determined to produce competitive distortions, or unsustainably high tolls, some regulators have chosen to deviate from the historical regulatory compact, while preserving its essential bargain, by removing some investments or costs from the utility’s cost of service, and have provided

for cost recovery outside of conventional tolls, such as through securitization of costs which are determined to be unrecoverable, and the use of a broad-based surcharge on tolls. This form of cost recovery has been used frequently in the US and in Ontario for stranded generation costs, and for above-market purchased gas costs and purchased power costs in circumstances where utilities shed merchant functions. The FERC has also made clear that it has the right to impose exit fees on customers that seek to take advantage of competitive opportunities where incumbent utilities have made investments based on a reasonable expectation of continuing to serve that customer.”

2546. In its Exhibit B10-2, filed in response to NEB 3.1, TransCanada went on to explain that securitization is a legal and financial mechanism that is often utilized in the energy/utility sector, and then went on to provide a detailed explanations as to the structure of such a transaction. There were diagrams and all of that that you will find in that very detailed answer.

2547. During the cross-examination of TransCanada’s Panel 8 dealing with TransCanada’s reply comments on the evidence filed by all intervenors, several of TransCanada’s witnesses indicated that, at least on a conceptual basis, they are not opposed to the idea of securitization and that, all depending upon the timing -- timing and circumstances, they do not necessarily see -- they do not necessarily see it as something that violates the regulatory compact.

2548. For example, at page 21 of its reply evidence, Exhibit B21-2, TransCanada states the following, and I quote:

“TransCanada considers securitization to be potentially a useful tool for regulator and governments, but it is not appropriate at this time as an alternative to the Restructuring Proposal. While securitization may be appropriate in the future, the Restructuring Proposal is a better response to changes in the business environment, more timely and more certain.”

2549. IGUA also refers to the following statements made by TransCanada’s witnesses, including Mr. Reed, Mr. Johannson and Mr. Engen, acknowledging that securitization may be a proper avenue to follow in certain circumstances.

And these exchanges are found in the cross-examination of Panel 8, Volume 33 on August 22nd, 2012 in Montreal.

2550. So in paragraphs 5077 to 5081 inclusive, both Mr. Johannson and Mr. Reed agreed that a properly structured securitization can provide a lower cost means of utility cost recovery than the traditional regulatory practice, and can maintain the financial integrity of utilities by permitting the retirement of capital invested in regulated assets.

2551. In paragraph 5136, Mr. Reed was reminded of an expert -- of an excerpt rather of his reply evidence, in which he had stated that he personally believed that quote, "*securitization can be appropriate under certain circumstances*", end of quote.

2552. And more importantly, in paragraphs 5145 to 5149, which I would be grateful to the stenographer to reproduce in the notes ---

"5145. You know, I think the main message here is that TransCanada understands securitization. We understand the benefits that it could bring and we understand the issues that we'd have in bringing it to fruition.

5146. We also feel that securitization is not needed at this time. There are other options. We view securitization as somewhat of an extraordinary remedy and we are comfortable that, if we needed securitization to ensure recovery of -- a reasonable opportunity to recover our return of a non-capital, we would be in front of the Board on that. We have enough capability at TransCanada to develop a securitization proposal.

5147. But as of right now, we think it's not really in the scope of this two-year application that we have. Even if we were to pursue it right now, it's only one part of the larger restructuring proposal we need. The restructuring proposal deals with a lot of other issues like rate design, service packages, proper allocation of accumulated depreciation.

There's many other items that we're trying to deal with in the restructuring proposal on top of the return of a non-capital.

5148. But it is -- TransCanada is not against securitization. We understand it. We understand that it could be a useful tool under certain circumstances but we do view, again, that it's quite extraordinary.

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5149. And to give you a timeline on when would the proper time be, we can't tell you that right now. What we could tell you is that TransCanada would be back. If we felt securitization was needed, we would be back to ask for it and to propose something like that." [See transcript – Volume 33, paragraphs 5145 to 5149]

2553. --- Mr. Johannson stated the following, and I will quote the most salient passages that I find very important. Quote in paragraph 5145:

"You know, I think the main message here is that TransCanada understands securitization. We understand the benefits that it could bring and we understand the issues that we'd have in bringing it to fruition. We also feel that securitization is not needed at this time."

2554. And I'll come back to that.

"There are other options. We view securitization as somewhat of an extraordinary remedy and we are comfortable that, if we needed securitization to ensure recovery of -- a reasonable opportunity to recover our return of and on capital, we would be in front of the Board on that."

2555. And now it's very important:

"We have enough capability at TransCanada to develop a securitization proposal."

2556. Very important statement.

2557. Paragraph 5148:

"... TransCanada is not against securitization. We understand it. We understand that it could be a useful tool under certain circumstances but we do view, again, that it's quite extraordinary."

2558. Paragraph 5149:

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“If we felt securitization was needed, we would be back to ask for it and to propose something like that.”

2559. Later on, Mr. Reed added the following, 5152, quote unquote:

“First, I view securitization as being a potential opportunity down the road on top of the restructuring proposal. There’s absolutely nothing in the restructuring proposal that would be inconsistent with securitization at a later date.” [See transcript – Volume 33, paragraph 5152]

2560. It’s very close to what we’re proposing. I mean, I will explain later that in IGUA’s view, securitization is presented not as an alternative to the RP but rather as an additional toll reduction measure to be layered on top of the restructuring proposal or whatever decision the Board will render on the restructuring proposal. So, apart from the timing question, we can see that Mr. Reed himself seems to have a similar view.

2561. In paragraphs 5165 to 5168, Mr. Johansson acknowledged that TransCanada would come up with a securitization proposal if directed by the Board to do so, and I believe that this was during his cross-examination by Board Counsel, Mrs. Audino.

2562. So question at 5165:

“What if this Board were persuaded that the current tolls under your proposal, as updated with your throughput -- revised throughput forecast for 2013, are simply too high? Would that be an appropriate time to talk about this?”

2563. Answer by Mr. Johansson in paragraph 5167:

“So I think my first response to that is I would have to understand why the Board thought they were too high and I’d have to understand the directions from the Board in that respect.”

2564. Five thousand one sixty-eight (5168).

“My second point is that if the Board directed us to look at this

then, obviously, we would. If the Board thought that this was -- that they wanted this to be reviewed and they felt that this was appropriate then, obviously, TransCanada would listen to that and take action on that.” [See transcript – Volume 33, paragraphs 5165 to 5168.]

2565. So it’s very, very, very clear, and we’re talking about TransCanada’s main policy witness, Mr. Johannson here.
2566. At paragraph 5652, always in the same transcript, and after resisting vigorously the idea of securitization in the context of these proceedings, Mr. Engen nevertheless acknowledged that, at some point, under the right conditions, with the right support, it is doable.
2567. In paragraph 5658, Mr. Engen also acknowledged that securitization could be contemplated if the restructuring proposal did not achieve the purposes that it’s supposed to achieve, which is precisely what we’re telling you.
2568. So, at the end of the day, the use or non-use of securitization may well be just a question of timing. That being said, during his cross-examination by the Board’s counsel at the hearing of August 23rd -- that’s Volume 34 -- Mr. Reed acknowledged as follows that securitization could be used by the Board before we are actually at the Armageddon risk.
2569. And I would like here the reporter to reproduce paragraph 6243 and 6244 of the transcript that day.

“6243. MS. AUDINO: So is it your position that if at some point in the future no other viable options remained for the Board to protect the Mainline and allow it a reasonable opportunity to recover its prudently incurred cost that the Board would need to resort to a remedy such as securitization in order to maintain the regulatory compact?

6244. MR. REED: If the remedy of securitization is available, then I don’t think at that point -- and it’s workable -- then I don’t think at that point we’re actually at the Armageddon risk because there is something that the Board can do to ameliorate the situation and to permit the recovery of prudently incurred cost.” [See transcript – Volume 34, paragraphs 6243 to 6244]

2570. Essentially along the same lines the same day, Volume 34, Mr. Johannson agree that we don't have to wait until there is no revenue left to be securitized before implementing such a measure.

2571. And I refer you to paragraphs 6255 and 6256 of the Transcript of Volume 34.

“6255. I understand your point being that will there come a time where there's really so little -- there's no revenue or so little revenue left that you can't find the cash flow to securitize and I guess that is a possibility but I don't think TransCanada would wait until that time was upon us before we did embark on or we did start working on something like securitization. 6256. I think I said yesterday in one of our discussions that TransCanada understands securitization in that we understand that it does have some value in a process like this, depending upon the circumstances, and that we would be the first ones to come to the Board saying this is what we have to do. And I don't think that we would wait until there was no revenue left to be securitized.” [See transcript – Volume 34, paragraphs 6255 to 6256]

2572. “We don't have to wait until there was no revenue left to be securitized” were his words.

2573. These answers, coupled with the Chair's aforementioned exchange with Mr. Lohnes at the hearing of September 13th, Volume 44, clearly indicate that securitization could and should be considered as an intermediate tool, layered on top of whatever decision the Board will render on TransCanada's RP if the Board, like we do, is of the opinion that TransCanada's proposal and the 2013 Final Rates proposed in late June 2012 are not sufficient in order to provide a viable solution to the current crisis.

2574. IGUA readily acknowledges that, realistically, securitization could not be implemented in time for the years 2012-2013, which is the reason why we put forward the Interim Proposal described by Mr. Newton at the hearing of September 24-25, 2012.

2575. In practice, this means that should the Board see any merit in exploring the securitization avenue, its implementation could not take place

before the year 2014 at the earliest.

2576. Given these circumstances, IGUA strongly believes that the Board should ask itself the following question: In case of doubt -- in case of doubt as to the Restructuring Proposal's prospects for success, can we collectively afford to wait beyond 2013 to come up with additional measures in order to save the Mainline?
2577. What if, during the two years, 2012-13, volumes continue to go South, and then we are faced, for 2014 onwards, with even higher tolls than those now being proposed, what then? What are we going to do?
2578. IGUA's answers to this is that we simply cannot afford to take that chance. We have nothing to lose and everything to gain with an order by the National Energy Board enjoining TransCanada to come back with a securitization proposal that could be implemented in a timely fashion, should TransCanada's RP fail to achieve its intended results for 2012-2013.
2579. Mr. Johannson has already testified that they have enough capability at TransCanada to develop a securitization proposal. So why wait another two years just to see if the RP will fail before taking Mr. Johannson up on his offer? We cannot take that risk.
2580. Which brings me to Section D, IGUA'S Specific Proposals.
2581. This could be perhaps a good time to take our 20-minute break and come back with this, which is more than halfway in my argument.
2582. **THE CHAIRMAN:** We agree with you, Maître Sarault. This is an excellent time for a break.
2583. **MR. SARAULT:** Thank you.
2584. **THE CHAIRMAN:** So we'll take a 20-minute break and reconvene just right after 11:00 -- sorry, 10:40.
2585. Thank you.
2586. **MR. SARAULT:** Thank you.

--- Upon recessing at 10:20 a.m./L'audience est suspendue à 10h20

--- Upon resuming at 10:43 a.m./L'audience est reprise à 10h43

2587. **THE CHAIRMAN:** So we are ready to come back to final argument.

2588. We had a slight delay due to our web services but now everything has been resolved. So, anybody monitoring on the website, you haven't lost anything if you were wondering, in the last five minutes.

2589. So, Maître Sarault, s'il vous plaît.

2590. **Me SARAULT:** Merci, monsieur le président.

**--- FINAL ARGUMENT BY/ARGUMENTATION FINALE PAR MR. SARAULT:
(Continued/Suite)**

2591. **Me SARAULT:** Alors, lorsqu'on s'est quitté tantôt, j'ai tenté de vous démontrer que la proposition de TransCanada a pas de chance de succès et que vous avez de la preuve devant vous, dont de la preuve émanant de TransCanada elle-même à l'effet qu'il y aurait potentiellement d'autres outils disponibles à votre disposition.

2592. Et j'appelle des "outils supplémentaires" au-delà de la proposition qui pourrait potentiellement vous permettre de régler la présente crise.

2593. Ce qui m'amène à ce que nous, l'ACIG, proposons précisément et c'est l'item D de mes notes d'argumentation. IGUA's Specific Proposals -- au pluriel -- parce qu'il y en a trois.

2594. Alors, the first one, IGUA's Long-Term Proposal.

D. IGUA'S SPECIFIC PROPOSALS

D.1 IGUA'S long-term proposal

2595. So during the course of these proceedings, we have heard several witnesses talking about IGUA's proposal as "IGUA'S Securitization Proposal." While it is true that securitization is a component of IGUA's proposal, it is not the only one. In fact, IGUA'S proposal is a three-step approach that our expert, Mr. Geoff Inge, described as follows during his cross-examination at the hearing of

September 24th, Volume 51.

2596. And I reproduce here paragraphs 24681 to 24683 inclusive. And I quote, Mr. Inge is speaking:

“24681. MR. INGE: --- Mr. Yates, we approached this in a sequential fashion and you’re correct that the first step, if you will, was the removal from rate base of \$1.6 billion of rate base.

24682. The second step was then to determine how the cost of removing that from rate base would be shared. As you know, we’ve proposed 50/50 sharing between TransCanada shareholders and the shippers in this case.

24683. The third step then was to consider how best to finance the shipper portion of the \$1.6 billion. So the securitization is actually part of the third step in the process.” [See transcript – Volume 51, paragraphs 24681 to 24683]

2597. The tolls savings generated by IGUA’s proposals come from step one, which is removing the value of underutilized assets from the rate base for purposes of rate calculation.

2598. Securitization, in and of itself, does not provide savings. It only comes in the third step as the proposed mechanism to finance the portion, 50 percent of the costs of removing assets from the rate -- of removing the value from the rate base borne by the shippers. [See transcript - Volume 51, paragraphs 24884 to 24887 inclusively]

2599. Which leads me to a long -- I’m a little sorry -- an unwritten addition that I had to prepare on the question of the jurisdiction of the Board on the -- what Mr. Yates qualified as an asset write down, being part of our proposal. And I believe that this is extremely important.

2600. During his argument on Wednesday, that’s Volume 60, Mr. Yates stated that the Board has no jurisdiction to order, specifically, or effect as he explained, through the disallowance of costs for rate calculation. And what he qualified as an asset write down, and that this would constitute an illegal confiscation of private property which the Board has no explicit not implicit jurisdiction to authorize.

2601. I believe that the sole and leading authority that he quoted and supported this argument is the Supreme Court of Canada decision in ATCO Gas, found at Tab 10 of TransCanada's compendium.
2602. The facts at the origin of that decision and the legislation powers of the Alberta Energy Utilities Board, that were the object of the court challenge, have nothing to do with our situation, with all due respect.
2603. It was not a regulatory decision on the determination of rates, but rather an ancillary decision of the Board, of the Alberta Board, to apportion -- to allocate if you prefer, between the shareholders and the users, the proceeds of the sale of assets that the Board was authorized to approve, in broad terms, pursuant to its enabling legislation with no explicit power to allocate the net sale proceeds.
2604. And the reasons leading to its ruling as to the absence of jurisdiction of this ancillary power by necessary implication -- that's paragraph 73 of the decision that Mr. Yates talked about -- the Supreme Court noted prior to getting there -- and I'm talking about paragraph 60 and we'll look at it together.
2605. The court noted that the Board's power to supervise finances and operations of companies is, although wide, only incidental to fixing rates. Let's read paragraph 60 together. It's very important. Quote:

"Although the Board may seem to possess a variety of powers and functions, it is manifest from a reading, 'three legislations' that the principal function of the Board in respect of public utilities is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates."

2606. And then he goes on to quote an excerpt from the opinion of Mr. Justice Estey in a prior ATCO case. And that excerpt is very important in my view. It reads as follows:

"It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above, that the legislature has given the Board a mandate of the widest proportions [a mandate of the widest proportions] to safe guard the public interest in the nature and quality of the service provided to the community by the public [utilities]."

Such an extensive regulatory pattern must, for its effectiveness, include the right to control the combination or, as the legislature says, the union of existing systems and facilities. [There is no doubt]-- this, no doubt, has a direct relationship with the rate fixing function which ranks high in the authority and functions assigned to the Board."

