

1 New Brunswick Energy and Utilities Board

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5 IN THE MATTER OF an application by New Brunswick Power  
6 Distribution and Customer Service Corporation (DISCO) for  
7 approval of changes in its Charges, Rates and Tolls (Includes  
8 Interim Rate Proposal)

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10 Delta Hotel, Saint John, N.B.

11 May 30, 2007

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13 CHAIRMAN: Raymond Gorman, Q.C.

14 VICE-CHAIRMAN Cyril Johnston

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16 MEMBERS: Yvon Normandeau

17 Constance Morrison

18 Robert Radford

19 Edward McLean

20 Roger McKenzie

21

22 BOARD COUNSEL: Ellen Desmond

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24 BOARD STAFF: John Lawton

25 Doug Goss

26 David Young

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28 BOARD SECRETARY: Lorraine Légère

29 ASSISTANT SECRETARY: Juliette Savoie

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31 .....

32 CHAIRMAN: Good morning, everyone. The purpose of today's

33 hearing is to hear a motion by New Brunswick Power

34 Distribution and Customer Service Corporation, requesting

35 that the EUB make an interim order pursuant to Section 40

36 of the Energy and Utilities Board Act, Chapter E-9.18 RSNB

37 1973 approving a 9.6 percent increase to all electricity

38 rate categories except water heater rental rates and

39 connection fees where the increase will be 3 percent to be

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effective from the date of such interim order until further order of the Board.

Prior to commencing the hearing the Board intends to deal with a few preliminary matters, particularly the matter relating to which version of Section 40 will apply. But I guess we will get to that shortly.

My name is Raymond Gorman. I will chair today's panel. The rest of the panel consists of Cyril Johnston, Roger McKenzie, Edward McLean, Constance Morrison, Yvon Normandeau and Bob Radford.

At this time I will take the appearances. For the Applicant please?

MR. MORRISON: Good morning, Mr. Chair and Commissioners. Terrence Morrison on behalf of the Applicant. And also assisting me today is my partner Ed Keyes. Also at counsel table is Mike Gorman, Terry Murphy and Sharon MacFarlane.

CHAIRMAN: Thank you, Mr. Morrison. Canadian Manufacturers & Exporters?

MR. LAWSON: Good morning, Mr. Chairman. Gary Lawson for CME along with David Plante.

CHAIRMAN: Thank you, Mr. Lawson. Enbridge Gas New Brunswick?

MR. HOYT: Len Hoyt for Enbridge Gas New Brunswick. And I'm

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joined by Dave Charleson, the General Manager of EGNB.

CHAIRMAN: Mr. Hoyt, where are you? Thank you. FPS Canada Inc.?

MR. BAIRD: Chuck Baird. I'm accompanied by Jennifer Little and Ross Gilliland at the table.

CHAIRMAN: I'm sorry. I can't see you either. Perhaps you could just identify. Thank you very much, Mr. Baird. Irving Oil Limited? The Board I believe did receive a letter from Mr. Nettleton indicating that Irving Oil would not be present at today's hearing but will continue as an intervenor.

J. D. Irving Pulp and Paper Group?

MR. WOLFE: Good morning, Mr. Chair. Wayne Wolfe.

CHAIRMAN: Thank you, Mr. Wolfe. NB Forest Products Association? No one here from NB Forest Products Association?

MR. ARSENAULT: Good morning, Mr. Chairman. Mark Arsenault with the New Brunswick Forest Products Association.

CHAIRMAN: Thank you, Mr. Arsenault. NBSO?

MS. DESMOND: Mr. Chair, I believe we received notification that they weren't going to be able to attend today.

CHAIRMAN: Thank you. Utilities Municipal?

MR. ZED: Peter Zed representing Utilities Municipal. And I'm joined today by Dana Young from Utilities Municipal

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and various people representing the constituent members, Eric Marr, Daryl Shonaman, Marta Kelly, Charles Martin, Mike Couturier and Dan Dionne.

CHAIRMAN: Thank you, Mr. Zed. Vibrant Communities Saint John?

MR. PEACOCK: Good morning, Mr. Chair. Kurt Peacock here. I'm joined today this morning by Mr. Ken Sollows who has kindly offered to help me navigate through the rather turbulent regulatory waters.

CHAIRMAN: Thank you, Mr. Peacock. Public Intervenor?

MR. THERIAULT: Good morning, Mr. Chair. Daniel Theriault. And I'm joined this morning by Robert O'Rourke and Jamie O'Donnell.

CHAIRMAN: Mr. Theriault, where are you?

MR. THERIAULT: The very back.

CHAIRMAN: Thank you. And the New Brunswick Energy and Utilities Board?

MS. DESMOND: Ellen Desmond as Board Counsel. And with me is Doug Goss, Don Lawton and David Young.

CHAIRMAN: Thank you, Ms. Desmond.

The Board has also received an e-mail from the Agricultural Alliance of New Brunswick indicating that they wish to be granted intervenor status.

Is there anybody here this morning from the

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Agricultural Alliance of New Brunswick?

Okay. Well, the Board will grant intervenor status to the Agricultural Alliance of New Brunswick.

MS. DESMOND: Mr. Chair, is that formal or informal status?

CHAIRMAN: That would be formal status. I believe that is what was requested.

In addition to the formal intervenors there are a number of informal intervenors who have registered. And the distinction being between the formal and informal intervenors is that the informal intervenors do not typically take part in the process but are registered for information purposes. But I will determine whether or not any of those are present.

The informal intervenors that we have registered today -- City of Miramichi, is there anybody here from City of Miramichi?

The second one is the Department of Energy? Nobody here from the Department of Energy? Flakeboard Company Limited?

MR. BURKE: Pat Burke here for Flakeboard Company.

CHAIRMAN: Thank you. Mr. Terry MacDonald is self-represented intervenor. And The Times and Transcript? I think that this might be an appropriate time to mark the exhibits, which I believe a list has been circulated

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to the parties of exhibits that it was the Board's intention to mark today.