2607. And then in the following paragraphs at the ATCO decision, the Supreme Court goes to conclude that there was no explicit power to make the allocation of the proceeds. And no implicit power, but bearing in mind that we're not talking here about the Board's main function, which is ratemaking, but rather we're talking rather about an incidental power which was just like an accessory to its main jurisdiction.
2608. So the ATCO decision does not tell us what the Supreme Court would have decided if it had been called upon to rule and interpret and apply the powers that may be exercised by a regulator in the jurisdiction for purposes of its main jurisdiction, which is fixing rates, which is the case here.
2609. When we're talking about allowing or disallowing costs for determining the rate base, for approving rates, we are at the heart of your jurisdiction within the meaning of section 62 and follow of the NEB Act.
2610. And with all due respect, I don't think that the ATCO decision is on point with respect to what these ratemaking powers can entail as opposed to what ancillary or accessory powers may contain in terms of jurisdiction.
2611. So that being said, what we are proposing in this case is not an asset write down per se, but rather a disallowance of costs for purposes of rate determination, which is at the very heart of your jurisdiction, as described in the NEB Act as I explained.
2612. And as Mr. Yates correctly admitted himself during his argument on these issues, the case law interpreting and applying the Board's -- the regulators in general and jurisdiction over ratemaking, is very clear to the effect that those powers are extremely wide, that the regulators have a wide jurisdiction and that the courts of law defer and respect that wide and discretionary jurisdiction.
2613. I'm talking about here of the Trans Mountain decision at Tab 23,

paragraph 9, of Mr. Yates' compendium. I'm talking also about the TCPL 2004 decision, also found at Tab 20, paragraph 30. And paragraph 30 -- Tab 20, excuse me, is, in my opinion, very important.

2614. The authority of the Board to determine just and reasonable tolls is not limited -- is not limited by any statutory directions. The broad authority of the Board was well articulated by Thurlow judge in *B.C. Columbia Hydro Power Authority v. versus Westcoast Transmission*.

2615. And I quote:

"There are no like provisions in Part 4 of the National Energy Board Act. Under it, tolls are to be just and reasonable and may be charged only as specified in a tariff that has been filed with the Board and is in effect. The Board is given authority in the broadest of terms to make orders with respect to all matters relating to that.

Plainly, the Board has authority to make orders designed to ensure that the tolls to be charged by a pipeline company will be just and reasonable. But its power, in that respect, is not trammelled or fettered by statutory rules or directions as to how that function is to be carried out or how the purpose is to be achieved.

In particular, there are no statutory directions that, in considering whether tolls that a pipeline [company] propose to charge are just and reasonable, the Board must adopt any particular accounting approach or device, or that it must do so by determining cost of service and the rate base, and affixing a fair return thereon."

2616. This is a very broad language. This is very broad language as to the extent of your ratemaking powers pursuant to the NEB Act. And when the rates are determined on the basis of costs-of-service, the Board's wide powers on rate fixing would have no meaning if the Board could not disallow costs deemed to be excessive or representing the value of assets deemed to be not used nor useful.

2617. I did not have the time to conduct a long research but I'm sure that if you look in the archives of the NEB or in the archives of provincial regulators in

- Canada, you will find numerous examples of decisions disallowing costs for purposes of inclusion in the rate base or other costs deemed to be excessive.
2618. This is at the heart of your jurisdiction. And I don't see how if you honestly feel that a portion of the value of the rate base is underutilized, that it doesn't meet the test and it's another regulatory standard -- we'll talk about it later -- but if it doesn't meet the test of used and useful, why you should not have the power to reduce a value corresponding to that underutilized capacity.
2619. I think it's important to remind the Board here that we have not proposed that assets be physically removed from the rate base, and we had not requested any direction from the Board as to how TransCanada should use its portion of the value of the underutilized capacity removed from the rate base. This is clearly a management decision. There is no confiscation at all, in our opinion.
2620. During his exchange with the Board members on Thursday -- that's yesterday, Volume 61 -- Mr. Yates went even further by suggesting that it would be illegal for the Board to set tolls at a competitive level. If such tolls would preclude the recovery of prudently incurred costs in which case there would be, once again, confiscation of private property within the meaning of the ATCO decision.
2621. In response, Mr. Chairman, to your own example of a Board decision setting the rate at \$1.50, for example, to make it more competitive and clear the market, versus a rate of \$2 allowing for full recovery of costs, Mr. Yates' answer was clearly that your hands are tied and that you cannot legally set the tolls at a level precluding full recovery of prudently incurred costs.
2622. With all due respect, I think he's going too far, way too far. This is going overboard. And it's totally incompatible with the broad ratemaking powers conferred upon regulators pursuant to the case law, including the Trans Mountain and TCPL's case that I've quoted earlier.
2623. But even if we were to accept, for purposes of the discussion, TransCanada's very narrow definition of regulatory compact -- i.e. reasonable opportunity to recover prudently incurred costs -- how could they say that the toll set, for example, at a more competitive level of \$1.50 would not provide them this opportunity to recover on the aggregate all of their prudently incurred costs.

2624. Indeed, it is very possible that a toll set at a more competitive level of \$1.50 could likely generate significant increases in throughput allowing the pipeline on the aggregate to recover all of its prudently incurred costs. There's an effect, when you have a more competitive toll, obviously, it may contribute to significantly increase throughput and therefore revenue for the pipeline.
2625. So TransCanada's approach to the regulatory compact and Board's jurisdiction issues, in our opinion, are totally incompatible with both the NEB Act and the fundamental goals of regulation of public utilities as set forth in the numerous relevant and applicable regulatory standards when properly interpreted and applied collectively.
2626. We believe that TransCanada's approach could, at the limit, result and the equivalent of a straightjacket, preventing the Board from fulfilling its most basic duties of reviewing and approving all costs for purposes of determining just and reasonable tolls. And I think that this approach is totally incompatible with the fundamental goal of the regulation of public utilities which is balancing the interests of the investors on one hand and the -- and users, the tolls payers, on the other hand.
2627. So this is the end of my longue parenthèse sur cette question de juridiction, which leads me and je pense que c'était probablement un bon endroit pour le mettre parce que le "Step 1" semble être interprété comme -- par TransCanada comme étant un "asset write down" et nous contestons ceci.
2628. Ce n'est pas un "asset write down"; c'est un refus d'inclure certains coûts qui, de l'avis du régulateur, ne constituent pas -- ne sont pas utiles -- ne sont pas utilisés ou utiles -- used and useful -- pour les fins du service prodigué par l'utilité publique.
2629. Ceci ça m'amène à la suite de la démarche qui est proposée par l'ACIG.
2630. The reimbursement of the portion of the costs born by the shippers is achieved via a universal toll rider that would apply on all volumes on the system. According to the illustrative 2012 tolls calculation shown at Answer 42 of Mr. Inge's written evidence, C4-9-13, this toll rider would amount to 5 cents a gigajoule.
2631. As explained in Answer 38 of Mr. Inge's evidence, the significant

- amount of underutilized capacity has allowed some shippers to replace long-haul, long-term transportation service with short term, short-haul and/or discretionary transportation services. With a universal toll rider, these shippers would share in the burden of the costs related to the underutilized capacity. So we think that it's fair.
2632. However, the volumetric rate rider approach is not carved in stone, and IGUA is prepared to consider alternative allocation methodologies, such as a distance-based toll rider, provided only that Mainline shippers contribute an equitable portion to the cost of the excess capacity. *[On this point, IGUA refers to its Response to TransCanada IR 1.34(g), C4-12-5]*
2633. At page 27 of its final reply evidence, B100, TransCanada asserts that, while IGUA's proposal would have TransCanada bear \$800 million of capital costs upfront, TransCanada would be precluded from redeploying the \$800 million of rate base, subject to IGUA's proposed securitization, thus allowing shippers to maintain access to Mainline facilities otherwise deemed no longer used and useful by IGUA.
2634. This is totally inaccurate. IGUA's proposal does not request that the underutilized portion of the Mainline's assets be removed from service, nor does it prohibit TransCanada from redeploying the capacity related to the 50 percent of the asset -- of the value write down that they absorb.
2635. IGUA's position is that the details of how capacity-related sequestered rate base is utilized in the future, is one of the subjects to be addressed during the development phase of the securitization plan. IGUA also made it clear that it will be up to TransCanada's management to decide whether to redeploy, or not, the 50 percent portion absorbed by TransCanada.
2636. And on this point, we refer you to the testimony of Mr. Newton at the hearing of September 24, at paragraph 24892, where he clearly indicated that this was a management decision. *[See transcript – Volume 51, paragraph 24892]*

“24892. We don't know if it's going to be a write-down. We don't know what TransCanada is going to do with its share -- its \$800 million of the \$1.6 billion. Is the company going to choose to leave those facilities in service? I don't know if that's what the company is going to do; that's a company decision. And I'm certainly not going to get into all of the options that

might be available to TransCanada in terms of what it might want to do with that, but those are -- those are clearly management decisions.”

2637. It is also important to remind everyone that IGUA’s proposal is not submitted as an alternative but that it’s proposed an additional -- as an additional tolls reduction measure that can be layered on top of whatever toll design and cost allocation the Board will approve pursuant to this proceeding. *[See Murray Newton’s written evidence, C4-10-2, answer 57, as well as his oral testimony on September 24, 2012 – Volume 51, paragraphs 24590 to 24592]*
2638. IGUA’s specific proposal corresponds to Option 5 of the six options described in the written evidence of our expert, Mr. Geoff Inge, Exhibit C4-9-13. While this written evidence does provide a calculation of the tolls reductions generated by each option in comparison to TransCanada’s RP tolls, it is important to note that these calculations were provided for illustrative purposes only, and that they do not mean in themselves that IGUA either supports or opposes TransCanada’s RP or any portion thereof.
2639. As further explained in Answers 14 and 15 of Mr. Inge’s written evidence, the calculation of the level of underutilized capacity at the source of the \$1.6 billion reduction in the rate base that he initially proposed was discussed in detail by IGUA’s witness, Mr. Bernard Otis, who had come to the conclusion that 49 percent of the Prairies' System Capacity and 57 percent of the Northern Line capacity are not required to meet the needs of TransCanada's long-term firm and projected discretionary transportation contracts. *[See the written evidence of Bernard Otis, C4-9-7]*
2640. It should be noted, however, that Mr. Otis filed additional evidence, C4-27-4, on September 21st, 2012, providing a revision to his calculations in order to take into account the Revised Throughput Projection of June of this year, B40.
2641. According to Mr. Otis's revised calculations, the underutilized capacity for 2013 for both the Prairies and Northern Line segments is now 62 percent. Mr. Otis' additional evidence further specifies that the cost burden to shippers of the revised underutilized firm capacity on these segments is now in excess of \$500 million each year.
2642. If we were to revise today Mr. Inge's financial calculations on the basis of Mr. Otis' additional evidence, the calculation of the reduction in value in the

- rate base would be greater than \$1.6 billion. Furthermore, and as explained by Mr. Newton at the hearing of September 25th, 2012, that's Volume 52, these numbers may well change again depending on the level of underutilization that will exist if and when IGUA's proposals will be implemented. *[See transcript of September 25, 2012 – Volume 52, paragraphs 25894 to 25896]*
2643. The 50/50 cost sharing of the rate-base reduction that we propose in Step 2 of our proposal is not the result of an impulsive or arbitrary decision on the part of IGUA. Indeed, if you read carefully the written evidence of Mr. Inge, you will see that other options were contemplated and that these include the absorption of 100 percent of the costs by TransCanada's shareholders, that's Option 1, or their total absorption by the shippers, Option 6.
2644. As explained by Mr. Newton at the hearing of September 24 -- that's Volume 51 -- we landed on a 50/50 allocation as being the fairest way that we could address this situation for which we can't really assign blame to anyone. And this is important. We believe that market circumstances have brought us to where we are today. It is not TransCanada's fault, it is not the market's fault, it is not the producers' fault. *[See transcript – Volume 51, paragraphs 24853 to 24856.97]*
2645. And you'll remember from Mr. Newton's cross-examination by Mr. Yates that several questions were put to Mr. Newton in an apparent attempt to suggest that IGUA was casting blame for this situation. We are not and we do not have to cast blame. However, TransCanada's own position seems to be rather obscure as to whether someone is to blame for the current questions and, if yes, who is to blame.
2646. On one hand, TransCanada seems to welcome the position advocated by those like IGUA who state that no one is to blame, not TCPL, et cetera, and that prudence is not challenged either. They take note of that.
2647. But despite this, I was kind of puzzled and disappointed to hear Mr. Yates, in his final argument, state that the current state of the underutilization of the system is largely the result of shippers choosing not to renew contracts and LDCs shifting long haul to short haul.
2648. What Mr. Yates seemed to forget here is that these decisions are not made arbitrarily. They are a reaction to the very high and volatile tolls that we had seen that, in themselves, become a very powerful deterrent not to stay on the

system; and they're also caused by other problems.

2649. But I don't know why Mr. Yates introduced this in his final argument if it's not to continue impose to shippers the full 100 percent burden of the cost resulting from underutilization. I find that most unfortunate.
2650. Our 50/50 allocation is also supported by the numerous precedents referred to in Mrs. Wiggins' evidence, C4-9-8, as to the solutions followed by U.S. regulators when situations of underutilization, excess capacity, capacity turn-back, or other cases raising the application of the "used and useful" standard are caused by market -- changes, rather, in market circumstances for which no one can be held responsible.
2651. I will come back on these concepts in further detail when I will explain how IGUA's proposal conforms to the applicable U.S. and Canadian regulatory standards.
2652. In terms of "how" and "when", IGUA acknowledges that securitization is an extremely complex transaction and that it will take some time to be implemented. This is why we've proposed an interim proposal for 2012 and '13 as I've explained earlier.
2653. It is also essentially for the same reason that we have not attempted to describe the procedure, step-by-step, that TransCanada, third-parties, stakeholders and the Board would need to follow to securitize Mainline cash flows and obtain government guarantees.
2654. As explained in IGUA's response to NEB's IR-1.2 -- that's Exhibit C4-12-2 -- a general description of the process has already been provided by TransCanada in its response to NEB 3.1. In addition, we acknowledge that developing the appropriate structure and related process for implementation of a securitization plan in this case will undoubtedly require input from investment, legal, regulatory and legislative experts.
2655. However, we cannot insist enough on the fact that we haven't heard anyone say that securitization cannot be done. We've heard people say that it's going to be difficult or that it's complex, but we haven't heard anyone say that it cannot be done, quite the contrary, and that includes TransCanada.
2656. We strongly feel that the industry working group or task force

- approach followed by the Alberta Board in its decision 2002-057 decision provides a good example of how the Board could proceed in this case. *[This decision was filed as C4-2-14, attachment 1, to IGUA's response to NEB 1.2 c.]*
2657. And we've already heard from Mr. Johansson that they have the resources to put together a securitization plan and that they would do so if ordered by the Board to do so. *[See transcript – Volume 33, paragraphs 5165 to 5168]*
2658. However, we're not naïve and we do not believe that TransCanada's shareholders or its management will volunteer to come up with a securitization proposal unless they are compelled to do so by a strong order from the National Energy Board.
2659. We also feel that such a strong order from the Board would go a long way towards convincing the Government and financial institutions to provide whatever assistance will be necessary for the transaction to be implemented. *[On this point, see Mr. Newton's testimony at the hearing of September 25, 2012 – Volume 52, paragraphs 26187 to 26196]*
2660. At page of 26 of its Final Reply Evidence, B-100, TransCanada states that it would be opposed to the development of an industry task-force whose purpose is to "develop and implement" securitization, as opposed to more properly evaluating its usefulness and workability.
2661. It further adds that the company will actively engage in discussions with all Mainline stakeholders if a securitization proposal is to be developed in the future, but it does not believe that a specific mandated process is an appropriate or effective means of accomplishing the objective, considering the difficulty experienced by Mainline stakeholders in resolving tolling matters of this complexity.
2662. I believe that this latest excerpt only shows that, despite the very -- the aforementioned very clear and candid statements made by Mr. Johansson at the hearing, TransCanada's management, presumably for the protection of its shareholders' best interests, now shows signs of reluctance and will probably do everything it can in order to delay or otherwise circumvent the implementation of securitization.
2663. Given these latest developments, IGUA respectfully submits that regardless of whether the proposal will be put together through the work of a task-

- force or not, the Board's ruling should be addressed at TransCanada itself and enjoin the company to come back with a securitization proposal pursuant to terms of reference to be specified by the Board in its Order.
2664. By way of example, IGUA refers the Board to decision D2012-076 rendered by the Régie de l'énergie du Québec in June 2012 on Gaz Métro's Application R-3693-2009, Phase 2, requesting the approval of a new version of its incentive mechanism, which had been negotiated and approved within the framework of a special taskforce composed of Gaz Métro and its main stakeholders.
2665. C'est la décision que vous retrouvez à l'onglet 2 de mon compendium.
2666. The Régie did not like the new mechanism and dismissed it in its entirety. The decision then goes on to outline the terms of reference and other elements that the Régie would expect to see in a new, improved version of the incentive mechanism.
2667. Alors, il y a plusieurs pages dans la décision. Vous verrez que la Régie donne une indication très précise des éléments qu'elle souhaiterait voir dans un nouveau mécanisme incitatif pour remplacer celui qui a été proposé et qu'elle a refusé.
2668. And the decision then concludes with the following order au paragraphe 240 et je cite:
- “La Régie demande au distributeur de déposer une proposition d'un nouveau mécanisme qui rencontre les exigences de la présente décision au plus tard le 1^{er} octobre 2012. Par la suite, la proposition du distributeur sera soumise au processus d'audience habituel. La Régie fixera ultérieurement le déroulement de la phase 3 du présent dossier. ”*
2669. Phase 3, évidemment, qui se penchera sur cette nouvelle proposition que l'on ordonne au distributeur de produire à la Régie.
2670. We respectfully submit that there is absolutely nothing preventing the National Energy Board from issuing a formal order of this kind to TransCanada. You are the regulator and they are the regulated utility.

2671. Accordingly, we take strong exception to the suggestion contained in TransCanada's Final Reply Evidence to the effect that they would oppose the development of an industry taskforce whose purpose would be to "develop and implement" securitization. With all due respect, this is not their decision. It is yours and yours only.
2672. On this point, we refer to article 13(a) of the National Energy Board Act, specifically granting the Board wide powers to issue mandatory orders, et je cite:
- "The Board may:
(a) order and require any person to do, forthwith, or within or at any specified time and in any manner prescribed by the Board, any act, matter or thing that such person is or may be required to do under this Act, or any regulation, certificate, licence or permit, or any order or direction made or given under this Act." [R.S.C., 1985, c. N-7]*
2673. Ça c'est un langage très large. Je vous soumetts que vous avez une discrétion très étendue et des pouvoirs importants pour émettre des ordonnances mandatoires aux entités qui sont sous votre juridiction et TransCanada est une de ces entités.
2674. Furthermore, given the vital importance of this case, not only for the future of TransCanada's Mainline, but also for the viability of the Canadian Natural Gas industry as a whole, we respectfully submit that, in Canada's best public interest, the Board should contemplate exercising the advisory functions set forth in articles 26 et suivants of the *NEB Act* in order to formally recommend to the Federal Government to provide the assistance and guarantees required for the implementation of a securitization transaction.
2675. We believe that a formal recommendation of this nature addressed by the National Energy Board to the government would receive very serious attention in Ottawa.
2676. In its response to NEB 1.2(c) -- that's Exhibit C4-12-2 -- IGUA provided specific proposals as to the terms of reference that the Board's decision and recommendation could contain. Using this response as our starting point, we respectfully submit that the decision on securitization should include the following.

2677. Et là, j'ai sept points:
2678. Point numéro 1. A quantification of the financial value of plant no longer used and useful, based upon the latest data available as to the Mainline's then current level of underutilization.
2679. Numéro 2. A quantification of the corresponding capital reduction amount and the pipeline/shipper sharing percentages. IGUA's recommendation in this respect is 50/50.
2680. Numéro 3. An indication of the goals of the securitization program to be put in place, which would essentially be to guarantee the repayment of the portion of the costs absorbed by the shippers through a toll rider.
2681. Numéro 4. Très important. A formal order directed at TransCanada itself, enjoining the company to develop, in cooperation with a special taskforce composed of concerned stakeholders such as shippers, producers and end users, government officials, the financial community and an NEB neutral -- neutral -- observer, a formal securitization proposal for Board analysis and approval at a special hearing to be held for that purpose.
2682. Ça c'est très important. D'abord, l'ordonnance est dirigée à TransCanada, c'est eux qui ont la responsabilité première pour le développement de la proposition. Les gens qui sont autour sont là pour collaborer, mais le "lead role" c'est TransCanada qui l'a. Et la première responsabilité ce sont eux qui l'a. Monsieur Johansson nous a dit qu'ils avaient les ressources nécessaires, bien, qu'ils nous le démontrent.
2683. La deuxième chose c'est que nous n'entendons pas -- et c'est une question qui a été soulevée lors de la comparution du panel de l'ACIG: Quel serait le rôle de l'Office national d'énergie dans ce processus-là? Nous ne voyons rien d'autres que celui d'un observateur neutre et objectif et détaché. Vous ne faites pas partie du développement de la proposition.
2684. Pourquoi? Parce qu'elle va vous être présentée en audience. Et c'est dans le cadre des audiences à être tenues subséquemment que vous aurez l'occasion de faire valoir votre point de vue dans une décision finale. Alors, vous avez pas -- ça ne déroge pas, je pense, au rôle d'arbitre neutre, impartial et indépendant qui est traditionnellement conféré à l'Office et c'est correct ainsi.

Nous respectons ça.

2685. Et je pense que le processus d'audience que nous proposons ici -- c'est ce qui a été fait par la Régie de l'énergie dans la décision que je viens de vous montrer -- va garantir à tout le monde, incluant TransCanada, aux autres participants, le droit d'être entendus et de faire valoir leur point de vue sur les tenants et aboutissants de ce programme bien particulier.
2686. Alors ça c'est l'item 4, c'est probablement l'item le plus important aux fins de votre décision.
2687. Item 5. The deadline on or before which TransCanada's proposal should be filed for Board approval in order to allow sufficient time for the securitization plan to be implemented with effect on January 1, 2014, with retroactive effect if necessary.
2688. Et encore une fois, vous verrez que dans la décision que je vous -- de la Régie que je vous donne en exemple, y ont donné un deadline -- 1^{er} octobre -- à Gaz Métro: Revenez nous avec une proposition.
2689. Vous êtes le régulateur, ils sont les régulés et je pense qu'il est important que tout le monde réalise quel est son rôle ici.
2690. Item 6. A recommendation addressed to the Federal Government of Canada to provide TransCanada whatever guarantees and other assistance deemed necessary for the implementation of the securitization transaction.
2691. Comme je vous ai dit tantôt, je me mets dans la peau des politiciens et des fonctionnaires -- des hauts fonctionnaires au Ministère des Ressources naturelles à Ottawa, et dire: "Là, écoutez là, c'est pas une carte de Noël qu'on vient de recevoir là, c'est une ordonnance de l'Office national d'énergie avec une recommandation adressée au gouvernement fédéral à l'effet de contribuer et d'aider un pipeline qui est en difficulté et qui est nécessaire pour la viabilité de l'économie canadienne à maintenir son intégrité financière."
2692. Et je suis certain qu'à Ottawa ils vont vous prendre très au sérieux. Il y a aucun doute dans mon esprit.
2693. Item 7. An order to TransCanada to keep detailed records and minutes of the work of the task force and to file interim reports with the Board as to the

progress of its work at least every two months.

2694. Et l'auteur des procès-verbaux ça sera TransCanada.
2695. Comme je l'ai dit, l'ordonnance doit leur être adressée à eux et c'est eux qui sont les sujets de cette ordonnance mandatoire et c'est eux qui ont des comptes à rendre à l'ONE en vue du dépôt de leur proposition pour être étudiée en audience.
2696. IGUA respectfully submits that without such a formal order and recommendation, chances are high that we may soon find ourselves once again before the NEB facing an even worse situation that would require more drastic measures.
2697. Once again, IGUA cannot stress enough that in case of doubt as to the chances of success of TransCanada's RP, as we believe there is a significant doubt, we should not wait any longer and take, immediately, the necessary steps leading to a long-term and viable solution to the current tolls crisis.
2698. Je vous dirais ici que, ça, ça s'inscrit pas dans la partie "Tarifs 2012/2013", cette partie-ci vient s'inscrire dans la Partie 2 du dossier qui est le "Restructuring Proposal". Et quand on parle "Est-ce qu'on a besoin de direction de l'Office national d'énergie?", je pense que les sept points que je viens de vous relater constituent une direction très claire, très précise, très limpide et qui va être facilement compréhensible par les dirigeants de TransCanada.
2699. Ce qui m'amène à:

D.2. IGUA's interim proposal for 2012 and 2013

2700. As explained by Mr. Newton at the hearing of September 24-25th, 2012, IGUA's interim proposal for these two years is to disallow TransCanada any return on equity on the portion of its rate base deemed not to be used and useful.
2701. At the hearing of September 24th, Mr. Inge specified that this proposal corresponds to Option 4 of his written testimony. And that according to the initial calculations, made on the basis of Mr. Otis' initial assessment of the Mainline's underutilization, this option would produce a \$106 million reduction in the annual gross revenue requirement. *[See transcript – Volume 51, paragraphs 25036 to*

25041]

2702. Mr. Newton also explained that this interim proposal is not meant as a punitive measure, and that it essentially purports to remove costs from tolls and therefore, make the tolls more competitive as quickly as we can. *[See transcript – Volume 51, paragraphs 25063 to 25067]*
2703. If you look at the initial illustrative 2012 tolls calculations, indicated at Answers 31 and 42 respectively of Mr. Inge’s written evidence, the tolls reduction generated by Option 4 was of the order of 9 cents per gigajoule compared to 22 cents a gigajoule for Option 5 which corresponds to IGUA’s long-term securitization proposal.
2704. As IGUA’s interim proposal does not entail the sharing of costs between TransCanada’s shareholders and the shippers, nor the need for a securitization mechanism in order to guarantee the repayment of what would be the shipper’s portion under the permanent proposal, there is no rate rider to be implemented pursuant to the interim proposal for these two years. *[See transcript – Volume 51, paragraphs 24557 and 24581]*
2705. Once again, it is important to note that the illustrative 2012 tolls reductions indicated in Mr. Inge’s written evidence did not take into account the revised estimates of underutilization contained in Mr. Otis’ additional evidence, C4-27-4.
2706. As explained by Mr. Newton at the hearing, our recommendation with respect to 2012 and 2013 would be that TransCanada would forego its return on equity on 62 percent of the value of the assets of the Northern Line and Prairie segments, which is the revised percentage proposed by Mr. Otis, in his additional evidence. *[See transcript – Volume 52, paragraphs 25892-25893]*
2707. If you read carefully the written evidence of Dena Wiggins, C4-9-8, you will see that she does quote examples of State precedents where utilities were deprived from their return on equity on the portion of their rate base where there was found to be excess capacity. *[See Evidence, C4-9-8, answers 62 and ff]*
2708. Contrary to what TransCanada suggests at page 21 of its final reply evidence, B100, this interim measure is not punitive nor confiscatory in that the shareholders are not deprived from the return on the rate base to cover interest on debt nor from the revenues needed to cover depreciation, operation and

maintenance expenses. In other words all that the shareholders are deprived from are the net profit on the assets deemed to be not used nor useful.

2709. Under this interim proposal, the shippers don't get a free ride either because they continue to pay, through their tolls, all of the aforementioned costs with the only exception of the return on equity on the portion of the rate base determined to be not used nor useful.

2710. Accordingly, we submit that this solution is balanced and equitable to all concerned parties.

2711. IGUA's interim proposal is conceptually similar to what is proposed by the Eastern LDCs and their alternative proposal filed as C56-8-3. And I quote from this proposal:

“Removal from the revenue requirement of the equity return associated with the [...] Northern Line segment from the revenue requirement in each year from 2012 to 2020. This element recognizes that the [...] Northern Line segment is not, nor is it likely to become, sufficiently utilized during this period. Removal of the equity return on the [...] Northern Line segment will serve to reduce the revenue requirement for the next nine years.”

2712. Here again, we can see that the objective pursued by this element of the Eastern LDC's alternative proposal is similar to IGUA's, i.e. a reduction of the revenue requirement in order to make tolls more competitive. And in our case, as early as in 2012 and 2013.

D.3 Possible solutions on a go forward basis:

2713. Which leads me to my third subsection in our proposal which is the possible solutions on a go-forward basis.

2714. IGUA's long-term securitization proposal, as well as its interim proposal for 2012 and 2013, propose an appropriate allocation of the costs of underutilized capacity between the pipeline and the tolls payers.

2715. These proposals therefore purport to resolve the burden of costs associated with the current underutilization of the system but they do not address

how the risks associated with future throughput fluctuations could be shared on a go-forward basis.

2716. That being said, the Board will recall that in its responses to the NEB's generic questions, C4-27-3, on the subject of toll methodology, services and pricing, IGUA stated the following with respect to possible risk-sharing measures for the future.

“IGUA is also attracted to go forward risk sharing measures that would see TransCanada exposed to prospective risk associated with further deterioration of its Mainline throughput below current levels. The following exchange between Mr. Reed and Board Member Ms. Habib at (T-44, par.16966-16967) was informative in that regard:”

2717. And we there reproduce those two paragraphs from Volume 44 of the transcript.

“16966. MR. REED: Everyone on the panel agrees that the key word here is ‘prospectively’.
16967. That if you were to say current Mainline receipts and throughput are 3 Bcf, to use the round number that's been discussed today, and from this point forward we're going to try and operate within the regulatory compact but have some of that risk borne by TransCanada, risk beyond what has already occurred, I think that could be accomplished within the regulatory compact if the Board so directed’.” [See IGUA's responses to the NEB's generic questions, C4-27-3]

2718. During his testimony at the hearing of September 24th, 2012, Mr. Newton made it very clear that he was favourable, not only to the concept of a sharing mechanism for the current costs of underutilization, but also for future risks. [See transcript – Volume 51, paragraphs 25077 to 25080]

E. ARE IGUA'S PROPOSALS IN CONFORMITY WITH THE APPLICABLE REGULATORY STANDARDS?

2719. Which leads me to the fifth section of my presentation; are IGUA's proposals in conformity with the applicable regulatory standards?

E.1 The so-called regulatory compact

2720. Almost all of TransCanada's witnesses have put a great deal of emphasis on the concept of regulatory compact. This is my -- j'ai trois sujets là. Le premier c'est "regulatory compact"
2721. In an apparent attempt to shield the pipeline from having to share in the cost burden of its reduced throughput. They essentially claim that any sharing of the costs of underutilized assets would cause the pipeline's capital costs to increase because investors rely on the regulatory compact, and therefore do not expect to ever have to share in any of the additional costs or risks resulting from changes in the market for pipeline transportation.
2722. At page 5 of its final reply evidence, B100, TransCanada reiterates its assertion that the "regulatory compact" requires that the Board establish tolls that provide TransCanada with a "reasonable opportunity to recover its prudently incurred costs, including a fair return on and of capital".
2723. Nowhere in this definition can we find any reference to the concept of public interest, nor to the well-known regulatory standard that tolls must be just and reasonable.
2724. For all intents and purposes, this narrowly-defined concept is used by TransCanada in order to provide to its shareholders with an iron-clad guarantee that they will recover all of their costs, including a return on and of capital regardless of what happens with the operation of the pipeline.
2725. And that was made very clear by Mr. Yates in his final argument, that as soon as the investment has met the prudence costs and has been approved by the NEB in the past, it -- they're allowed to recover the full cost regardless as to whether the same assets become unused or unuseful.
2726. However, to the best of our knowledge, the statements in the record and evidence filed by TransCanada fail to cite any statutes, regulations or binding precedent confirming the definition and meaning of this narrowly defined "regulatory compact". They also fail to explain the conditions and exceptions for its application and to present any concrete articulation of the concept.
2727. Moreover, some witnesses used words such as "implied" to describe the source of the concept, and words like "imbued" to describe its importance.