It is my understanding that that list was circulated, is that correct?

MRS. LEGERE: On May 22nd.

CHAIRMAN: Thank you. Mr. Morrison, I think it is four exhibits that are listed that are all exhibits in applicant. And do you have any difficulty with the numbering system that has been proposed?

MR. MORRISON: No, Mr. Chair.

CHAIRMAN: Thank you. Then just for the record, exhibit A-1 will be the affidavit of publishing. Exhibit A-2 is evidence dated April 19th 2007 for interim rate request. And that is Volume 1 of 3. Exhibit A-3 is evidence dated April 19th 2007 for an interim rate increase. That is Volume 2 of 3. And exhibit A-4 is evidence dated April 19th 2007 for an interim rate request. And that is Volume 3 of 3. A-4 is the evidence dated April 19th 2007 for interim rate request. That is Volume 3 of 3.

Any other documents to be marked at this time?

MR. MORRISON: No, Mr. Chair. But there is one preliminary matter that I would like to deal with when you so direct.

CHAIRMAN: Well, the Board did have a number of preliminary matters of its own. It may well be that your preliminary



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matter and ours, there may be some similarity, I don't know.

So perhaps if you could tell me the nature of it?

MR. MORRISON: Well, this really is more an informational thing, Mr. Chair. It deals with the simultaneous translation.

CHAIRMAN: Yes.

MR. MORRISON: We have had -- we have made great efforts to have simultaneous translation here today through the Translation Bureau which is a government arm, as you know. They have scoured Atlantic Canada, Quebec City, Montreal and various other areas and have not been able to provide simultaneous translation for the proceedings here this morning.

I pass that along for information purposes. It wasn't from lack of effort, I can assure you.

CHAIRMAN: Thank you, Mr. Morrison.

Is there anybody in the room that requires simultaneous translation that would have any difficulties with us proceeding today in the absence of the translation services?

I guess silence is acquiescence then. Thank you,

Mr. Morrison.

The next item that I wanted to deal with this morning was the confidentiality policy. And at the pre-hearing

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conference on May 18th the Board sought input from the various parties with respect to the confidentiality policy which will be adopted by the EUB.

A number of comments have been received by the Board. But unfortunately time does not permit an appropriate review of these submissions. As a result the Board is not in a position to provide the parties with the updated confidentiality policy.

But we will provide a draft as soon as possible so that the policy can be in place prior to the filing of the balance of evidence in early July.

The next issue, as everybody is aware, the Board has scheduled the hearing of the Applicant's motion with respect to generation costs to be heard tomorrow.

Subsequent to the pre-hearing conference the Public Intervenor filed a notice of motion which also appears to deal with generation costs.

The Public Intervenor is not in a position to proceed with his motion tomorrow. But it is my understanding that both the Public Intervenor and the Applicant agree that the two motions could be heard at the same time.

The Board does not wish to have a number of motions covering the same subject matter heard at different times.

So as a result, first of all, I would ask the parties to

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advise the Board as to whether or not they have any additional motions with respect to this issue.

And we would also like to hear from the parties with respect to dates to hear these two motions in the event that we do agree to an adjournment from tomorrow's date.

I guess before I canvass with respect to dates, there are a number of dates in June that the Board is not available, which I guess I will run through right now. June the 4th, 5th and 6th, 13th, 19th, 20th, 25th, 26th, 27th, 28th and 29th.

And I would add that the 13th, although it is currently not available, that could be made available, if that turns out to be the only day which this could be heard.

The Board Secretary has made some inquiries with respect to availability of hearing rooms. And I'm not sure that that is complete. I think you are still waiting on some information with respect to that. But first of all, I guess I'm not entirely certain as to how much of a delay the Public Intervenor is requesting.

So Mr. Theriault, perhaps you could advise me as to when you feel you would be in a position to proceed with these motions?

MR. THERIAULT: Thank you, Mr. Chairman. Ideally with

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respect to getting the evidence that I'm looking for, roughly three weeks would be ideal, perhaps the 21st or 22nd of June.

CHAIRMAN: Thank you. Well, starting with you, Mr. Morrison, I'm just going to go through the room then with respect to the request I guess to delay these two motions, to have them -- and the Board would like to hear them at the same time and also to determine whether or not there are any other motions relating to the same issue that might be brought forward.

So Mr. Morrison, I guess I will ask you for your comments first?

MR. MORRISON: Well, Mr. Chairman, I have, as I indicated to the Board, no objection with pushing this issue off for a couple of weeks. And I agree that the issues are so similar that they should be heard at the same time. I am concerned, however, when I hear Mr. Theriault saying it is going to take three weeks to have that evidence prepared. He will file evidence. Undoubtedly we will take a look at it to see whether we have to file evidence to counter that evidence or at least to explain it. I'm very concerned about the impact this will have on the schedule. We are scheduled to file our additional

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evidence on July 3rd. Clearly, whatever decision the Board makes in connection with underlying generation costs is going to impact on how we assemble that additional evidence.

So those are my main concerns. I know that Mr. Theriault doesn't have any control over his expert. But if we could even contract that to two weeks, I think would be certainly helpful.

CHAIRMAN: I think the -- if I understood Mr. Theriault correctly, the dates he was suggesting for the hearing were the 21st or 22nd or both. And I would assume from that that evidence would be available prior to that date. Mr. Theriault, perhaps you could address that issue?

MR. THERIAULT: Thank you, Mr. Chairman. Yes. It is my understanding that I should have some evidence available within two weeks. And then I was thinking the 21st, 22nd which would be roughly another week, which would allow the Applicant and the other parties to review the evidence.

CHAIRMAN: So could I take it that when you say your evidence would be available, it would be filed with the Board and made available to all parties say no later than Friday, the 15th of June? Is that essentially what you are telling us?

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MR. THERIAULT: That is correct.

CHAIRMAN: Mr. Morrison, does that make any difference with respect to your position?