2728. For example, in Mr. Colby's reply evidence, and in response to a question regarding the meaning of the term "regulatory compact", Mr. Colby answered, and I quote:

"I mean that the procedures under which the Mainline has been regulated to this point imply that the Board should establish tolls in this proceeding that provide TransCanada with an expected rate of return equal to the cost of capital on, and full recovery of, the prudently incurred costs of its investments in the Mainline." [See Mr. Colby's Reply Evidence, B21-8, page 8, lines 9-12]

2729. Similarly, in TransCanada's response to Undertaking U-3, the company admits that:

"Although the Board has rarely made reference to the regulatory compact in its decisions, the concept is one that has imbued the NEB regulation from its inception". [See TCPL's response to Undertaking U-3, B38, page 1]

2730. Nowhere can we find a clear-cut source cited in support of this concept.

2731. Given this apparent confusion, we were not surprised with the following comment made by the Chairman at the conclusion of the cross-examination of TransCanada's Panel 10 at the hearing of September 13, 2012, which was the 44th day of the hearing:

2732. Ça faisait 44 jours que vous entendiez TransCanada et vous dites et je cite, au paragraphe 17243:

*"17243. **THE CHAIRMAN:** I was looking for a clear, brief statement because we heard the phrase so often, Mr. Yates, and I think it has been sometimes brandished as a scarecrow as to why we shouldn't do things. So any clarity as to what the essence of the concept is welcome and I'll welcome any of the parties' view on the same matter as to the clear, crisp, brief statement of the compact as it is known." [See transcript – Volume 44, paragraph 17243]*

2733. Ça c'est après 44 jours d'audience. Ça en dit long.
2734. Furthermore, nowhere in the numerous FERC or other U.S. precedents quoted in Mrs. Wiggins' evidence on such issues as changes in the regulatory structure, general market changes, failed projects, abandoned assets, turn-back or excess capacity or other events that have rendered regulated assets unused and unuseful or underutilized, can we find any reference to a so-called "regulatory compact" shielding the utilities' investors from having to share in the costs of risks associated with such situations.
2735. Under the best of all scenarios, it is our view that the so-called "regulatory compact" is only one of the nine legal and regulatory standards listed in section 4, that's Exhibit B1-8 of the Application.
2736. Et vous retrouvez dans ce passage de la section 4 -- l'exhibit que je viens de vous donner -- une énumération des principes réglementaires applicables et vous verrez là-dedans qu'il y a beaucoup de références -- il y a des références à -- puis il y a des références à des précédents américains, et cetera, et le premier qu'on met c'est: Public interest standard. We couldn't agree more.
2737. Et vous retrouvez là-dedans le "regulatory compact" mais vous retrouvez aussi "used and useful". Il en n'a pas juste un standard réglementaire qui s'applique ici, il y en a neuf. "Regulatory compact" c'est un parmi tant d'autres.
2738. So of all these regulatory standards, we strongly feel that public interest is, and by far, the most important. It is this standard which has been consistently interpreted by the courts and regulatory tribunals as requiring public utilities to charge tolls that are just and reasonable and to strike a proper balance protecting the users against exploitation at the hands of natural monopolies. [*FTC v. Hope Natural Gas Co.*, 320US591, 610]
2739. Ça, ça remonte au fameux précédent de *Hope* que je vous ai donné au Tab1 de mon compendium.
2740. Sur ce point-là en particulier, I would like to go back, Mr. Chairman, to your exchange with Mr. Yates yesterday, at Volume 61, as to paragraph 108 and 109 of his prior argument, and Volume 59 as to the public interest transcending positions of individual parties, the concept of the greatest good for

- the greatest number.
2741. Here we see that TransCanada, in this case -- that not only the ASE but its restructuring proposal is contested not only by the producers or by the Provinces of Alberta, British Columbia, but they're contested at large.
2742. I mean there is widespread opposition to this restructuring proposal as a whole, including by market participants representing the end users. I was talking about the LDCs, APPrO and IGUA.
2743. As far as we're concerned, I think we should remind TransCanada that your jurisdiction is first and foremost governed by the NEB Act, which uses extremely broad language, to describe your jurisdiction, as well as all nine regulatory standards which, in our view and I insist on this, should be interpreted and applied collectively in harmony with one another based upon the prevailing market environment.
2744. So I don't think that the regulatory standards, be it regulatory compact or others, should be interpreted in watertight compartments or should be given precedence over one another with the only exception of the public interest standard which transcends, in our opinion, all of the others.
2745. So among the other regulatory standards that we feel you should take into account there is the "used and useful concept". It's in the list. And nowhere in the precedents or other literature relevant to these issues can we find any suggestion that this standard is less important than the "regulatory compact".
2746. In Answer 40 of his written evidence, B1-19, Mr. Reed also attempts to propose his own order of importance in the regulatory standards by asserting that the principle of sound tolling methodologies can be separated into two categories; tolling principles on one hand and tolling objectives on the other, and then suggesting that principles are more important than objectives.
2747. In the same answer of his written evidence, he asserts that his suggested principles and objectives are consistent with the criteria set forth by Professor James Bonbright, an American, in the initial 1961 edition of his "Principles of Public Utility Rates".
2748. While, after consulting the 1988 Second Edition of the same book, I found that Professor Bonbright proposes a series of 10 attributes of a sound rate

structure and -- but that he does not divide them between "more important" principles and "less important" objectives, and that he further indicates the following as to their relative importance.

2749. Et ça, c'est au Tab numéro 3 de mon compendium. C'est les extraits de *Bonbright 1988* and I quote:

"Of the ten proposed attributes enumerated in this section, the first three relate to the provision of adequate stable and predictable revenues and rates; the next five are based on cost, efficiency and equity considerations, and the remaining two deal with matters of practicality and acceptability. However, the sequence in which the ten attributes are presented is not meant to suggest any order of importance." [See James C. Bonbright, Principles of Public Utility Rates, Second Edition, 1988, pages 382-384]

2750. It is also noteworthy that Mr. Reed's less important tolling objectives of toll simplicity and understandability, ease of administration, effectiveness in meeting the revenue requirement, revenue stability and rate stability, are mostly consumer oriented, whereas his more important principles of cost causation and economic efficiency seem more utility oriented. Is it a coincidence? I don't know.

2751. As far as IGUA is concerned, the U.S. and Canadian regulatory policy framework are both on the same length and they both focus on the need to balance the interest of the utility shareholders and those of the toll payers through inter alia, the setting of just and reasonable tolls within the meaning of Article 62 of the Act.

2752. And here, inasmuch as TransCanada has given a great deal of importance and emphasis to the concept of regulatory compact throughout these proceedings, it presents it as critical, the definition of the concept has been a moving target, literally.

2753. At the outset of the proceedings I couldn't find the specific quote -- et je m'en excuse -- but I understood from certain witnesses of TransCanada that the compact was some form of an agreement between the regulator and the regulated utility only. The users were not in the picture.

2754. Là, par la suite, in their response to Undertaking 45, that's B81, they came up with the concept of reasonable opportunity to recover prudently incurred Mainline costs, including a fair return on and of capital.
2755. Et c'est ce qui est répété dans le "Final Reply" à la page 5, Exhibit B100; même définition que celle qu'on avait retrouvée dans B81.
2756. Voici maintenant, avant-hier, Volume 59, paragraphes 154 et suivants que là on nous propose une nouvelle définition. Là, ça devient un "bargain" entre l'utilité -- the customers -- administered by the Regulator. Tout à fait nouveau.
2757. Moi, ceci m'amène à dire: Écoutez, si on fait preuve de tant d'incohérence et d'inconsistance dans la définition de ce qui est supposé être le principe réglementaire le plus important sous-jacent à ce dossier, il y a un problème en quelque part. Ce qui me ramène à vous dire: Il y a beaucoup de standards réglementaires dans l'horizon et que le "Regulatory Compact" peut être un d'entre eux mais ce n'est pas la panacée.
2758. Et même, si on lit le "transcript" du Volume 59, si on accepte ce concept -- pour les fins de la discussion seulement là -- si on accepte ce concept de "bargain" entre l'utilité publique et les "tolls payers" puis on nous dit, du côté de l'utilité publique: Our end of the bargain is that we've accepted lower returns and lower risk throughout, that's our end of the bargain. Did they live to their end of bargain between 2007 and today?
2759. We've seen from Dr. Booth's evidence that their actual return during those five years have exceeded the allowed return granted under the Board's formula and that the equity thickness and their capital structure was raised to 40 percent for purposes of the negotiated settlement. They didn't suffer. So that was their end of the bargain.
2760. What was our end of the bargain? To pay just and reasonable tolls, that is our end of the bargain. Were tolls really just and reasonable between 2007 and today, including the interim tolls of over \$2 that we're still paying? Are those tolls still just and reasonable? So I'm asking you, if this is a bargain who broke the bargain, the users or the investor? And I think that the answer is easy to come to.
2761. So to conclude on the various definitions of regulatory compact, I was amused because I read thoroughly the ATCO decision, Tab 10, Supreme Court of

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- Canada, and I was amused to find in passing that they also talked about the regulatory compact and at paragraph 63 they refer to it as ensuring that all customers have access to the utility at a fair price, nothing more.
2762. We're pretty far from the definitions proposed by TransCanada, and that's their -- that's a case that they seem to agree with in many respects.
2763. At paragraph 81, same case, talking again about the regulatory compact they say that the users are protected through rate setting process. In both excerpts they're talking about consumer protection. We're pretty far from TransCanada's very narrow definition of the regulatory compact.
2764. So to conclude on this, comme les Anglais disent, je pense que ça devient un "red herring" le "Regulatory Compact". Je pense qu'il faut prendre nos distances puis regarder ça avec un regard un petit peu plus froid là et dire: Avant de sauter au plafond là, il faut se demander si c'est vraiment si important que ça.
2765. Et je pense que votre remarque, monsieur le président: "Is this a scarecrow?", ça commence à ressembler à ça un petit peu. Je m'excuse là mais c'est mon impression personnelle.
2766. To conclude on this, we submit that the written evidence filed by Mrs. Wiggins, as well as her testimony at the hearing, provide compelling precedents and argument supporting the sharing of the burden between a utility and its customers when its assets or a portion of its assets cease to be used and useful as a result of a change in market circumstances for which no one can be blamed.
2767. Nowhere in the evidence of TransCanada, including the reply evidence filed by its experts, Mr. Reed and Mr. Carpenter, can we find any credible precedent discarding the application of the numerous authorities quoted by Mrs. Wiggins on this subject.
2768. Which brings me to ouvrir une parenthèse once again. I'm almost closed with my parenthèse arising from Mr. Yates' final argument.
2769. At paragraph 308 of his oral argument, that would be Volume 59 -- I'm not sure, I think it is -- Mr. Yates refers to the latest judgment issued by the administrative law judge in the *El Paso* case where the judge would have:

"...specifically rejected the position that a revenue shortfall suffered by a pipeline as a result of a FERC policy shift, as a result of a FERC policy shift...should be imposed on the pipeline as 'risk sharing'."

2770. With all due respect, this argument by Mr. Yates ignores the fact that in Answer 25 of her written evidence, at page 18, that's Exhibit C4-9-8, Mrs. Wiggins herself suggests that:

"FERC makes a distinction between assets rendered no longer used and useful due to regulatory changes [or policy shifts on one hand] as compared to assets rendered no longer used and useful due to market changes."

2771. Et c'est seulement dans le deuxième cas qu'il y a un partage entre l'utilité publique et les usagers. Lorsque les actifs deviennent "unused and -- nor useful" en raison d'un changement dans les politiques du FERC ou d'un changement législatif, et cetera, il est bien évident qu'il faut protéger l'actionnaire parce qu'il y a aucun contrôle là-dessus.

2772. Mais là, on parle ici de changements, de "market changes", et dans ces cas-là la jurisprudence de Madame Wiggins est clairement à l'effet qu'il peut y avoir un partage et c'est ce que nous proposons ici.

2773. C'est sûr que les experts, Monsieur Reed et Carpenter, ont émis une opinion à l'effet contraire; j'en suis bien conscient et while we do not dispute the knowledge and experience of Mr. Reed and Mr. Carpenter as expert witnesses and Mr. Reed particularly, he's an expert; he's an excellent expert witness.

2774. We respectfully submit that they are not lawyers, and that Mrs. Wiggins, on her part, is a duly licensed U.S. attorney who has considerable experience before the FERC and is obviously well recognized by her peers of the legal profession as a leading expert in energy, legal, and regulatory matters.

2775. There is no question that her interpretation of U.S. FERC policy and precedents should carry perhaps more credibility than that of TransCanada's experts on these very complex legal issues.

2776. Je n'attaque pas la crédibilité de Messieurs Reed et Carpenter, loin de

moi cette idée. Cependant, lorsqu'on a deux témoins qui viennent formulé des opinions contraires sur des interprétations d'ordre juridique aux États-Unis et que l'un des experts est un avocat, une procureure qui pratique depuis plus de 25 ans, qui est reconnue comme une experte dans le domaine, je pense que ça transporte quelque chose.

2777. Ça m'amène au deuxième concept réglementaire qui a été utilisé, c'est le "Underutilization and Used and Useful."

E.2 Underutilization and Used and Useful

2778. At page 31 of its final reply evidence, B100, TransCanada asserts that the concepts of underutilization and used and useful are clearly different and that APPrO's and IGUA's interpretations of these concepts blur their distinction in an attempt to overturn alleged Board's previous findings that the Mainline shippers bear the risk of underutilization.

2779. At page 32 TransCanada is critical of the fact that no party has identified specific Mainline facilities that are no longer used and useful and that no one has recommended that specific Mainline facilities be removed from service.

2780. With all due respect, TransCanada seems to be in total disconnect with the sad but harsh reality that, according to Mr. Otis' latest calculations, the level of underutilization of both the Prairies and the Northern Line segments have now reached a staggering 62 percent. In the face of such a huge amount of excess capacity, how can they pretend that these segments of the Mainline are still used and useful?

2781. At page 23 of its initial reply evidence, B21-2, TransCanada states that it does not dispute that the Mainline has the capability to transport additional volumes on an average day. In fact, nowhere in TransCanada's written or oral evidence can we find any assertion that the Mainline is not underutilized to a certain extent, to a large extent even.

2782. Furthermore, nowhere in TransCanada's evidence can we find any calculation remotely casting a doubt on the accuracy of the evaluations made by Mr. Otis as to the amount of excess capacity on the Mainline.

2783. Ça c'est très important. On a pris la peine de faire un calcul et nulle

part pouvons-nous retrouver de la preuve de TransCanada contredisant ce calcul.

2784. Despite these compelling figures, TransCanada's initial reply evidence, B21-2, further asserts that capacity above current firm requirements remains beneficial and that, for example, additional pipeline capacity minimizes pressure drops, resulting in lower fuel burn and cost for shippers.
2785. TransCanada also asserts that additional compression offers security of deliveries to meet peak winter demands during periods of extreme cold weather when equipment failures are more likely to occur. Quite frankly, IGUA fails to see how such random use of the capacity in order to meet peak demand in case of equipment failure can meet the used and useful requirement.
2786. The fact that capacity may sporadically be used on such rare occasions does not mean that all this excess capacity is useful. Et là j'insiste là-dessus. In our view, the appropriate test is used and useful, not used or useful. There is an "and" between the words.
2787. During his testimony at the hearing of September 24th, Mr. Newton provided additional explanations as to how the current level of underutilization on the Mainline is such that the facilities can no longer be considered as used and useful.
2788. And I refer you here to paragraphs 24971 to 977 -- 24977 inclusive. You can read them, as well as I can. And I would be grateful to the reporter to reproduce them in the transcript.

"24971. MR. NEWTON: So, Mr. Yates, the way I'm going to try to begin to answer this question -- and I'm going to ask others on the Panel to chime in -- the magnitude -- the amount of facilities that, in our view, are underutilized and are no longer used and useful is very significant.

24972. We're not talking about, you know, a pipeline loop or a couple of compressor stations. We're talking about essentially one-third of the rate base, one-third of the capacity.

24973. And the argument that some of those facilities that are sitting idle for almost all of the year may be used for a few hours or a few days or even a week under some sort of emergency situation and, therefore, have a remaining use and fit the used and usefulness term is something that, you know,

we've talked about that a lot internally. It's a very expensive insurance policy if it's only being used sporadically.

24974. And Mr. Otis has undertaken studies to try to determine how much capacity would be required on the Mainline in order to deliver volumes that are included in TransCanada's Application and so all of our analysis flows off of TransCanada's own flow forecast.

24975. And my understanding of that is we've included all of the firm service requirements that TransCanada has forecasted and, in addition to that, we've included all of the discretionary services, all of the interruptible services, all of the short-term firm services. And that's what's gone into Mr. Otis' calculations.

24976. And so our conclusion was that those facilities that are underutilized throughout most of the year are just not providing a use for the system.

24977. The cost associated with those underutilized facilities outweigh by far any possible benefit that existing shippers would be receiving from it. So it's a question of magnitude and a question of where we are in today's circumstances." [See transcript – Volume 51, paragraphs 24971 to 24977]

2789. To the best of our knowledge, there are very few precedents in Canada, if any, raising the application of the used and useful principle. Et là-dessus -- Mr. Yates raised this apparent absence of specific Canadian precedent on used and useful as a complete bar to the application of this principle in Canada.

2790. One easy answer to this, I believe that there are very few instances, if any, of underutilization or similar situations raising the application of this concept in our Canadian regulatory history.

2791. C'est pour ça d'ailleurs qu'on a retenu les services de Madame Wiggins. C'est parce qu'on voulait avoir des précédents réglementaires, y en avait -- y en a pas au Canada.

2792. But it doesn't mean that the concept does not exist as a proper and applicable regulatory standard. It's specifically listed in the enumeration of the nine regulatory standards in TransCanada's own evidence, and is explained very well in Mrs. Wiggins' main evidence, used and useful must not be confused with the prudency standard, which is not an issue in this case.