MR. MORRISON: No, it doesn't, Mr. Chair. Because we are looking at a hearing which would be the 21st, 22nd of June, allowing the Board some time to consider the arguments and come to a decision during the last week in June.

We have to file our evidence a week after that. And it just will not be possible to assemble evidence if it has to go beyond what the Applicant is currently proposing. So there is -- and whether that will have an ultimate impact on the schedule as we move forward, I don't know. But it may have an impact on the filing day of July 3rd.

CHAIRMAN: Mr. Morrison, I guess in order to meet that filing date of July the 3rd, when do you feel last possible opportunity for a hearing?

MR. MORRISON: Well, I'm told -- and this would take a Herculean effort. But it would take approximately -- if the Board rules that all of the underlying generation costs are to form the basis of the Revenue Requirement, then it would take at least three weeks. And that is basically working around the clock to file evidence to

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present to the Board.

CHAIRMAN: Thank you. Mr. Lawson?

MR. LAWSON: Mr. Chairman, as to the date of the 21st, 22nd, those are available. As to the question of the timeliness, perhaps the Board could consider -- I don't know how to resolve it because it will push the date further -- but sort of a two-phase filing by DISCO, one being the evidence that they would otherwise file on July 3rd, and then perhaps a one-week.

I don't know if the calendar can afford any more than one-week delay for the balance of it. Just a suggested solution.

CHAIRMAN: Thank you, Mr. Lawson. Mr. Hoyt?

MR. HOYT: EGNB understands that the motion will be limited to generation cost issues. And as we indicated at the pre-hearing, do not plan to participate in these motions.

And we also further understand the timing of this generation cost issue won't impact the timing of the interim rate matter. So in terms of the motions and so on, the dates, EGNB doesn't plan to participate.

If I could, just while I have got the floor, I just wanted to make one comment on the confidentiality policy. The Chair had indicated there were a number of comments received. And as you know, EGNB circulated a number of

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2 comments to all participants.

3 And I would just ask that if other comments were received  
4 but not circulated to parties, if that could be done it  
5 would be very helpful.

6 CHAIRMAN: That shouldn't be any problem. Thank you.

7 Mr. Baird?

8 MR. BAIRD: Mr. Chairman, the dates are fine with us.

9 CHAIRMAN: Thank you. Mr. Wolfe?

10 MR. WOLFE: The dates are okay as well with us.

11 CHAIRMAN: Thank you. Mr. Arsenault?

12 MR. ARSENAULT: Mr. Chairman, those dates work fine for us  
13 as well.

14 CHAIRMAN: Thank you. Mr. Zed?

15 MR. ZED: The dates work fine. But we do have a concern,  
16 unlike that expressed by Mr. Lawson, that we not be put  
17 and the parties not be put to a bifurcated process whereby  
18 we have parallel processes running with respect to IR's.  
19 In my experience, marshalling the forces necessary to  
20 respond to IR's to review the evidence, you have a lot of  
21 the same people together. And it is just going to mean  
22 getting together at different times, which is essentially  
23 going to add greatly to the cost and inconvenience.

24 So I would say we would be available on those dates. And  
25 if it is not possible for the generation evidence to

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2 be filed on July 3rd, then perhaps the Board could look at  
3 delaying the filing of all evidence, so we are back on a  
4 uniform schedule.

5 CHAIRMAN: Thank you, Mr. Zed. Mr. Peacock?

6 MR. PEACOCK: We have no opinion, Mr. Chair.

7 CHAIRMAN: Thank you. Mr. Theriault, anything further to  
8 add?

9 MR. THERIAULT: I realize I'm the author of this problem  
10 with the schedule. But I would support Mr. Zed's comment.

11 CHAIRMAN: Any comment, Ms. Desmond?

12 MS. DESMOND: Mr. Chair, just to clarify. I understood Mr.  
13 Morrison to suggest that they were concerned about being  
14 able to respond in the event information was ordered to be  
15 produced.

16 But I'm not sure if he commented on the issue if the  
17 Public Intervenor filed their evidence by June 15th. Was  
18 that sufficient time then for the Applicant to review that  
19 evidence and respond by the 21st? If he could just  
20 comment on that issue.

21 CHAIRMAN: Mr. Morrison?

22 MR. MORRISON: I believe we can do it. In discussions with  
23 Mr. Theriault we have made some inquiries about potential  
24 experts. So it's tight, but given the alternative we  
25 would rather have it dealt with earlier as opposed to

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later. So the 22nd perhaps would be a better date, but that time frame is fine.

And just while I have the microphone, Mr. Chair, I agree with Mr. Zed. I don't want to get into a bifurcated process.

CHAIRMAN: Thank you. The Board will consider the timing of this during a break and come back and inform the parties some time this morning.

The next issue that I wanted to deal with this morning had to do with the status of the Board's decision on the motion heard with respect to the status of the various studies that were ordered by the former Public Utilities Board, and this is really just for the information of the participants. The EUB expects to be in a position to finalize its decision next week and to publish it at that time.

The next issue that the Board wanted to deal with prior to commencing today's hearing has to do -- it's a procedural matter having to do with the hearing of the motion for an interim rate increase, dealing with the issue of a witness panel.

At the pre-hearing conference on May 18th none of the Intervenors requested the opportunity to cross-examine any witness on the Applicant's evidence, and I guess I'm

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drawing on my experience in the courts where it would be normal on a motion to hear argument based on the evidence that is filed both by the Applicant and any intervenors, and not normally to have oral evidence.

And of course leave can be granted by a court if a party requests it if in fact they can demonstrate that it's appropriate to do so.

The Board did not anticipate that there would be a panel or that any witnesses would be called on this motion.

However, unfortunately it was just one of those issues at the pre-hearing that did not get thoroughly canvassed.

And I have a concern if we start to hear argument today if we get through three or four intervenors if somebody then says, well, you know, I have a really good reason why I would like to have cross-examination, but the intervenors who have proceeded without the benefit of that cross-examination then may want us to go back to sort of ground zero if you will.

So on that basis I really just want to canvass the parties to ensure that my understanding from the pre-hearing was correct, that in fact there would not be any cross-examination of the Panel.

So, Mr. Morrison, I am just going to ask you for what

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2 your position would be with respect to that issue?

3 MR. MORRISON: My position with respect to that issue is  
4 quite clear, Mr. Chairman. We have no intention of  
5 putting a witness panel up. The Chair is quite correct  
6 that in special circumstances or when the demonstrated  
7 need is shown, that the courts will allow cross-  
8 examination of a deponent.

9 I do note that there is a recent Court of Appeal decision,  
10 I believe within the last month or two, and I can't give  
11 you the cite because I only know about it because one of  
12 my partners argued it, that it is a fairly onerous test.  
13 But that aside, as you will hear later this morning I  
14 hope, that it's our position that an interim rate is based  
15 on a prima facie case, a prima facie case in and of itself  
16 would indicate that it's not subject to cross-examination.

17 So it's our position that we have no intention of putting  
18 a witness forward and then it is not appropriate to have a  
19 witness cross-examined.

20 CHAIRMAN: Thank you, Mr. Morrison. I am going to canvass  
21 the other parties just to ensure in advance that that's  
22 everybody else's understanding as well. Mr. Lawson?

23 MR. LAWSON: Thank you, Mr. Chairman. No, we would not  
24 propose to do a cross-examination, but I would point out  
25 that we don't necessarily share the view that a full

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2 hearing is inappropriate before an interim hearing -- interim  
3 order can be given, but we will save that for argument  
4 later.

5 CHAIRMAN: Thank you. Mr. Hoyt?

6 MR. HOYT: No cross-examination. We are ready to make our  
7 submission.

8 CHAIRMAN: Mr. Baird?

9 MR. BAIRD: We support the standing position.

10 CHAIRMAN: Mr. Wolfe?

11 MR. WOLFE: We have no questions of the Applicant.

12 CHAIRMAN: Mr. Arsenault?

13 MR. ARSENAULT: We have no questions of the Applicant but we  
14 support the CME position.

15 CHAIRMAN: Thank you. Mr. Zed?

16 MR. ZED: No. We understood that we did not expect to  
17 cross-examine the Applicant.

18 CHAIRMAN: Mr. Peacock?

19 MR. PEACOCK: We have no questions, Mr. Chair.

20 CHAIRMAN: Mr. Theriault?

21 MR. THERIAULT: We do not expect to conduct cross-  
22 examination either.

23 CHAIRMAN: Ms. Desmond?

24 MS. DESMOND: Nothing further. Thank you.

25 CHAIRMAN: The next issue that the Board would like to deal

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with prior to commencing today's hearing deals with Section 40 of the Energy and Utilities Board Act. And I think, as the parties are aware, the Act presently reads, "The Board may, instead of making an order final in the first instance, make an interim order and reserve further directions, either for an adjourned hearing of the matter or for further application."

Now Section 40 of the Act was amended, it has received third reading, but my understanding is that this amendment has not yet received Royal Assent. In fact it may be scheduled for Royal Assent today, but at least to my knowledge, unless somebody can correct me, I don't believe that it has.

The amended Section 40 reads as follows: "40(1) The Board may, with respect to any matter before it, make an interim order where it considers it advisable to do so, and may impose such terms and conditions as it considers appropriate.

40(2) The Board may provide directions in the event that the interim order is different from the final order.

And 40(3) Section 104 of the Electricity Act does not apply to an interim order made by the Board with respect to charges, rates or tolls."

I guess what I would like to hear from each of the

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Applicant and the intervenors is their view as to which version of Section 40 governs this motion, because we have a number of potential scenarios. The amendments could become law as we are speaking, they may well have received Royal Assent this morning, I don't know, or the amendment could get Royal Assent after the hearing of the motion but before we issue a decision. Or it could actually be passed after a decision is rendered, which of course would have some impact in terms of what might happen down the road in the event that an interim rate increase was granted and it turned out that the Applicant didn't prove that the revenue requirement was as great as granted in the interim.

So, Mr. Morrison, starting with you I would like you to address that issue.

MR. MORRISON: Thank you, Mr. Chair. As I will make clear in my submission later on, I don't think it makes any difference which version of the section the Board applies. However, with respect to the issue that you specifically wish to address, Mr. Keyes will be providing comment on this.

MR. KEYES: Thank you, Mr. Chairman. The Board has raised the issue of whether this interim rate hearing should be governed by the previously worded Section 40 of the Act or

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the new amended Section 40 when it becomes law.

It is our submission that the law is clear that the amended version of the Act will govern from the moment it becomes law.

You have recited both the section -- the current section and the previous one and I don't need to do that again and the amended one that we expect will be coming shortly.

The amendment to Section 40 of the Energy and Utilities Board Act, c. E-9.18, does not contain any transitional language dealing with interim rate applications pending before the Board. Accordingly, Section 8(2) of the Interpretation Act of New Brunswick, c. I-13, governs this matter in our submission. The relevant portions of Section 8 read as follows:

"8(2) Where an enactment is repealed in whole or in part or a regulation revoked in whole or in part and other provisions are substituted therefor, at (c) it states, every proceeding taken under the enactment or regulation so repealed or revoked may be taken up and continued under and in conformity with the provisions so substituted, so far as consistently may be." At (d) it states, "The procedure established by the substituted provisions shall be followed so far as it can be adapted in the recovery or



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enforcement of penalties and forfeitures incurred and in the enforcement of rights, existing or accruing under the enactment or regulation so repealed or revoked, or in any proceedings in relation to matters that have happened before the repeal or revocation."

For the Board's information, this provision is nearly identical to those set out in other provinces, such as British Columbia and Ontario, as well as in the Federal Interpretation Act.