2793. In her Answer 7 she states that prudence is a backward looking concept whereas the concept and possible solutions that we focus on are forward looking to resolve cost recovery and rate issues, while at the same time refraining from assigning blame.
2794. We, therefore, take strong exception with TransCanada's assertion that once the investment in a given asset has approved its prudence recovery should be allowed at 100 percent regardless of whether it becomes -- later becomes not used nor useful.
2795. Alors, comme je vous ai dit, la preuve très élaborée de Madame Wiggins procure une foule de précédents soulevant l'application du principe "used and useful" et qui a résulté dans un partage du fardeau des coûts entre les actionnaires et les usagers sans que, par ailleurs, ceci soit bloqué par un prétendu "regulatory compact" qui est véhiculé dans le présent dossier.
2796. J'achève.
2797. Furthermore, in IGUA's response to Undertaking 54 [C4-28-2], which has been prepared by Mrs. Wiggins, IGUA provided specific examples of decisions by U.S. regulators which partially or fully disallowed investment from being recovered in tolls by applying the used and useful standard without identifying specific assets.
2798. At page 32 of its final reply evidence, TransCanada brushes those precedents aside as irrelevant for the reasons previously discussed in the written reply evidence of Mr. John Reed. Here again, we have contradictory opinions between Mr. Reed and Madame Wiggins, and we'll leave it to your good judgment to determine what should have more weight under the circumstances.
2799. TransCanada's evidence also contains several references to the Board's RH-1-2001 decision, in which the Board would have reaffirmed that shippers, not TransCanada, bear the cost of underutilization. *[For example, see page 13 of TransCanada's Response to Undertaking U46, filed as Exhibit B82]*
2800. On this point in particular, IGUA refers to the following comment contained in Mr. Otis' additional evidence of September 21st, 2012, C4-27-4, in which he very properly puts in perspective the level of underutilized capacity forecasted for 2013 with the Mainline situation prevailing at the time RH-1-2001

was rendered:

*“In 2001, the shippers whose requirements amounted to 84% of the Mainline capacity were being asked to bear the annual owning and operating costs of the 16% of the Mainline capacity that was underutilized. This is part of the RH-4-2001 decision referred to by TransCanada.
At page 13 of this same decision, it is also noted that TransCanada had stated being reasonably comfortable operating within an 82% to 92% utilization range.
In 2013, the shippers whose requirements correspond to only 38% of the Mainline capacity are being asked to bear the annual owning and operating costs of the 62% of the Mainline capacity that is forecasted to be underutilized.
Finally, at page 26 of its RH-4-2001 decision, the Board expressed the view that ‘Specifically, the Mainline’s ability to recover its full cost of service would be put in jeopardy if its throughput declined to a point where the resulting toll exceeds what the market can bear’.” [See Exhibit C4-27-4, page 2]*

2801. Et je reproduis dans mes notes le passage de la preuve écrite de Monsieur Otis faisant référence à ça pour vous dire que la situation qu'on a devant nous aujourd'hui a rien à voir alors qu'à l'époque le niveau d'utilisation du Mainline était de 82 pour cent, là on est rendu à 38 pour cent seulement. On est à des années lumières.
2802. Alors évidemment, moi, j'ai toujours été d'opinion que les décisions que l'Office va rendre vont toujours tenir compte du contexte du marché dans lequel on se retrouve et la présente situation en est un exemple éloquent.
2803. J'ajouterais à ceci que, lorsque les investisseurs de TransCanada ont fait leur investissement ont accepté de prendre le risque de mettre des milliards de dollars -- comme Monsieur Yates l'a expliqué -- dans le sol pour tous ces équipements-là, la décision RH1-2001 avait pas été rendue encore, les investissements y ont été fait avant 2001.
2804. Alors, ils peuvent pas venir nous dire aujourd'hui que quand là y ont fait ces investissements-là, ils avaient à l'esprit une décision future à être rendue par l'Office dans un contexte bien particulier qui a rien à voir avec le contexte qui prévalait lorsqu'ils ont pris leur décision in the first place.

2805. Ce qui m'amène au dernier sujet dans les "Regulatory Standards".
TCPL has been compensated in the past for the risk of underutilization.

E.3 TCPL has been compensated in the past for the risk of underutilization

2806. Another legal and regulatory issue to be considered by the Board for purpose of its decision in this case is whether it can be said that TransCanada has been compensated in the past, in whole or in part, for the risks associated with the underutilization of the Mainline.

2807. We fully realize that TransCanada brushes this argument aside as totally unfounded on the basis of its narrow interpretation of the "regulatory compact", whereby the so-called very low returns on equity it would have been awarded over the past several years would constitute the trade-off for not having to bear any risk whatsoever as to the underutilization of the system.

2808. Et là, je vais vous faire grâce du prochain paragraphe de mes notes, j'en ai déjà parlé. On a vu jusqu'à quel point TransCanada a été bien compensé au cours des dernières années par rapport à la situation que vivaient à la même époque ceux qui payent les droits.

2809. Under these circumstances of excess returns, there's -- it cannot be said that there was such a thing as "low returns on equity" that could have constituted TransCanada's contribution for not having to bear any risk whatsoever as to the underutilization of its system.

2810. We strongly feel that TransCanada's position on these issues is blatantly unfair to the Mainline's users and it runs contrary to the most elementary principles of public interest and consumer protection underlying the very foundation of the regulation of public utilities.

2811. As Mr. Newton correctly pointed out during his testimony at the hearing, it would be virtually impossible to find any reasoned decision on cost of capital, be it at the NEB level or at the provincial level, or even in the United States for that matter, where such issues as business risk, supply risk, demand risk are not formally discussed for purposes of quantifying the utility's risk premium.

2812. By way of example, in its decision RH-1-2008 rendered in March

- 2009 on TQM's cost of capital, we find that the Board devotes no less than 22 pages (from page 30 to 52) to the subject of business risk, including supply risk, market risk and competitive risk. And that at page 79, the Board took the time of preparing a special figure, illustrating the various factors, including business risk, and their influence on its decision on TQM's total return for 2007-2008.
2813. As Mr. Newton correctly pointed out, *[See Transcript Vol. 52, par. 26101 to 26117]* what is the point of discussing all those business risks for purposes of establishing the utility's cost of capital if, at the end of the day, all those risks are exclusively borne 100 percent by the shippers ?
2814. On this point in particular, I also refer the Board to the evidence of Dr. Booth's that I mentioned earlier, showing that over the last several years, TransCanada has literally over earned, over and above its allowed return.
2815. Which leads me to second last point.
- F. IGUA'S POSITION ON CERTAIN OTHER ISSUES RAISED BY
THE RESTRUCTURING PROPOSAL**
2816. In his Answers 39 to 43 (inclusive) of his Amended Written Evidence, *[See C4-10-2]* Mr. Newton made a number of comments about certain aspects of TransCanada's restructuring proposal, such as the Alberta System Extension (ASE), the new surcharge applicable to the new TQM Eastern Delivery Area (TQMTBO), depreciation and cost of capital.
2817. Later, in IGUA's responses to TCPL's IR 1.6, *[See C4-12-5]* Mr. Newton made clear that IGUA's primary focus in this hearing is to address the tolls crisis that has been made worse by TransCanada's failure to address the core issue associated with the underutilized capacity that significantly contribute to uncompetitive Mainline tolls.
2818. Mr. Newton further specified at the time that IGUA might not take position on each of the individual components of TransCanada's RP, but that IGUA intended to actively participate in the oral hearing and that, after its members would have had the opportunity to consider the totality of all of the evidence, IGUA might or might not elect to take a position on a specific issue or proposal.
2819. That being said, during his testimony at the hearing of September 24-

25, Mr. Newton was specifically requested to indicate IGUA's position on a number of these issues. His responses were essentially the following:

2820. On TQM/TBO, I will essentially refer you to the paragraphs 24623 to paragraphs 24626 inclusive. We are against this proposal and he explains why.

“24623. There are really two key reasons: We were troubled with this proposal when we first heard about it. I wouldn't say that we had 100 percent made our mind up when we filed the evidence but it's pretty clear when you read, you know, the Q and A that we had issues with what TransCanada was proposing.

24624. I sat in the hearing room and I certainly read the transcript of Gaz Métro's cross-examination of the TransCanada witnesses with respect to today's operational integration of the TQM system and TransCanada Mainline systems and I'm convinced -- I'm not an expert, I'm not a pipeline engineer -- but I'm convinced that the TQM system and the Mainline remain integrated with one another. I don't really see a lot of changed circumstance since the TQM system was built. So that was one part of the decision-making process we went through.

24625. The other, quite frankly, was the rate impact -- the toll impact. I mean it's a huge rate shock. We're not talking two or three pennies per gigajoule, we're talking about 33 cents per gigajoule and, in our view, the Quebec market can't absorb that and I'm sure your client isn't happy with it either.

24626. So we didn't think it was fair, we didn't think it was appropriate, we didn't think it was necessary and we're not comfortable with it and we're opposed to it.” [See transcript of September 24, 2012 – Volume 51, paragraphs 24623 to 24626. See also Volume 51, paragraphs 26296-26297]

2821. On depreciation and cost deferrals, I refer you to paragraphs 26299 to 26301, in which he expresses grave concerns with the idea of deferring costs -- millions of dollars of costs into the future to future generations of users.

“26299. The other two areas in TransCanada's Application that are a concern are the cost deferrals. And we -- we do appreciate the fact that what TransCanada's trying to

accomplish there is to reduce the immediate short-term damage, get the toll down, in order to make their tolls more competitive.

26300. So from a policy perspective, from a directional perspective, I think that's an admirable thing to try to do and I think deferring costs is a tool that you would look at to do that.

26301. The problem that our Association has with that -- our Association has always been concerned about inter-generational inequities of pushing costs into the future to future ratepayers. We've never liked that concept. That's not something new." [See transcript of September 25, 2102 – Volume 52, paragraphs 26299 to 26300]

2822. On the Alberta System Extension, I refer you to paragraphs 26303 to 26306 inclusive, which I will be grateful for all them, to the reporter, to reproduce in the transcript, in which he says that he likes the result of the Alberta System Extension and that it does produce toll savings, but he's not -- he has concerns about how we get there in terms of methodology and conformity with regulatory standards.

"26303. The fourth and last item that I just want to address very briefly is the Alberta System Expansion or Extension proposal.

26304. And do we like the tolling impact of that? Absolutely. We think it's -- you know, it has a huge toll impact. So we like the result but we're uncomfortable with the way it was achieved.

26305. And again, I don't want to go over old ground but we -- we're not comfortable with costs being shifted to other pipeline systems. We think that could be a bad precedent. And it troubles us when we see end users, consumers -- they may not be part of the IGUA Association -- but consumers in Alberta being asked to pay for systems they've never used.

26306. We like the fact that it requires a producer contribution, quite frankly, and we like the toll impact. And, at the end of the day, we are not going to take a position on that issue one way or the other." [See transcript of September 25, 2102 – Volume 52, paragraphs 26303 to 26306]

2823. Another issue on which IGUA has taken a position is TransCanada's

proposed cost of capital. Indeed, at Answer 50 of his amended written evidence, Mr. Newton mentioned TransCanada's request for a much higher cost of capital as one example of some aspects of its proposal that may amplify the crisis.

2824. There is no question that IGUA considers that the rate of return on equity included in TransCanada's ATWACC proposal in this case is excessive in the context of the current tolls crisis. Accordingly, IGUA strongly supports the views expressed in the evidence filed by Dr. Booth on behalf of CAPP as to the reasonable rate of return on equity that should be awarded to TransCanada in the context of this application.

2825. And you'll remember that I cross-examined, extensively, Dr. Vilbert and Kolbe on ATWACC and I will leave it to Mr. Manning to argue these issues on behalf of CAPP because they have more -- much more extensive position on ATWACC and return generally than we have.

2826. Finally, another issue on which IGUA expressed its view is TransCanada's proposal for a multi-year fixed price. On this point, IGUA refers to Answer 47 of Mr. Newton's amended written evidence, C4-10-2, which speaks for itself.

2827. Which brings me to my conclusion at last.

G. CONCLUSION

2828. As indicated in the introduction of my final argument, TransCanada's restructuring proposal was filed against a background of five years of extremely high and volatile tolls, which have caused and continue to cause end-users, such as IGUA's members, a huge prejudice, not only in financial terms (high tolls levels), but also as to their ability to properly manage the energy supplies needed for the operation of their industries.

2829. This crisis situation simply cannot be allowed to continue. It considerably affects our industries' ability to be competitive in their markets and could ultimately jeopardize not only future major investment decisions in Canada, but also the maintenance of the industries that already operate in our country.

2830. This untenable situation is not only prejudicial to the end-users, but it is also highly unfair. Indeed, throughout the period of the crisis that we've lived ever since 2007, TransCanada's management and its shareholders have not been

affected.

2831. The evidence clearly shows that for the last five years the returns realized by TransCanada's shareholders have exceeded its allowed return on the basis of a very generous 40 percent equity component in its capital structure. TransCanada's current status quo tolls are not "*just and reasonable*" by any stretch of the imagination.
2832. TransCanada itself implicitly recognized this fact in that, as of December 9, 2010, it filed an Application purporting to make fundamental changes in its cost allocation and rate design methodologies in order to bring material reductions to its rates in comparison to the Status Quo. That did not work, with the result that, in September 2011, TransCanada filed its RP in this case, proposing yet again, fundamental changes of the same nature.
2833. Ever since this Application has been handled and heard by the Board from September, 2011 to this day, the situation has gone from bad to worse.
2834. The situation that we are now facing today is easy to summarize. The Final Tolls now proposed for 2013 are even higher than the 2010 Status Quo tolls that prevailed when TransCanada filed in 2010 and the evidence in the record shows that the various problems at the origin of the Mainline's declining throughput and ever-increasing tolls, far from being resolved, will continue to deteriorate.
2835. There is no question in our mind that the Restructuring Proposal will simply not work, and that the Board urgently needs to consider options over and above what has been put on the table by TransCanada.
2836. At this juncture, the market simply has no confidence in TransCanada's willingness to address the fundamental problem that the Mainline's throughput does not support its cost structure. This is, therefore, an extraordinary situation that requires urgent and viable solutions.
2837. In IGUA'S views, there is no magical solution. It is not by shuffling the chairs on the deck of the Titanic that its crew could have prevented the ship from sinking. IGUA, for its part, sees only one avenue: eliminate from the rate-base the value of the excess capacity on the Mainline in order to bring the tolls down to a level compatible with the realities of the markets in Eastern Canada.

2838. We cannot insist enough on the fact that, according to our latest calculations, we are talking about a half a billion dollars of excess costs in TransCanada's revenue requirement, year after year. This is simply not sustainable.
2839. IGUA's proposal, for the long term, the interim, as well as for the future to resolve this tolls crisis are fair and equitable to all concerned parties and they rest upon sound regulatory principles. They focus on the fundamental underutilization problem at the source of the crisis. They provide an equitable sharing of the current cost burden and future risks between the tolls payers and the utility's shareholders.
2840. This is important. We share 50 percent in the solution. We pay for the solution. Securitization has been used in similar situations and we -- and can be accomplished within the regulatory framework in Canada and TCPL has openly declared that it has all the required resources to put forward a securitization plan if required by the Board to do so.
2841. IGUA's interim proposal not only generates additional tolls savings for 2012 and '13 but it also provides a bridge allowing sufficient time for the development of a securitization plan.
2842. Even though TransCanada does not dispute that the kind of solutions proposed by IGUA may eventually have to be contemplated, it continues to insist that its RP will do the job and that, accordingly, it would be premature for the Board to consider adding other measures over and above what will be decided on TransCanada's Application.
2843. But what if TransCanada is wrong? What if its Restructuring Proposal doesn't do the job? Can we really afford to take that chance?
2844. So our main message to the Board is the following: Should you entertain any doubt as to the Restructuring Proposal's prospects for success, as we believe you should, it is now urgent for you to act and issue a formal and mandatory order directed at TransCanada enjoining the company to come back with a securitization proposal in time for implementation in 2014, as I've explained in detail further on.
2845. We respectfully submit that, in case of doubt, failure to act now would be a whole lot worse. Indeed, there is a real risk that a significant proportion of

- throughput losses resulting from out of control and volatile tolls could become permanent with fewer shippers to share the cost and more to lose for the producers and TransCanada's shareholders.
2846. Ultimately, we could reach a point where even securitization could be too late to save the Mainline. In closing, we will all remember that TransCanada's witnesses have put a lot of emphasis on how additional measures such as those proposed by IGUA could be perceived negatively in the investment community.
2847. Our answer to this is that there is no evidence that those people have been overly worried over the last five years.
2848. But what about the users? What about those people who have paid and continue to pay those very high and volatile tolls without having anything to say in the matter? What about them?
2849. Which brings me to the most basic rules of the game, including the regulatory compact, that we are supposed to be subjected to: There is no question in our mind that these rules are not meant for the sole protection of the investors, and that regulators, such as the National Energy Board, have a very important role to play to balance the interests of the investors and those of the tolls payers.
2850. This delicate balance is now broken and it has been broken for more than five years. It is now time to fix it.
2851. It may be true that, over the past several years, it has been widely accepted that the NEB's regulation of TransCanada's operations, including the determination of its tolls, could be successfully achieved through litigation at the initiative of the pipeline or of a stakeholder, or through negotiated settlements.
2852. And we agree that this has worked very well under "*normal*" circumstances but the tolls crisis that we are now facing with TransCanada is not normal. In fact, it is unprecedented.
2853. Accordingly, IGUA respectfully submits that this is an extraordinary situation requiring the Board to make an urgent and proactive intervention, over and above the scope of TransCanada's Restructuring Proposal in order to bring a viable solution to this grave crisis. This is not TransCanada's decision. This is yours to make and yours alone.