Furthermore it is our position that the amendment to the Act is procedural in nature and does not deal with any vested rights. In *Halagan v. British Columbia (Securities Commission)* (2002), BCCA at 288, the British Columbia Court of Appeal had an opportunity to deal with the issue of which legislation governs when an amendment is made during a proceeding. There the Rules of Court governing the preparation and filing of an Appeal Record were amended.

Mr. Justice Rowles determined that the amendments were procedural in nature and quoted Baron Wilde in *Wright v. Hale*, an 1860 decision, at 158 English Reports 94, and at page 96 he stated: "... where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before

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or after the passing of the Act."

Mr. Justice Rowles further quoted Professor Sullivan in Driedger on the Construction of Statutes, 3rd edition Toronto: Butterworths, 1994 edition, at page 543, which made reference to the above quote from Wright, and Driedger states: "Procedural legislation is about the conduct of actions. It indicates how actions will be prosecuted, proof will be made and rights will be enforced in the context of a legal proceeding. Such legislation is presumed to apply prospectively for it applies only to stages in proceedings and events that occur after its coming into force. However, as the quote from Baron Wilde indicates, it is presumed to apply immediately to on-gong proceedings, including those commenced but not completed before its coming into force."

In Halagan Mr. Justice Rowles determined that the amendment to the Rules of Court provision governing the filing of an Appeal Record, if given immediate effect, would not affect any existing or substantive rights of the parties.

In another decision re Campbell River Fibre Ltd. (2001), found at Carswell BC 3243, the British Columbia Labour Relations Board quoted from Driedger at page 552 and summarized the principles regarding temporal

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application of legislation.

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First it is presumed that legislation is not meant to have a retroactive application. The next point, it is presumed that legislation is not meant to interfere with vested rights.

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The most important of the principles however is this, it is presumed that legislation is meant to apply immediately and generally to ongoing facts unless its application would interfere with vested rights. This presumption applies to all legislation including procedural provisions, beneficial provisions and provisions designed to protect the public interest.

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It is our position, Mr. Chairman, Members of the Board, that as the amended Section 40 is strictly procedural in nature it does not affect any party's vested rights. It will have immediate affect and will apply from the moment it becomes law.

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I turn then to the questions posed by the Board. The first question was the amendments are passed or during the motion which legislation will apply. It's our position that the new legislation will apply.

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The second question posed, if the amendments are passed after the hearing of the motion but before a decision is issued on the motion, which legislation will

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apply. Again it's our submission that the new legislation will apply.

And the final scenario that the Board has asked us to consider is if the amendments are passed after the decision on the motion is issued but before the final decision on the general rate application is issued, we then would assume that the Board has dismissed our application and because of inadequacies in the existing legislation then it would be required by the Applicant under the new legislation to file or to bring a new application for an interim rate hearing.

That is our submission on the matter. Thank you very much.

MR. JOHNSTON: Mr. Keyes, if I might just ask a couple of questions about that. Your position is that this legislation is procedural only. I would like you to elaborate on why you hold that view. It may very well be correct but I would like to have a more complete understanding of your position in that regard.

And just let me say that one possible interpretation I think is that this section confers certain jurisdiction on the Board, and it is my understanding that legislation which confers jurisdiction is not considered to be procedural. I understand the contra-argument as well.

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The second point I would like you to address is that if the legislation is procedural only my understanding at this moment, and I'm going to listen to everybody and probably read a bit more, is that it applies to any step in a proceeding which is not completed at the time that the legislation takes effect. And I would like your comments on when a step in a proceeding is completed. And specifically if we were to hear all arguments on this motion prior to the new legislation receiving Royal Assent, but it were to receive Royal Assent prior to our rendering a decision, when during that timeframe would this step in the proceeding be considered to be completed?

Because I do think we are in an unusual situation here in terms of timeframes. So if you could just address those points.

MR. KEYES: If I could remember what your first point was?

MR. JOHNSTON: My first point was simply why do you say that this section is procedural only, because I think that is the test, that it is procedural only.

MR. KEYES: No question. It is our position that it doesn't confer any vested rights. Quite frankly, the position is the current legislation allows for an interim rate hearing. The amended legislation is not affecting the Applicant's ability to apply for an interim rate hearing.

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It's just clarifying procedural steps, if you can call it that. It's not affecting anyone's vested rights to apply for an interim rate hearing. It's not prohibiting anybody from applying for an interim rate hearing.

It's just, if I can for lack of a better word, clarifying the procedure to be used in applying for an interim rate hearing. No vested rights are affected by this. So it's our position that as a result of that the new legislation will apply.

So if it had taken some substantive step to prevent somebody from doing something, then you may have an argument that there was some existing or vested rights to be affected, but in this case there is nothing in the proposed legislation that would affect that. So that's the bottom line position with respect to that.

As for when a step is completed or when it would be applicable, the case law clearly states it's immediate.

So the process may start today with respect to the interim rate hearing. It won't be complete until the Board renders a decision. Argument is argument, but I would think it's throughout the period of time when if it comes an hour after the Board concludes today's hearing, the Board is bound by the amended legislation. So it's immediate is what is intended and certainly seems to be

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supported by the courts with respect to that issue.

MR. JOHNSTON: I would like to follow up with you on the first point you raised to make sure that I understand it.

If Section 40 did not exist and the legislature had enacted it, then that would not be procedural only. That would be a substantive section which grants the Board jurisdiction. However, since all it is doing is, to use your words, clarifying an existing jurisdiction, it's procedural only. Have I captured your argument?

MR. KEYES: Yes.

MR. JOHNSTON: Thank you.

CHAIRMAN: Mr. Keyes, just as a follow-up to these questions posed by the Vice-Chair, is the rendering in your opinion and the rendering of a decision a step in the proceeding?

MR. KEYES: It certainly -- rendering of a decision is a step in the proceeding, absolutely, I mean. And as I said, with respect to the third issue, if a decision has been rendered and the new legislation hasn't come into force, you have already given your decision, then the onus would be on the applicant to reapply for an interim rate based on the amended legislation. And I think that is what you have asked.

CHAIRMAN: Thank you. Any other questions from the panel?

Thank you, Mr. Keyes. Mr. Lawson?

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MR. LAWSON: Thank you, Mr. Chairman. I will first apologize for not having become a legislative expert in the less than 24 hours which we have had to prepare for this.

And in that vein I would certainly ask the Board for an opportunity after the hearing today for submissions to be made sometime early next week on this precise issue.

Because I think to have been expected to address the issue on such short notice while preparing for the balance of this hearing is a little much.

That being said, with respect to the issue of whether or not this is procedural, I think there is some legislative principal that the Legislature has to have some intent in making its change. And I submit that in this case it was not intended to be one of clarification.

But there is in fact a substantive difference between what is I think, let's say for the moment, is currently Section 40 versus what might be in the next few minutes a new Section 40(1), in that it is our view that Section 40 as it currently is drafted and in force contemplates the need for a full hearing, given the wording that there is in the section, where it says instead of making an order final in the first instance, it contemplates in our view that that contemplates a need for a hearing on the matter,



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2 not just argument as we are here or a prima facie case to be  
3 met.

4 So that being said, I guess we would say there has been  
5 indeed a substantive change rather than a procedural  
6 change by virtue of Section 40(1). And to that extent it  
7 should not -- it is in fact affecting vested interests,  
8 right. And what should govern is the Section 40 in place  
9 at the time the motion was brought.

10 CHAIRMAN: Thank you, Mr. Lawson. With respect to your  
11 request for an opportunity to essentially do a little more  
12 research and file a brief, again the panel will discuss  
13 that during a break and advise.

14 Anybody from the panel have any questions? Mr. Hoyt?  
15 Perhaps, Mr. Hoyt, I might ask you to come forward. It is  
16 difficult I think for the panel to see the parties who are  
17 making representations if they are at the back of the  
18 room.

19 MR. HOYT: Thank you, Mr. Chair. Just for information  
20 purposes, I actually had an associate in our office check  
21 with the Legislature Clerk yesterday, who was advised that  
22 this matter is on the order paper for this afternoon at  
23 4:00 o'clock for the bill to receive Royal Assent. I  
24 mean, I wouldn't take that to the bank. But that was the  
25 advice that we were given.

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2 When legislation is amended the law is clear that pending  
3 matters under the original provisions are to be decided by  
4 the designated authority based on the law as amended at  
5 the time a decision is finally rendered.

6 In the case of the Attorney General of Quebec and the  
7 National Energy Board 1991 (3) Federal Court 443 -- and I  
8 have copies of that decision if the Board would like them  
9 -- the Federal Court of Appeal affirmed the National  
10 Energy Board's decision to take into account certain  
11 amendments to the National Energy Board Act which had come  
12 into effect during an application proceeding.

13 Mr. Justice Marceau noted, and I quote, "It is true that  
14 the Board considered it was bound by the new Act. But I  
15 think it was quite right in this respect. And its  
16 reasoning seems to me to be faultless. The provisions of  
17 Bill C-23 must begin producing their effect from the  
18 moment the bill came into force."

19 In that case, on June 1st 1990 in accordance with the  
20 general principle of the immediate effect of legislation.

21 In that case the National Energy Board had taken into  
22 account amendments that had come into force after the  
23 hearing in which it had reserved its decision.

24 Although the Supreme Court of Canada, in a case reported  
25 in 1994 1 S.C.R. at 159 reversed the decision of

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2 the Federal Court of Appeal on other grounds, it agreed that  
3 the National Energy Board in making its decision was bound  
4 by the Act as amended.

5 And Enbridge Gas New Brunswick actually had a fairly  
6 similar circumstance before the Board about a year or so  
7 ago in an application by Atlantic Wallboard for a single  
8 end use franchise, where in that case amendments had been  
9 made to the Gas Distribution Act. They had received Royal  
10 Assent but had not been proclaimed at the time that the  
11 hearing was underway.

12 And as part of that application we actually made a  
13 submission. And there are a couple of other cases that I  
14 would just refer the Board to for your information.

15 There is a case of Re Wilkin, et al & White reported at  
16 1979 108 D.L.R. 3rd at 468, and secondly the case of  
17 McAllister & Canada at the Minister of Citizenship and  
18 Immigration which is reported at 1996 2 Federal Court at  
19 page 190. So those I think would also be helpful.

20 So I believe this addresses the first two scenarios the  
21 Board asked us to address.

22 With respect to the third scenario, were the amendments  
23 passed after the decision on a motion but before filing a  
24 decision on the general rate application, EGNB would  
25 request that in the event the Board decides not

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to grant the requested interim rate order that it be clear on whether its decision was based on the existing legislation.

In such a case EGNB believes, as applicant has suggested, that NB Power could re-apply once the new legislation is in force at anytime prior to the final decision on the general rate application. Those are our submissions.

CHAIRMAN: Thank you, Mr. Hoyt. I think you indicated that you did have some jurisprudence that you could circulate.

And the Board would appreciate that.

MR. HOYT: I have got copies of the two cases, the Quebec Attorney General case, the lower court and the Supreme Court of Canada decision.

The other two decisions I mentioned I would be happy to circulate those to the parties later today.

CHAIRMAN: Thank you. Perhaps if you have those two cases I will let you circulate those now and then we will hear from the other parties once that has been done.

MR. MORRISON: Mr. Chairman, we also have copies of the cases that Mr. Keyes referred to and we will circulate those and provide them to the Board at whatever time you would like.

CHAIRMAN: Perhaps you could do that now. We will just take

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2 three or four minutes and get the cases circulated.

3 (Pause)

4 CHAIRMAN: Mr. Morrison, it appears that there is a little

5 bit of stapling going on. Maybe we can get those --

6 MR. MORRISON: As you can appreciate, Mr. Chairman, some of

7 these were put together last night and we are a little

8 staple impaired this morning.