2854. The whole respectfully submitted. And I apologize for being longer than I anticipated but there were things that I wanted to add from Mr. Yates' argument. And I am obviously available to answer your questions.
2855. **THE CHAIRMAN:** No apologies were necessary, Maître Saurault. We do expect you to deal on your feet with argument you heard the day before ---
2856. **MR. SAURAUULT:** Thank you very much.
2857. **THE CHAIRMAN:** --- and you did that so this is expected and appreciated.
2858. The Board will have questions after we return after a 10-minute break.
2859. Alors, nous serons de retour à 2h35 pour des questions pour Maître Sarault.
2860. **MR. SARAUULT:** Thank you.
- Upon recessing at 12:24 p.m./L'audience est suspendue à 12h24
--- Upon resuming at 12:33 p.m./L'audience est reprise à 12h33
2861. **THE CHAIRMAN:** Maître Saurault, I'd like to repeat what I said yesterday or the day before. You should feel totally comfortable consulting with your client as you prepare answers to the Board's questions. So ---
2862. **Me SAURAUULT:** Très bien.
2863. **THE CHAIRMAN:** --- we've done that with TransCanada ---
2864. **Me SAURAUULT:** Il est ici derrière moi.
2865. **THE CHAIRMAN:** --- and every other party is welcome to also give to the Board the best answers they can, given the time we have and given the resources you have at your disposal.
2866. Les premières questions seront de la part de Madame Mercier, s'il vous plaît.

**Final argument of IGUA
Questions by Member Mercier**

2867. **Me SARAULT:** Je vous écoute.

--- QUESTIONS BY/QUESTIONS PAR MEMBRE MERCIER:

2868. **MEMBRE MERCIER:** I will do like Mr. Cabana was doing when he was testifying. I was showing my ears.

2869. Alors, bonjour, Maître Sarault. Je n'ai qu'une question pour vous.

2870. **Me SARAULT:** Oui.

2871. **MEMBRE MERCIER:** Et puis, la question c'est à propos du groupe de travail ---

2872. **Me SARAULT:** Oui.

2873. **MEMBRE MERCIER:** --- que vous voudriez voir institué dans le cas où est-ce que l'Office, dans sa décision, demanderait que TransCanada regarde la "sécuritisation".

2874. Vous avez soumis, sous l'onglet 2, la dernière décision de la Régie.

2875. **Me SARAULT:** Oui.

2876. **MEMBRE MERCIER:** Ça s'adonne que je l'avais lue, par intérêt.

2877. **Me SARAULT:** Oui.

2878. **MEMBRE MERCIER:** Donc -- mais, en fait, ça fait un petit bout de temps.

2879. Ce que j'ai de la difficulté à voir c'est de quelle façon un groupe de travail serait utile -- je comprends très bien la décision de la Régie pourquoi parce que ils ont rejeté l'entente incitative ---

2880. **Me SARAULT:** M'hm.

2881. **MEMBRE MERCIER:** --- pour laquelle il y a plusieurs volets qui touchent différents aspects du distributeur qui devaient être regardés.

**Final argument of IGUA
Questions by Member Mercier**

2882. Quand je regarde une demande d'envoyer TransCanada travailler sur la "sécuritisation" -- en français, c'est quoi donc?
2883. **Me SARAULT:** Je le sais pas c'est quoi en français, c'est un mot à coucher dehors là!
- (Laughter/Rires)
2884. **MEMBRE MERCIER:** En tout cas, on va dire ---
2885. **Me SARAULT:** On va l'appeler "securitization".
2886. **MEMBRE MERCIER:** "Securitization", c'est un dossier dans mon -- dans ma petite tête qui est assez technique et j'ai beaucoup de difficulté à voir quel serait le rôle d'un groupe de travail.
2887. Est-ce que vous pouvez m'éclairer là-dessus?
2888. **Me SARAULT:** Bien, c'est -- on s'est inspirés un peu de ce qui avait été fait en Alberta puis y avait un observateur du Alberta Board et ça semblé bien fonctionner.
2889. J'imagine -- bien, Monsieur Johannson nous a dit qu'ils avaient les ressources nécessaires à TransCanada pour en préparer une et j'ai pris bonnes notes de ça, comme vous avez pu le voir.
2890. Mais je pense que d'avoir la participation, le point de vue, de d'autres parties comme les intervenants directement concernés par le résultat de cette démarche-là, ça pourrait être souhaitable. Ça pourrait peut-être produire une proposition qui fait davantage l'unanimité lorsque viendra le temps de la présenter à l'Office pour approbation en audience.
2891. Tandis que s'ils le font tout seuls de leur côté, sans avoir la participation ni le "input", le point de vue des intervenants qui sont directement touchés par ça, bien, on risque de se retrouver dans une audience où la proposition de TransCanada serait tout aussi controversée et faire l'objet de contestations comme nous avons vécues dans le présent dossier.
2892. Alors, moi, l'idée d'un groupe de travail c'est d'accroître les chances

**Final argument of IGUA
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- de succès de la proposition lorsque viendra le temps de l'analyser en audience pour que TransCanada puisse dire et que l'Office puisse se satisfaire par son observateur neutre et indépendant puis les rapports que je propose que TransCanada devrait soumettre les rapports intérimaires en cours de route pour avoir au moins une certaine satisfaction morale lorsque la proposition va être déposée à l'Office pour analyse en audience qu'il y a déjà un certain consensus autour de ça. C'est le souhait que j'entretiendrais.
2893. Mais c'est sûr que, si l'Office entretient des réserves quant à la notion de groupe de travail, moi là, TransCanada c'est pas une petite compagnie là. Ils nous ont dit qu'ils avaient les ressources nécessaires pour préparer ce genre de proposition-là.
2894. C'est sûr que -- ils seraient capables de revenir avec quelque chose mais ce quelque chose-là va-t-il être acceptable? Va-t-il requérir encore des mois d'audience pour qu'on l'accepte?
2895. Parce qu'on essaie de -- moi, je pense que l'idée c'est qu'on -- nous, on pense que c'est urgent et on pense au moins de tenter de le développer en vue de 2014 sachant que c'est complexe, sachant que c'est d'une grande envergure. Je me dis, bien, si on attend un autre deux ans avant de procéder, on va-tu se retrouver en 2016 avec ça? Puis, en 2016, va-t-il être trop tard?
2896. C'est pour ça que j'essaie -- on a essayé d'imaginer un processus qui permet d'accélérer, d'aller tout aussi rapidement que possible et d'atteindre un consensus tout aussi rapidement que possible.
2897. **MEMBRE MERCIER:** Donc, ce qui vous concerne -- ce qui vous inquiète le plus c'est -- c'est le calendrier de réalisation?
2898. **Me SARAULT:** Bien, nous, on pense -- on est d'opinion, à tort ou à raison, que on n'est pas loin du mur de béton.
2899. On regarde là ce qu'il se passe dans le marché, je regarde ce qui s'est passé avec les révisions de "throughput" qui ont été déposées au mois de juin, on va en avoir d'autres en juin 2013, j'ai aucune raison de croire que ça va être beaucoup mieux. Moi, j'ai toutes les raisons de croire que ça va être encore pire.
2900. Alors, dans les circonstances, je pense que -- puis les chiffres -- les chiffres que je vous ai donnés des tarifs qui nous sont proposés pour 2013, je

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trouve ça un peu accablant et inquiétant.

2901. Alors, écoutez, ils proposent des taux, des tarifs qui sont plus élevés que qu'est-ce qu'eux-mêmes considéraient trop élevés en 2010. Ça ne peut pas marcher.
2902. Puis on le voit déjà dans le marché, on voit Gaz Métro est en train de tout remplacer ça par du "short haul" à Dawn puis on voit tous les projets -- on voit ce qu'il se passe au niveau de leurs problèmes sous-jacents à tout ça puis l'optimisme n'est pas au rendez-vous. Je regrette, j'ai beau analysé le dossier de tout bord, tout côté et j'ai pas de raison d'être optimisme.
2903. Alors, oui, nous sommes préoccupés par le temps. Nous croyons que c'est urgent puis on pense qu'on peut plus se payer le luxe d'attendre d'autres années.
2904. Ça vous engage à rien; hein? Qu'ils déposent une proposition pour le "securitization", tout à coup ça va mieux, bien, tout ce que vous avez à dire lorsqu'ils vont le présenter c'est de dire : On n'a peut-être pas besoin tout de suite. Ça, vous pouvez le faire.
2905. Mais s'ils en ont véritablement besoin puis qu'on retarde ça d'un autre deux ans, bien là, ça peut avoir des conséquences que je considère graves.
2906. **MEMBRE MERCIER:** Donc, je comprends que c'est le calendrier.
2907. **Me SARAULT:** Oui.
2908. **MEMBRE MERCIER:** Pour ce qui est de l'aspect technique et financier, on est d'accord que c'est -- c'est dans les mains de TransCanada?
2909. **Me SARAULT:** Oui.
2910. **MEMBRE MERCIER:** Oui.
2911. **Me SARAULT:** C'est leur responsabilité.
2912. **MEMBRE MERCIER:** Responsabilité.
2913. **Me SARAULT:** Première.

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2914. **MEMBRE MERCIER:** C'est bon.
2915. **Me SARAULT:** C'est l'ordonnance est adressée à eux ---
2916. **MEMBRE MERCIER:** À eux.
2917. **Me SARAULT:** --- et à eux seuls puis on souhaite qu'il y ait un groupe de travail qui soit créé pour accroître les chances de succès puis l'échange de l'information avant le dépôt pour accroître ces -- le consensus.
2918. Mais là, l'ultime responsabilité ça doit être celle de TransCanada, je pense.
2919. **MEMBRE MERCIER:** O.k.
2920. **Me SARAULT:** C'est eux qui sont sous votre juridiction d'ailleurs.
2921. **MEMBRE MERCIER:** Oui.
2922. Bien, c'est beau. C'est tout ce que j'avais comme questions.
2923. **Me SARAULT:** Merci.
2924. **MEMBRE MERCIER:** Le reste était très clair. Merci.
2925. **Me SARAULT:** Merci.
2926. **LE PRÉSIDENT:** Merci, Madame Mercier.
2927. Avant que je passe le micro à Maître Habib -- à Madame Habib, pardon -- vous êtes pas encore avocate, là, Maître Habib -- j'aimerais poser une question supplémentaire reliée à votre échange avec Madame Mercier.
2928. Quand vous avez parlé du groupe de travail, vous avez parlé de la participation de l'Office à titre d'observateur neutre et détaché.
2929. **Me SARAULT:** Oui.
2930. **LE PRÉSIDENT:** Dans quelle mesure est-ce que c'est un élément

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- fondamental de votre concept “groupe de travail”?
2931. Supposant, par exemple, que l’Office est un peu soucieux de participer même à titre d’observateur seulement à des discussions qui sont vraiment en cours de formation vers une position qui sera présentée à l’Office pour fins de la juger?
2932. **Me SARAULT:** Bien, encore une fois, c’est parce que -- pour que vous sachiez que -- ce qu’il se passe, que vous soyez pas gardés dans l’obscurité quant à l’élaboration d’une proposition qui est d’une très grande importance pour résoudre les graves problèmes de TransCanada.
2933. **LE PRÉSIDENT:** Je comprends bien le pourquoi mais je vous demande dans quelle mesure est-ce que c’est fondamental au concept de “groupe de travail” si l’Office était inquiet par rapport aux questions des ---
2934. **Me SARAULT:** Si vous êtes inquiets peut-être que ---
2935. **LE PRÉSIDENT:** --- d’indépendance et puis de pas avoir une présence ---
2936. **Me SARAULT:** Oui, je comprends.
2937. **LE PRÉSIDENT:** --- induit ou ...
2938. **Me SARAULT:** Bien ---
2939. **LE PRÉSIDENT:** Si on était soucieux des questions de -- d’équité procédurale, est-ce que c’est fondamental pour vous qu’il y ait des employés de l’Office qui participent comme observateurs neutres et détachés?
2940. **Me SARAULT:** Je pense que non.
2941. Si j’avais à choisir entre ‘oui’ et ‘non’, ça va être ‘non’.
2942. Vous pourriez vous contenter, par exemple, de requérir des rapports périodiques quant à la progression là du travail, ça puis en prendre connaissance au moins pour vous satisfaire qu’il y a quelque chose qui se fait.
2943. **LE PRÉSIDENT:** D’accord.

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2944. Merci. Ça répond à ma question. C'était relié aux questions de Madame Mercier et puis j'en ai d'autres mais ça en est déjà une pour moi ---

2945. **Me SARAULT:** Oui.

2946. **LE PRÉSIDENT:** --- qui est déjà résolue.

2947. Madame Habib, s'il vous plaît?

--- QUESTIONS BY/QUESTIONS PAR MEMBER HABIB:

2948. **MEMBER HABIB:** Thank you, Mr. Chairman.

2949. Maître Sarault, one of the things that you have said the Board should do with the -- in its reasons for decision is to give an order to TransCanada with respect to the -- the securitization.

2950. And one of the things that you said from the seven items that you had listed, the first one was the quantification of the plan that is not used.

2951. **MR. SARAULT:** M'hm.

2952. **MEMBER HABIB:** And I understand that this is not a very easy thing to do because that depends on the -- on whose definition of what is used and useful.

2953. So when you ask the Board to prepare an order of that nature, is it your recommendation or is it -- are you advising us that we tell TransCanada on what basis that is to be determined?

2954. For example, TransCanada had told us, as a criticism of what the intervenor submission had been, is that there was no identification of any specific facilities that are ---

2955. **MR. SARAULT:** That would be impossible, in my opinion.

2956. I think it would be virtually impossible to pinpoint specific assets.

2957. **MEMBER HABIB:** Yes.

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2958. **MR. SARAULT:** I mean, it's not the purpose of the exercise.
2959. I mean, if they want a methodology, they can read Mr. Otis' evidence. It's very clear. I mean, its methodology is well-described in the document and, as far as I can tell, I haven't seen any contradictory evidence on the part of TransCanada casting a doubt on the accuracy of Mr. Otis' calculation.
2960. And I will go even further: Mr. Otis' has been deliberately conservative in the methodology that he's followed. He's accepted TransCanada throughput projections and he's included discretionary services for purposes of quantifying the level of underutilisation.
2961. This is important, though, for purposes of the securitization plan because this is what will give to TransCanada and the financial community an indication of the magnitude of the dollar amounts we're taking about.
2962. I mean, for purposes of the government guarantee, for purposes of the financial institutions that will be involved in the securitization plan, I think that the discussion will not be the same if we're talking about -- just for purposes of discussion -- 1.5 billion on one hand or \$3 billion on the other, and the starting point of the dollar amount of the securitization transaction is the calculation -- the quantification of the financial value of the portion of the -- the proportion of the rate base and therefore the proportion of capital that's deemed to be not used nor useful.
2963. So this is an important calculation. It's subject to debate. Ideally, I think TransCanada itself is probably in the best of all positions to provide an estimate of the degree of underutilization of its own system.
2964. I mean, they have the information. But as to the idea of identifying pipes or compressors or other equipment, I think that the -- we've refrained from doing that because at the end of the day -- and they've done that in their reply evidence. It's always easy for them to say, "Well, I mean, this compressor in particular, I mean, can be used twice a year in case of equipment failure" or that kind of thing.
2965. And this is not the approach that we've taken at all. I mean, in our view it's a question of proportion of -- as I tell you, this is huge. I mean, we followed the news and we were very concerned about the millions of dollars that

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are lost as a result of the lockout in the National Hockey League. It's not half a billion dollars a year. And this is what we're talking about now.