9 CHAIRMAN: I think in the interest of expediency perhaps

10 maybe after the break we can get those cases. Thank you.

11 Mr. Baird?

12 MR. BAIRD: Mr. Chairman, Members, we have no comment at

13 this time.

14 CHAIRMAN: Thank you, Mr. Baird. Mr. Wolfe?

15 MR. WOLFE: We are in agreement with CME.

16 CHAIRMAN: Than you. Mr. Arsenault?

17 MR. ARSENAULT: Mr. Chairman, we hold the position of CME

18 and Gary Lawson.

19 CHAIRMAN: Thank you. Mr. Zed?

20 MR. ZED: Thank you, Mr. Chairman. We support the position

21 very articulately set out by the Applicant and added to by

22 Mr. Hoyt, and really would have thought that that would

23 have settled. Thank you.

24 CHAIRMAN: Thank you, Mr. Zed. Mr. Peacock?

25 MR. PEACOCK: Mr. Chair, we will leave this one to the

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lawyers.

3 CHAIRMAN: Thank you, Mr. Peacock. Mr. Theriault?

4 MR. THERIAULT: Thank you, Mr. Chairman. My research  
5 indicates the position of the Applicant as set out by Mr.  
6 Keyes is the appropriate one. Thank you.

7 CHAIRMAN: Thank you. Ms. Desmond, anything to add?

8 MS. DESMOND: Yes, thank you, Mr. Chair. Having heard the  
9 submissions of the various parties, it would appear that  
10 everybody has assumed that the interim order would not be  
11 granted and from a staff level we are wondering that if in  
12 the event an interim order was granted, what if any  
13 difference would that make to the Board in terms of  
14 remedies that could be granted in the final decision given  
15 the proposed Section 40(3).

16 CHAIRMAN: Thank you, Ms. Desmond. I think that's an  
17 interesting point. And I'm going to go back to Mr. Keyes.  
18 In your submission I guess you indicated that if the Board  
19 were to turn down the application for interim relief based  
20 on the existence of -- or the wording of the existing  
21 legislation that you might reapply, but the scenario I  
22 think that Ms. Desmond puts forward is one where, for  
23 instance, that let's say that the Board were to grant the  
24 relief requested, what impact does the existing  
25 legislation or the amended legislation have on what would

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happen going forward?

For example, let's say that the interim relief was granted, the full hearing was held and the revenue requirement was not justified, and so there was an order - the Board was looking to issue some order with respect to how you would handle an overpayment if you will, which legislation would govern? I think that's the issue, is that correct, Ms. Desmond? That hasn't been addressed?

MS. DESMOND: No, I'm sorry. I meant the -- that's correct.

I just reference the wrong section. It's actually 40(2), not 40(3).

MR. KEYES: I appreciate that, Mr. Chairman. The new legislation will be the legislation in effect. That's what applies. So there won't be any effect at the end of the day, if I understood that correctly. You are asking what effect would the new legislation have on an order made possibly granting interim relief.

CHAIRMAN: Really what I am saying is what effect would the new legislation have on an order that was made under the old legislation? I mean plainly put I think that's really what we are saying.

MR. KEYES: If it is granted, it won't have any.

CHAIRMAN: No, but it has implications -- potential implications down the road under 40(2).

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MR. KEYES: The new Act -- the new amendment applies. So it doesn't give any -- it says the Board may provide direction in the event that the interim order is different from the final order. That's what it says. That's going to be what applies. Thank you.

CHAIRMAN: Thank you. Any of the other intervenors want to make any comment on what Mr. Keyes has responded with?

MR. HOYT: Mr. Chair, it's EGNB. As I understand the question, it seems to have presumed that without Section 40(2) there is no mechanism for an adjustment to be made if at the end of the final hearing the decision is different than the interim.

As we will submit shortly in our main submission, I don't think it matters. There is a Supreme Court of Canada case dealing with interim rates that makes it clear that there is jurisdiction to make such an adjustment under legislation very similar to the current wording. So I think regardless of which Act you are under that authority will rest with the Board.

CHAIRMAN: Thank you. I don't think the question presumed anything. It was just whether or not that might be an issue.

Mr. Lawson, you were looking for additional time to do some research and to file a brief. And I guess I want to



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get a sense of how much time it is that you are seeking and I guess, secondly, do you think the Board should proceed prior -- I think you are the only one that asked for an opportunity to do that. I didn't get the sense that any of the other intervenors wanted that additional time. So first of all, I guess how much time do you feel that you would need and, secondly, should we proceed with the motion that was scheduled for today prior to you having an opportunity to submit that brief?

MR. LAWSON: Mr. Chairman, thank you. I would say we could have something in by the end of the day of Monday of next week. So we are not looking for a long time. And I wouldn't have any -- in order to not be an obstructionist here -- have any problem with the matter proceeding today sort of on the understanding that it depends on what the outcome of the decision will be by this Board.

CHAIRMAN: The Board will take an adjournment at this time to consider some of the issues that have been raised. And I guess I'm not going to predict when we will be back. But we will be back as soon as possible.

Thank you.

(Recess - 10:40 a.m. to 1:15 p.m.)

CHAIRMAN: Good afternoon, everyone. Is there anybody

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present this afternoon that was not present this morning?

Okay. The first matter that the Board is going to deal with is the issue with respect to the outstanding motions related to generation and other costs.

The Board has been informed by Board Staff that with respect to the motions related to the costs of generation and other costs that the parties have agreed as follows.

Number (1) the Public Intervenor will file evidence by noon on Thursday, June 14th. Number (2) that DISCO and other parties, if they wish, will file their evidence if any by noon on Tuesday, June the 19th. Number (3) the public hearing on the motion will commence at 9:30 a.m. on Thursday, June 21st and continue on Friday, June 22nd if necessary at a location to be determined.

The Board considers that any subsequent dates related to these motions, such as when DISCO would file any additional information that might be required, should be discussed after the Board has issued its decision on these motions.