2966. **MEMBER HABIB:** I didn't mean for the intervenors to list what these specific facilities are. I appreciate it would be difficult for intervenors to do so. I'm trying to imagine the order that you want us to send to TransCanada.
2967. And under Item 1 of the Order, the quantification of the plan that is not used, so the Board would give further directions, along with that first item, I'm asking you if the Board would give further direction to say that would be dependent on the percent underutilization of the total system?
2968. Are you imagining or are you thinking that the Board would give directions as to how that quantification of the plan that is not used on what criteria -- and I'm not saying specific facilities. Are you saying that you, TransCanada, have to look at your percent underutilization at that point in time and you should be providing for a capital reduction that will be commensurate with that underutilized proportion. Is this what you have in mind?
2969. **MR. SARAULT:** It's either one of two things; either the Board would see fit to provide an indication of the kind of methodology and criteria that should be used in order to quantify the level of underutilization. And perhaps Mr. Otis' expert report provides a good starting point as to how this can be achieved. And I don't know if he's looking for a job to assist you in that regard.
- (Laughter/Rires)
2970. **MR. SARAULT:** I'm just joking. But another possibility could be to say to TransCanada, "We ask you TransCanada, as part of the process, to dig out your computers, pens and pencils and quantify this for purposes of your proposal and to provide in your proposal the rationale for quantifying the financial value of the proportion of rate base which is deemed to be no longer used and useful."
2971. It is not contested at TransCanada that there is a level of underutilization, and if you ask them to -- rather than to identify specific assets, which is, I believe, not necessary for purposes of a securitization plan, you could ask them to provide it in percentage and in dollar value; that you do not need to receive a list, an inventory of specific assets, because we're not asking nor proposing that they be physically removed from the rate base, at all. That's the very essence of our proposal.

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2972. **MEMBER HABIB:** Thank you. That's clear.

2973. **MR. SARAULT:** Thank you.

2974. **MEMBER HABIB:** My second question is one of the other things that you had urged us to do is to include in the reasons a request or an order for TransCanada to come up with risk sharing measures on a go-forward basis after accommodation is done for the securitization and so forth.

2975. What we heard from TransCanada is there isn't enough on the record to -- or it is not -- since they don't have a baseline it will be difficult at this point in time to come with a risk sharing. And I wonder if you can comment on this argument that we heard from Mr. Yates.

2976. **MR. SARAULT:** Well, I mean, you know, I think that TransCanada people know their system very well. You know, you could ask them, conceptually at least, you know, to -- if they're going to come back with a proposal to be assessed at a future hearing, to include something as to how, in their view, there could be some risk sharing mechanism for the future on a go-forward basis to provide ideas and perhaps proposals to the Board to be reviewed.

2977. I mean, I think -- you know, TransCanada is a very large organization and I do not underestimate their capacity to come up with proposals if requested to do so. So I think we're talking about the future, so it would be, for example, for 2014 onwards, whatever, and they have the information, they have the data, they have the resources, it's a huge company, they have knowledgeable people, and they understand regulation. I mean, they know the various avenues that could be contemplated.

2978. I mean, just listen to some people like Mr. John Reed, I'm sure that they ask for his input as to what kind of regulatory avenues could be contemplated in the future for risk sharing measures, I am totally certain that he could come up with very articulate ideas. No doubt in my mind. It's just a question of will, that's all. That's what it boils down to. Are they willing to do it?

2979. **MEMBER HABIB:** Thank you, sir.

2980. Thank you.

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--- QUESTIONS BY/QUESTIONS PAR LE PRÉSIDENT:

2981. **LE PRÉSIDENT:** Merci, Madame Habib.
2982. Sur une note un peu légère, Maître Sarault, d'après la banque de données terminologique et linguistique du gouvernement du Canada ---
2983. **Me SARAULT:** Oui.
2984. **LE PRÉSIDENT:** --- qui est connue sous le nom de Termium Plus

2985. **Me SARAULT:** De?
2986. **LE PRÉSIDENT:** Termium Plus. C'est un site internet ---
2987. **Me SARAULT:** Oui.
2988. **LE PRÉSIDENT:** --- du gouvernement du fédéral, le mot "securitization" en français c'est -- c'est la "titrisation."
2989. **Me SARAULT:** Titrisation, bien oui.
2990. **LE PRÉSIDENT:** Je vous laisse ---
2991. **Me SARAULT:** Vous avez raison.
2992. **LE PRÉSIDENT:** --- je vous laisse méditer là-dessus.
2993. **Me SARAULT:** J'ai déjà entendu cette expression-là de la part d'avocats de droit corporatif.
2994. **LE PRÉSIDENT:** Je vous laisse méditer là-dessus et pratiquer sa prononciation.
2995. Je vais vous poser des questions dans la langue des mots que vous avez utilisés ---
2996. **Me SARAULT:** O.k., pas de problèmes.

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2997. **LE PRÉSIDENT:** --- alors j'ai des questions en anglais si vous avez parlé en anglais d'un concept et puis j'ai des questions en français si vous avez utilisé le français pour vous exprimer.
2998. **Me SARAULT:** O.k.
2999. **LE PRÉSIDENT:** Mais je vous encourage à utiliser la langue de votre choix dans votre réponse et séparément du choix de langue que j'ai ---
3000. **Me SARAULT:** D'accord.
3001. **LE PRÉSIDENT:** --- fait pour la poser.
3002. My first question is probably the most central question I have for you and for your client, Maître Sarault, it is central to the position IGUA 's been taking from the beginning, and I think was central today in your argument.
3003. In Part A of your argument, in the introduction of background you made clear you wanted us to be fully aware of the seriousness of the financial prejudice to industrial gas users arising from the level of the tolls, a serious financial prejudice, and I acknowledge that part of your argument as part of the background.
3004. My question is not about whether this can be defended or not as a basic notion. I can easily see how higher tolls can cause prejudice to a broad range of consumers of any service, including TransCanada's Mainline services.
3005. So my question isn't about: Can you prove that? It's not my question. My question is the -- and I think it's a legal question. Although you might want to also develop it from a practical standpoint, I think it's a legal question properly asked only in final argument -- as to the relevance of the financial impact of the level of the tolls on the calculation by the Board of a just and reasonable toll.
3006. And if you had your local -- your local -- your legal authorities as to the extent to which the Board must take into account in setting tolls of impact on consumers of the transportation services, I'd be grateful for that.
3007. **Me SARAULT:** Écoutez, je le sais que pour -- y existe des autorités qui sont très claires à l'effet que lorsque vient le temps de fixer le taux de

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- rendement sur l'avoir de l'actionnaire que l'impact sur les tarifs ou l'impact sur les usagers n'est pas quelque chose qui doit être tenu en compte par le régulateur.
3008. **LE PRÉSIDENT:** J'en suis conscient de ça puis ma question est beaucoup plus générale.
3009. **Me SARAULT:** Oui, oui.
3010. **LE PRÉSIDENT:** Sur la question d'établissement des droits, ---
3011. **Me SARAULT:** Oui.
3012. **LE PRÉSIDENT:** --- c'est l'objet de ma question.
3013. **Me SARAULT:** Mais dans la mesure où on accepte que le concept d'intérêt public réside dans cet équilibre entre les intérêts de l'actionnaire -- des investisseurs d'une part -- et nous respectons ça. Je pense que c'est très important. -- mais aussi ceux des usagers, des payeurs de tarifs d'autre part.
3014. Et lorsque l'on voit des situations de marché comme celles dont nous avons été témoins depuis 2007, je pense que dans la détermination de la question "Est-ce que ces tarifs-là sont justes et raisonnables ?" lorsque l'on voit des augmentations qui dépassent le 140 pourcent sur cinq ans, je pense que la question est légitime.
3015. Votre question d'un point de vue strictement juridique, moi, je pense que c'est un -- c'est un contexte de marché que l'Office doit tenir en compte parmi les nombreux éléments qu'elle doit tenir en compte aux fins de déterminer si les droits sont justes et raisonnables ; c'est pas le seul, y en a d'autres.
3016. Mais je pense que l'évolution des tarifs dans le temps et leur volatilité aussi, je pense que dans les principes -- si on lit *Bonbright*, il parle de "stable rates." C'est des principes réglementaires que l'on reconnaît. C'est de la prévisibilité, la stabilité des taux. Et leur évolution dans le temps sont des critères que l'on doit tenir en compte -- en tout cas selon *Bonbright* -- pour aboutir en résultat à ce que l'on appelle des tarifs justes et raisonnables.
3017. Et si les -- dans l'exercice -- dans l'appréciation des tarifs qui sont en vigueur, on en vient à la conclusion qu'il y a un degré de volatilité et d'instabilité aussi aigu que celui que nous constatons aujourd'hui, mais je pense que c'est une

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source légitime de préoccupation.

3018. Et dans l'extrait de *Bonbright* que je vous ai donné, il y avait -- de 10 critères là qui sont pas plus importants les uns que les autres -- vous allez voir que c'est des choses qui sont -- qui sont soulignées.
3019. D'après moi, d'un point de vue légal, je dirais que ça fait partie des "regulatory standards for a sound tolling structure". Pis le résultat de tout ça là, on prend les neuf "regulatory standards", je mets le "public interest" au sommet et le "just and reasonable toll", c'est le résultat de tout ça.
3020. Et comme je vous ai dit, tous les standards réglementaires, à mon avis -- et j'y crois fermement -- ne doivent pas être considérés en isolation les uns des autres. On doit les mesurer collectivement et en harmonie les uns avec les autres de façon à procurer un juste équilibre.
3021. C'est la réponse que je vous donne.
3022. **LE PRÉSIDENT:** Vous avez répondu à ma question, Maître Sarault, je vous remercie.
3023. Et vous dites que l'impact d'un niveau de droit sur le consommateur est une considération importante, mais vous dites aussi que on doit intégrer ça avec d'autres considérations ---
3024. **Me SARAULT:** Exact.
3025. **LE PRÉSIDENT:** --- comme le droit des investisseurs de recevoir un ---
3026. **Me SARAULT:** Absolument.
3027. **LE PRÉSIDENT:** --- un rendement sur leur investissement.
3028. **Me SARAULT:** Et jamais vous m'entendrez dire que l'investisseur a pas le droit à un rendement raisonnable.
3029. **LE PRÉSIDENT:** Alors, j'aimerais explorer la -- les limites de votre pensée sur cette question-là.

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3030. Ce que je crois que vous me dites c'est que on calcule un droit, un "tolls", et puis en choisissant le niveau du droit, il y a une variable qui influence notre choix ultime comme Office national de l'énergie qui est l'impact sur les consommateurs.
3031. **Me SARAULT:** M'hm.
3032. **LE PRÉSIDENT:** Dans le cas actuel y a un impact négatif en raison du niveau du droit ---
3033. **Me SARAULT:** Je pense que oui.
3034. **LE PRÉSIDENT:** --- et puis en raison peut-être, vous direz, la nature cyclique de l'environnement d'affaires des membres de l'ACIG fait en sorte que c'est peut-être pas le moment idéal pour imposer aux membres de l'ACIG un droit à ce niveau-là.
3035. Et je suppose que certains membres de l'ACIG sont assujettis à des cycles économiques et qui est pour certains -- peut-être plusieurs d'entre eux -- sont au bas du cycle et non pas au haut du cycle; n'est-ce-pas?
3036. Vous dites -- je vois votre tête être d'accord avec mon hypothèse.
3037. Alors, j'aimerais explorer avec vous les limites de votre pensée. Si le cycle était inversé et puis on était dans une période où est-ce que, dans le cycle économique, les membres de l'ACIG étaient prospères et que les droits étaient relativement au prix final de livraison du gaz aux clients moins important, est-ce que cette réalité-là ça l'a aussi une influence dans le sens contraire dont l'Office devrait tenir compte dans l'établissement d'un droit?
3038. Est-ce que c'est symétrique votre ---
3039. **Me SARAULT:** Bien, en fait ---
3040. **LE PRÉSIDENT:** --- pensée sur l'impact des droits sur les consommateurs dans le cycle complet des cycles économiques?
3041. **Me SARAULT:** Écoutez, je vais aller un pas plus loin.
3042. Je pense que là on a atteint un seuil où ce n'est plus seulement le

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- préjudice que cette situation cause aux usagers qui est en jeu. Potentiellement, si elle continue à s'aggraver, il va y avoir un préjudice à l'actionnaire.
3043. La viabilité économique du Mainline est en péril. Appelons les choses par leur nom. Et ça, en bout de ligne, l'actionnaire, l'investisseur peut devenir fortement pénalisé. Si le marché fait en sorte que les usagers, les "shippers", les "toll payers" commencent à explorer et trouver des solutions alternatives -- c'est un peu ce que je disais à la fin -- là à ce moment-là ça peut devenir permanent ces problèmes-là. Puis si ça devient permanent, l'actionnaire va perdre.
3044. **LE PRÉSIDENT:** Je comprends ça, mais ma question, Maître Sarault, avait -- j'hésite de vous interrompre -- mais c'est pas tout à fait l'objet de ma question.
3045. Je vous demande de supposer que le cycle économique est inversé, que dans un sous-contexte hypothétique les membres de l'ACIG sont dans un cycle de prospérité et puis que les droits de TransCanada représentent une beaucoup moindre part du prix final de livraison aux clients.
3046. Est-ce que, selon votre pensée et puis en vertu de votre analyse juridique, l'Office -- de la même façon qu'il le ferait maintenant selon votre proposition aujourd'hui -- devrait avoir un ajustement aux droits dans le sens contraire, pour refléter le cycle?
3047. **Me SARAULT:** O.k., prenons un exemple juste pour être bien sûr que je vous comprends.
3048. Disons, par exemple, on a vu qu'il y avait une crise du bois d'œuvre. Moi, j'ai dans les membres de l'ACIG des industries de pâte et papier, de l'industrie forestière, qui ont été très affectées par cette crise-là. Y ont été affectées aussi en 2008, et cetera.
3049. Moi, je pense que des considérations extérieures quant à l'environnement économique dans leurs propres industries dans lesquelles y opèrent, ça ne devrait pas être pertinent.
3050. Ce dont on se plaint en ce moment c'est restreint à l'impact que la composante "transport" peut entraîner à la compétitivité de ces industries-là, toutes choses étant égales par ailleurs. Parce que le contexte économique -- y sont -- les industries de pâte et papier au Canada, bien, y sont tous dans le même

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- environnement économique, à des nuances près. Les métallurgies puis, et cetera. Il y a un contexte nord américain, et cetera. Ça je pense que ce sont des facteurs extrinsèques à la composante “tarif de transport” comme influent les intrants de ces industries-là.
3051. Et je pense que dans le cas -- pour les fins de votre exercice -- je pense que ça doit être restreint à l'influence qu'ont les tarifs de transport. Vous ne devriez même pas, à la limite, regarder l'élément distribution en aval, ça c'est un autre problème.
3052. Et c'est -- parce que là on cherche l'équilibre entre qui? Entre les usagers mais aussi TransCanada PipeLine et le rôle de TransCanada PipeLine est limité au tarif de transport, y a pas d'autre chose.
3053. **LE PRÉSIDENT:** Alors, si nous faisons ça, Maître Sarault, je comprends mieux maintenant.
3054. Donc, ça l'a -- c'est une considération qui change jamais avec le temps. Donc, ce que vous me dites c'est que l'Office devrait établir des droits qui sont le plus bas possible.
3055. **Me SARAULT:** Oui.
3056. **LE PRÉSIDENT:** Mais en respectant à la fois les exigences de notre Loi ---
3057. **Me SARAULT:** Oui.
3058. **LE PRÉSIDENT:** --- et les prononcements des jugements des différents niveaux de cours canadiennes, y compris la Cour suprême, pour le respect des droits des investisseurs.
3059. Vous nous dites que c'est toujours un arbitrage qu'on doit faire à chaque cas.
3060. **Me SARAULT:** Je pense que oui.
3061. **LE PRÉSIDENT:** Bon.
3062. **Me SARAULT:** Un juste équilibre. Et d'ailleurs, du côté-là -- je veux

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- dire -- un des paragraphes de mon argumentation finale, je vous parlais d'un client industriel qui consomme 10 Bcf par année -- pis y en a -- je vous dis, pour lui, des augmentations de \$0.01 sur sa consommation ça peut entraîner des millions de dollars.
3063. Mais c'est ces millions-là qu'on porte à votre attention. Le reste de ses problèmes de ses opérations, de ses autres coûts, de ses autres intrants, je ne pense pas que ça fait partie de l'exercice qui non concerne.
3064. **LE PRÉSIDENT:** D'accord, merci. Ça clarifie votre point de vue, je vous remercie, Maître Sarault.
3065. My next question, again in English because you said it English, but feel free to answer in whatever official language of Canada.
3066. **Me SARAULT:** M'hm. Un beau mélange.
3067. **THE CHAIRMAN:** You express concern as part of your argument in section B2, or at least section B, about limited evidence on the supply side. And, I did not take copious notes around that. I would like to know whether you -- what you make of the basic argument, I think we heard the Applicant make, that -- with the implementation of the restructuring proposal, one might expect to see an increase the NIT pricing causing a supply response that would -- if you believe in the fundamentals of economics would improve supply?
3068. What do you make of that line of thinking?
3069. **MR. SARAULT:** Well that increase in NIT pricing would have to be significant. I think that right now one of the big problems that we see is that there is a -- you know, there is a differential that's not as high as it was between the prices at AECO when compared to Dawn.
3070. And this is not -- this explains in large part why people are now going at Dawn and abandoning Empress as a point of delivery. And, you know in order to change market behaviour at this juncture, I think that the -- when I look at the figures in the transmission tolls, I mean we're not talking about small increases, we're talking about significant increases. So in order for that to happen, it would have to be substantial. And I don't see that evidence in the record.
3071. I don't see, you know, a very credible, tangible trend reassuring me on

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- that score. And I think the best evidence that we have in the immediate past -- you know, they had supply projections back in October 2011 and only eight months afterwards they're telling us that those supply projections turned out to be wrong. I mean, this is not reassuring.
3072. And I'm very anxious to see what they will file in June of 2013 based upon their throughput analysis. But this is my answer.
3073. **THE CHAIRMAN:** So, you don't -- just to validate my understanding of what you just said, you don't disagree that directionally ---
3074. **MR. SARAULT:** Directionally?
3075. **THE CHAIRMAN:** Let me finish my question.
3076. **MR. SARAULT:** Sorry.
3077. **THE CHAIRMAN:** --- directionally, to the extent that the restructuring proposal were successful, at least in part, there would be a potential improvement in NIT pricing.
3078. But you have not been persuaded yourself as to the effect of that pricing adjustment and the degree to which the supply would respond adequately to the point of satisfying your concern about supply?
3079. **MR. SARAULT:** Correct.
3080. **THE CHAIRMAN:** Is that a fair summary of your thinking?
3081. **MR. SARAULT:** Yeah.
3082. **THE CHAIRMAN:** Thank you.
3083. It's a question of degree, not a question of basic relationships between economic variables.
3084. **MR. SARAULT:** This is a very good point that Mr. Newton is making. You know, it's not just the level of the tolls per se that's a great cause of concern, it's the uncertainty.