The second issue that the Board considered during the break was the issue raised by Mr. Lawson with respect to having sufficient time to prepare a submission in connection with Section 40 of the Energy and Utilities Board Act.

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2 The Board understands that Mr. Lawson would like until  
3 Monday afternoon to prepare his submission with respect to  
4 Section 40.

5 The Board also understands that other parties are prepared  
6 to proceed this afternoon with their submissions. And I  
7 think the parties should bear in mind that this room is  
8 available today, we have been told, only until 3:30 at the  
9 latest. And it is highly unlikely that all of the  
10 submissions will be completed by then.

11 In an effort to provide Mr. Lawson with some additional  
12 time, but not to delay the process unnecessarily, the  
13 Board wants to explore with the parties the possibility of  
14 adjourning this hearing until tomorrow in order to afford  
15 Mr. Lawson some additional time to make his submission.  
16 Mr. Lawson, the difficulty with allowing you until Monday  
17 to provide additional information is that it is entirely  
18 possible that the Board will have considered all of the  
19 evidence before it prior to receiving your submission.

20 If this hearing for example, and it now appears that we  
21 are contained within a single day, the Board would then  
22 immediately go into deliberations, not that we would want  
23 to preclude filing of further information that would be  
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2 helpful. It just may be that we would receive any further  
3 submissions that you had after a decision had been reached  
4 by the Board.

5 So I guess I would ask, Mr. Lawson, ask you to comment on  
6 whether or not that would be helpful, given that it is  
7 1:30 now, and as I say, at the very most we have two hours  
8 available to us today. And I feel pretty certain that we  
9 won't hear from everybody within that time frame. Would  
10 that be of any assistance to you?

11 MR. LAWSON: I would certainly do what I can to provide  
12 anything that I'm able to provide to the Board for the  
13 morning.

14 CHAIRMAN: The second part I guess are issues raised. So my  
15 question is would it be also useful to you to adjourn at  
16 this time so that you could use the afternoon in order to  
17 conduct further research, particularly in light of the  
18 fact that you would now at least have the benefit of the  
19 positions of the other parties as were enunciated here  
20 this morning?

21 MR. LAWSON: There would certainly be some benefit from  
22 that. And I think that if our time frame is tomorrow  
23 morning, I think the only way in fairness that we could do  
24 that is if it is in fact adjourned now to provide some  
25 greater opportunity to research.

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2 CHAIRMAN: And with respect to tomorrow morning, would it be  
3 helpful if we were to start later than 9:30? Or would  
4 9:30 work well for you?

5 MR. LAWSON: No. I don't think -- I think 9:30 would be the  
6 best time.

7 CHAIRMAN: Okay. I'm just going to canvass the room with  
8 respect to the possibility then of adjourning till  
9 tomorrow morning and continuing this motion at that time.  
10 Mr. Morrison?

11 MR. MORRISON: Well, I agree with you, Mr. Chair, that we  
12 are not going to get through the submissions this  
13 afternoon. I think rather than me start and perhaps not  
14 finish -- although I probably could get mine done -- I  
15 think it makes more sense to deal with them all as one  
16 piece.

17 And perhaps the legislative landscape may be different  
18 tomorrow than it is today, and which will save me some  
19 words in my submission.

20 CHAIRMAN: Thank you. Mr. Hoyt?

21 MR. HOYT: I have nothing to add. 9:30 tomorrow, that is  
22 fine.

23 CHAIRMAN: Mr. Baird?

24 MR. BAIRD: Mr. Chairman, 9:30 is fine with us.

25 CHAIRMAN: Mr. Wolfe?

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MR. WOLFE: 9:30 is fine also.

CHAIRMAN: Mr. Arsenault?

MR. ARSENAULT: 9:30 is fine, of course.

CHAIRMAN: Mr. Zed?

MR. ZED: That is fine.

CHAIRMAN: Mr. Peacock?

MR. PEACOCK: That is fine, Mr. Chair.

CHAIRMAN: Mr. Theriault?

MR. THERIAULT: That is fine.

CHAIRMAN: And Ms. Desmond?

MS. DESMOND: That is fine. Thank you.

CHAIRMAN: Well, okay. The hearing on the motion requesting interim relief then will commence tomorrow morning at 9:30. Having said that, at the opening of today's proceedings I did indicate that if the parties had any other preliminary matters, we certainly would give them an opportunity to consider those.

And again, Mr. Morrison, perhaps I will start with you.

Is there anything else on a preliminary basis that you felt the Board should deal with prior to commencing the hearing? Because it would be our intention at 9:30 to start right off with argument.

\ MR. MORRISON: I have no other preliminary matters, Mr. Chair.

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CHAIRMAN: Mr. Lawson?

MR. LAWSON: None, Mr. Chairman.

CHAIRMAN: Mr. Hoyt?

MR. HOYT: Nothing, Mr. Chair.

CHAIRMAN: Mr. Baird?

MR. BAIRD: Nothing, Mr. Chair.

CHAIRMAN: Mr. Wolfe?

MR. WOLFE: Nothing, Mr. Chair.

CHAIRMAN: Mr. Arsenault?

MR. ARSENAULT: Nothing, Mr. Chairman.

CHAIRMAN: Mr. Zed?

MR. ZED: Nothing.

CHAIRMAN: Mr. Peacock?

MR. PEACOCK: Nothing, Mr. Chair.

CHAIRMAN: And Mr. Theriault?

MR. THERIAULT: Nothing.

CHAIRMAN: All right. Well, then the Board will adjourn

this matter until tomorrow morning at 9:30 and will

commence argument at that time.

And Mr. Morrison, I understand translation services will  
be available at that time?

MR. MORRISON: Yes, Mr. Chair.

CHAIRMAN: Thank you very much.

(Adjourned)

Certified to be a true transcript of the proceedings of this  
hearing as recorded by me, to the best of my ability.

Reporter