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3085. **THE CHAIRMAN:** Okay.
3086. **MR. SARAULT:** The answer indeed of volatility are such that users are very reluctant to commit themselves to contracts, especially over the long-term.
3087. So at the end of the day even -- you know, unless we're certain that something is being done about the fundamental problems, it's not just an increase in the NIT pricing that could be sufficient in itself to cause market changes -- cause changes in behaviour.
3088. **LE PRÉSIDENT:** Merci, Maître Sarault.
3089. Je vais maintenant passer au sujet de titrisation, securitization in English.
3090. You've covered the topic already in part with -- I think with Ms. Mercier.
3091. Can I confirm that IGUA's proposal assumes that for securitization to proceed it requires a level of government to guarantee the financial instruments?
3092. **MR. SARAULT:** It would be highly preferable. There's no question about that because -- I mean, the great advantage of securitization is to provide a credit rating that we've seen. I mean, the -- TransCanada experts were talking about AAA, and that will generate borrowing costs that are extremely favourable. In order to have such a AAA rating, I think that the government support plays a key role ---
3093. **THE CHAIRMAN:** Thank you.
3094. **MR. SARAULT:** Hence our recommendation that you send a favourable advice to the government. Say it would be a good thing if you could provide this.
3095. **THE CHAIRMAN:** I'll get to that to that in a minute.
3096. I'll get to that in French because you spoke in French about that aspect.

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3097. **MR. SARAULT:** M'hm.

3098. **THE CHAIRMAN:** There is, on the record, an exchange between Mr. Reid and myself on what is the fundamental nature of the government guarantee of that kind. And you may recall me asking Mr. Reid to answer to my question as an economist; I was asking myself the question as a pseudo-economist.

3099. And I asked him to agree or disagree with me that such a scheme would be a government subsidy. And Mr. Reid agreed, that in terms of the parlance of the economist, a guarantee of the government of that kind is -- is a subsidy, and in this case, a subsidy of TransCanada Corporation.

3100. Would you object or can you associate with that characterization of what ---

3101. **MR. SARAULT:** I disagree.

3102. **THE CHAIRMAN:** You disagree, can you explain why please?

3103. And I'm not asking you to speak as an economist unless you want to play the role of pseudo-economist like I sometimes do.

3104. **MR. SARAULT:** Well you know, what we're asking from the government is a guarantee. It's not because you guarantee someone. Here I mean, the debt is the debt of the tolls payers through toll rider. That's what we'll repay -- their proportion and what's being guaranteed by the government is that toll rider.

3105. So when you endorse someone as a guarantor, you're not called upon to pay unless the main debtor is in default.

3106. And unless we have very serious concerns over the horizon as to a possible default, on the part of the community of the users paying that toll rider, there is no disbursement of dollars -- of money by the government. It's just a guarantee.

3107. So I -- in my mind, a subsidy as opposed to a loan or a guarantee, is something. I mean, the government would take money out of public funds in order to finance something. That's a subsidy.

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3108. But a simple guarantee -- and we see it. Il y a beaucoup de programmes de développement économique qu'on a vu à travers l'histoire au Canada pour Bombardier pis toutes sortes d'industries, où on pouvait avoir, d'une part, des subventions directes à l'industrie pis ça tant de millions de dollars qui est versé par le gouvernement. Ça c'est une subvention.
3109. Mais là si le gouvernement garanti un prêt contracté par Bombardier envers des banques ou et cetera, je le vois pas comme une subvention tant et aussi longtemps qui a pas un déboursé de la part du gouvernement.
3110. **LE PRÉSIDENT:** D'accord.
3111. Je vais poser ma question un peu différemment. Donc, est-ce que vous diriez que offrir une garantie d'une telle nature, ça impose au gouvernement un certain risque financier?
3112. **Me SARAULT:** C'est sûr qui a un certain risque financier. À chaque fois qu'on cautionne quelqu'un ---
3113. **LE PRÉSIDENT:** D'accord.
3114. **Me SARAULT:** --- on prend un risque. Il y a même des ---
3115. **LE PRÉSIDENT:** Voilà.
3116. Donc, vous comprenez mieux l'objet de ma question. Si y a un risque financier, est-ce que vous voyez dans cette réalité-là un coût économique pour le gouvernement à assumer?
3117. **Me SARAULT:** Vous savez, il y a bien des programmes qui ont été entrepris par nos gouvernements qui ont un coût économique mais qui sont nécessaires.
3118. C'est sûr qu'il y a un certain "exposure". Dès que l'on cautionne la dette de quelqu'un, on peut un jour si cette personne-là est en défaut être appelé à payer. Alors, le risque est là. Ça c'est indéniable. Et là, d'un point de vue économique et juridique, c'est indéniable.
3119. Mais dans ce cas-ci -- et je veux pas refaire l'histoire du Mainline --

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- mais y en demeure pas moins que c'est quand même le réseau de TransCanada qui relie les sources de production dans l'ouest au marché de l'est du Canada. Et ça toujours été perçu, je pense, par les Canadiens en tout cas puis par le gouvernement du Canada -- je pense que ça été encouragé par le gouvernement du Canada -- comme étant un réseau qui est dans le meilleur intérêt économique de l'unité canadienne et de l'interrelation économique entre les provinces canadiennes.
3120. C'est quand même pas un actif négligeable le réseau de TransCanada PipeLine et il serait regrettable que ça devienne un échec. Nous, on veut que cet actif-là puisse survivre et demeurer viable économiquement. Et je pense que pour le gouvernement du canadien ça fait du sens de peut-être prendre un risque économique, via une garantie, pour assurer la viabilité.
3121. Regardons ce que le gouvernement américain a fait avec les banques en 2008 aux États-Unis, avec l'industrie automobile, et cetera. Le gouvernement canadien aussi -- même si c'est des conservateurs -- ont investi beaucoup dans les infrastructures et ils l'ont fait pourquoi? Pour préserver la viabilité d'industries considérées comme importantes pour le bien du Canada et je pense que TransCanada c'en est une.
3122. **LE PRÉSIDENT:** Encore merci, ça répond à ma question, Maître Sarault.
3123. Mon avant-dernière question continue dans la même lignée et là je vais vous poser une question sur quelque chose que vous avez dit en français, donc, je continue le dialogue en français.
3124. Encore dans le domaine de la titrisation, ---
3125. **Me SARAULT:** M'hm.
3126. **LE PRÉSIDENT:** --- vous nous suggérez d'écrire à Ottawa pour recommander que Ottawa soit réceptif à l'idée d'un projet de titrisation endossé par TransCanada.
3127. **Me SARAULT:** Oui.
3128. **LE PRÉSIDENT:** Vous connaissez bien notre indépendance d'une part des pouvoirs politiques de même que de la formulation de politiques au

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- pluriel -- “Politics and policy” pour traduire en anglais les deux expressions que je viens d'utiliser -- et puis je pense que c'est beaucoup valorisé le fait que l'Office soit indépendant du gouvernement, la formulation de politiques, des intérêts politiques.
3129. **Me SARAULT:** M'hm.
3130. **LE PRÉSIDENT:** Et dans ce que vous nous demandez de faire, vous nous demandez de recommander à un gouvernement d'accueillir favorablement une idée que nous devons juger dans une cause tarifaire future, soit les droits de 2014.
3131. De quelle façon pouvez-vous m'expliquer ça -- m'expliquer cette idée-là sans que ça soit pour nous une situation où est-ce qu'on est partie prenante, auteur d'une recommandation favorable portant sur une idée que nous devons juger par la suite en terme de justice naturelle et d'équité procédurale?
3132. **Me SARAULT:** Moi, je pense -- je ne vois mais strictement aucun, mais aucune atteinte à votre neutralité et votre impartialité et laissez-moi vous expliquer.
3133. Cette recommandation-là serait partie intégrante d'une décision réglementaire que vous allez avoir rendue sur la base de la preuve présentée par TransCanada d'une part et présentée par une foule d'intervenants d'autre part.
3134. Vous en venez, à la suite de votre appréciation de cette preuve-là, à la conclusion qu'une transaction de titrisation est nécessaire pour assurer la viabilité économique de TransCanada PipeLine. Et que pour assurer le succès de cette genre de transaction-là pour procurer à l'entreprise le niveau de crédit nécessaire pour assurer le succès de cette mesure-là que vous jugez nécessaire dans votre opinion neutre, objective et impartiale, vous jugez que c'est nécessaire que le gouvernement procure cette garantie-là et vous la recommandez.
3135. Donc, la recommandation que vous adressez au gouvernement n'est pas le fruit d'une intervention dans -- politique de quelque manière, c'est l'opinion raisonnée d'un tribunal administratif qui a compétence en la matière et qui juge que cette mesure est nécessaire.
3136. Le gouvernement pourra décider ce qu'il veut après ça, ça c'est leur domaine. Mais la recommandation elle est là, elle est neutre et objective.

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3137. Et après ça, lorsque vous êtes appelé à décider sur la proposition de TransCanada PipeLine, l'existence ou non d'une garantie gouvernementale sera un élément qui sera là parmi d'autres pour considérer de façon toujours aussi neutre et impartiale de votre part.
3138. Mais je ne vois pas d'interférence, d'ingérence politique de quelque nature que ce soit, bien au contraire.
3139. **LE PRÉSIDENT:** Abordons peut-être une question supplémentaire sur le même sujet. Abordons plutôt la question de perception d'impartialité plutôt que l'impartialité comme telle.
3140. Au moment où est-ce que l'Office ferait sa recommandation au gouvernement fédéral, les détails de la formule de titrisation ne seraient pas encore connus.
3141. **Me SARAULT:** Exact.
3142. **LE PRÉSIDENT:** C'est une lettre qui accompagne le motif de décision, n'est-ce pas, dans la cause présente.
3143. Les composantes ne sont pas connues, nous aurions ordonné à TransCanada de définir les détails. Suite à notre recommandation, un plan est édifié, une proposition est formulée, elle nous est soumise. Et supposez, Maître Sarault, qu'elle nous déplaît et que nous la rejetons ayant demandé au préalable au gouvernement de contribuer à cette solution-là, en termes, disons, de perception d'indépendance -- et je vais rajouter un élément que je vous avais pas encore présenté -- en termes de crédibilité de l'organisme, où est-ce qu'on en est à ce point-là?
3144. **Me SARAULT:** Bien, si vous la rejetez ma réaction, moi, si j'étais en train de lire ma Presse, je dirais l'Office a rejeté une proposition qui a été présentée même si elle avait l'appui gouvernemental, je dirais: Ils sont joliment indépendants.
3145. J'en viendrais à la conclusion inverse. Je trouverais, mon Dieu, ils ont -- ils manifestent leur opinion sans égard à ce que le gouvernement a bien pu vouloir contribuer.

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3146. **LE PRÉSIDENT:** D'accord.
3147. En termes de crédibilité maintenant?
3148. **Me SARAULT:** Je vous trouverais totalement crédible. Je vous trouverais -- écoutez, je dirais, bien, voici enfin un tribunal quasi-judiciaire qui prend ses responsabilités.
3149. Écoutez là, la lettre que vous allez envoyer là -- je faisais des blagues tantôt -- au gouvernement c'est pas une carte de Noël. Ça va être accompagné d'une décision qui va avoir plus que 100 pages, je le sais pas, qui va analyser rigoureusement une preuve et qui va sopeser les avantages et les inconvénients de façon neutre, impartiale et objective, de façon rigoureuse. Et ça j'en suis totalement confiant.
3150. Je vous dis, pour ces motifs-là, monsieur gouvernement fédéral, afin de sauver la viabilité économique d'une entreprise importante pour le Canada, nous croyons que vous devriez favorablement considérer de garantir la transaction que nous ordonnons à TransCanada PipeLine de nous proposer.
3151. Vous êtes très neutre et très objectif. Ils prendront leur décision puis that's it.
3152. **LE PRÉSIDENT:** Je vous remercie, ça répond à ma question.
3153. My last question is a fairly more technical question possibly. When you were dealing with -- I think it was Point D1 ---
3154. **Me SARAULT:** M'hm.
3155. **THE CHAIRMAN:** --- you said that IGUA is not suggesting a write down but rather a disallowance of costs.
3156. **Me SARAULT:** Exact.
3157. **THE CHAIRMAN:** Can you educate me on the distinction?
3158. **Me SARAULT:** Ce que -- Monsieur Inge, je pense, l'a expliqué un petit peu.

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3159. Le “asset write down” c'est un concept comptable, hein, ça? Alors, nous, ce que nous proposons c'est une mesure réglementaire. C'est de ne pas allouer la reconnaissance de certains coûts aux fins de la détermination des tarifs justes et raisonnables.
3160. Ce qui vont faire d'un point de vue comptable à l'interne avec leur vérificateur et compagnie, ça c'est une autre paire de manches, mais ce n'est pas un “asset write down”.
3161. D'ailleurs, j'en reviens toujours à ce qu'on disait, on n'identifie pas aucun actif en particulier. Un “asset write down” c'est qu'on l'ôte de là là, carrément, ce qui est pas ce qu'on propose ici du tout.
3162. **LE PRÉSIDENT:** D'accord, je vous remercie, Maître Sarault.
3163. Ce sont les questions de l'Office. Maître Sarault, je dois vous remercier ainsi que votre client pour votre participation à l'Office, sous réserve de plaidoirie supplémentaire que vous voudrez peut-être faire en remontant la liste dans plusieurs jours.
3164. **Me SARAULT:** C'est nous qui vous remercions.
3165. **LE PRÉSIDENT:** Merci, Maître Sarault.
3166. **Me SARAULT:** Avec plaisir.
3167. **THE CHAIRMAN:** This takes us to the end of this first week of final argument. We have only a few minutes left to go. So I will disappoint counsel for CAPP and tell them that, no you may start and give us a few minutes of final argument. So I hope you don't feel too much deprived of a few warm up comments.
3168. Our planning assumptions for Monday then, are to hear from Mr. Mondrow, first in reply to Mr. Yates' concerns, and then if Mr. Yates has anything to comment in response to Mr. Mondrow's comments we'll hear that as well. And the Board will then deal with that matter.
3169. Then we'll call upon Mr. Manning to present his argument on behalf of the Canadian Association of Petroleum Producers. And there may or may not be time for Mr. Leach for the Small Explorers and Producers Association of

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Canada to present his argument, which he tells us will be rather brief.

3170. And if it is possible, though unlikely, that we will call upon Ms. Twyman for the Western Export Group on Monday as well. So we expect parties to be ready for that but we don't think that's going to be likely in her case. Those are our planning assumptions.

3171. Je souhaite une bonne fin de semaine à tout le monde. And we'll be back again here at 8:30 on Monday.

3172. Thank you.

--- Upon adjourning at 1:26 p.m./L'audience à ajournée à 13h26