New Brunswick Board of Commissioners of Public Utilities

In the Matter of a Hearing to review Section 2.1 of the Open Access Transmission Tariff (OATT) approved by the Board on June 19, 2003 and to Review the Board's "Open Season" direction contained in its March 13, 2003 Decision with respect to the said Tariff

Delta Hotel, Saint John, N.B.
November 10th 2003, 11:00 a.m.

CHAIRMAN: David C. Nicholson, Q.C.

COMMISSIONERS: J. Cowan-McGuigan
Ken F. Sollows
Robert Richardson
Leon C. Bremner

BOARD COUNSEL: Peter MacNutt, Q.C.

BOARD SECRETARY: Lorraine L,gŠre

.....

CHAIRMAN: Good morning, ladies and gentlemen. This is a continuation of the pre-hearing conference in reference to

our review of the "Open Season" direction.

And I will ask for appearances, first of all for the applicant?

MR. MORRISON: Thank you, Mr. Chairman and members of the Board. Terry Morrison appearing on behalf of the applicant. With me is Ken Little and Wayne Snowdon and Board staff Marg Tracy, Brent Lockhart and Linda Pyne.

CHAIRMAN: Good. Thank you, Mr. Morrison. And the Attorney

General?

MR. ANDERSON: William Anderson on behalf of the Attorney General, as a public intervenor.

CHAIRMAN: Pardon me?

MR. ANDERSON: As a public intervenor, yes.

CHAIRMAN: Thank you. So does that mean we are going to get something to add to our budget? Thanks, Mr. Anderson.

MR. ANDERSON: My pleasure.

CHAIRMAN: Bayside Power?

MR. MCELMAN: Mark McElman on behalf of Bayside Power.

CHAIRMAN: And what was the last name?

MR. MCELMAN: McElman.

CHAIRMAN: Thank you. Emera?

MR. ZED: Peter Zed and Serena Newman appearing on behalf of Emera. And I'm joined by Don Jessom and Jennifer Feron from Emera.

CHAIRMAN: Thank you. J.D. Irving, Limited?

MR. MCCARTHY: Kevin McCarthy appearing on behalf of J.D. Irving.

CHAIRMAN: Thank you, Mr. McCarthy. Maritime Electric?

Am I correct, Mr. Zed, that you had passed along some messages to Maritime Electric the last time? Or am I -- my memory faulty there?

MR. ZED: It was the Province of Prince Edward Island that

we passed the message along to. And I think we were since advised that they had contacted the Board.

We asked them to either tell us what they were doing or contact the Board directly. And they advised that they would contact the Board directly.

CHAIRMAN: All right. And they have, Mr. Zed.

So Mme. Secretary, are you able to tell me whether Maritime Electric was represented here the last time?

MRS. LEGERE: I believe they were.

CHAIRMAN: Okay. Well, we will -- again just to substantiate and reemphasize what I said at that time, if they are not going to appear and participate fully in this hearing, they won't be a formal intervenor. Anyway, they are not here today.

Nova Scotia Power Inc.?

MR. ZED: Peter Zed and Serena Newman, Mr. Chair.

CHAIRMAN: Thank you. And the Municipal Utilities?

MR. GORMAN: Mr. Chairman and members of the Board, Raymond Gorman and Dana Young appearing on behalf of the Municipal Utilities.

CHAIRMAN: Thank you, Mr. Gorman. WPS Energy Services?

MR. MCELMAN: Mark McElman again for WPS.

CHAIRMAN: Okay. Board Counsel?

MR. MACNUTT: Peter MacNutt for the Board, Mr. Chairman. I

have with me Doug Goss, Gaye Drescher and Isabel Fagan.

CHAIRMAN: Thank you. Now the informal intervenors, as you have just herd me indicate, Prince Edward Island Energy Corporation has indicated they wish to be an informal intervenor.

Also the Canadian Manufacturers & Exporters, New Brunswick Division has done the same. And Hydro Quebec and HQ Energy Marketing Inc. were from the beginning informal intervenors.

I believe the Secretary has passed out, is that correct, a tentative schedule?

MRS. LEGERE: I put it on the back table.

CHAIRMAN: All right. That is put on the back table. I presume everybody has received that. There are a number of housekeeping items that I want to cover before we get to the meat.

And I have talked about the intervenors. We will be marking the exhibits prior to the end of this pre-hearing conference.

Specifically in reference to the evidence that has been filed to this date by the applicant NB Power, I would suggest, subject to anything you might have to say, Mr. Morrison, that all be put in one volume and given one exhibit number as of today's date.

So that would include the addendum and the affidavit that was filed on Friday, as well as what was originally filed.

MR. MORRISON: We can do that, Mr. Chairman.

CHAIRMAN: But here is a list. And Mr. MacNutt has provided me with a tentative list of exhibits. And perhaps he can share that with you, Mr. Morrison and the other parties during our break.

Board staff has indicated it would be helpful if included in that exhibit marking would be a copy of the New Brunswick Power annual report of the 2002/2003 year, so they would be given a proper exhibit number in this hearing.

I understand that you have brought some copies with you, Mr. Morrison?

MR. MORRISON: That is correct, Mr. Chairman.

CHAIRMAN: Now it is my understanding through Board counsel -- it was a matter I think raised by you, Mr. Zed, in reference to evidence in a previous hearing as to whether or not it be used here.

I won't attempt to state your position. I will let you do that yourself.

MR. ZED: I have one of several alternative motions I would like to make. And while that may take some time -- and I

guess short of doing that now, what I will say is this.

My concern is really to understand when we -- if this hearing proceeds, what evidence if any from the previous hearing will constitute evidence on this hearing. And I know it is simple to say none or all.

But I guess my impression in talking with Mr. MacNutt -- and I guess I may be -- it is awhile since we had the discussion. I just have some concern that it be -- that it be set out with some particularity.

For example, the Market Design Committee Report, is that in or is it out? I mean, it is certainly a relevant piece of evidence in our view. And if we are starting from scratch and we know that, then we can prepare our own evidence accordingly.

So I just have that overall concern that there be some attempt to define what if anything from the previous hearing will be read into the record as part of this hearing.

CHAIRMAN: And you are going to include that in your barrage of motions that you are proposing to make. Is that what I hear you say?

MR. ZED: Well, no. I think my motions, to be fair, are really going to deal with the issue of whether or not we should be proceeding in any event. And once the Board has

ruled on that, I guess it might be appropriate -- I'm sorry.

My issue of evidence from the prior hearing really is only so everybody understands that this is -- if it is a completely new hearing, that nothing from the previous hearing is in evidence. If that is the case, that is fine. We can live with that.

If we are going to pick and choose then it becomes a very difficult process for us to follow. And it is very difficult for us to respond in advance unless we know what evidence from the previous hearing is going to be considered by the Board.

CHAIRMAN: All right. Frankly, Mr. Zed, in the past the Board's approach is that of an administrative tribunal and not a court of law.

And for instance we are a tribunal with a certain amount of expertise. And what we have learned or not learned from previous hearings, et cetera is part of our knowledge base.

And frankly in the past we have always approached it on the basis that if there is anything of relevance then it should come in during the hearing or be put in during the hearing, so that it can be tested.

But I don't -- you know, I will defer to you giving us

your full motions that you talk about. But we certainly don't want to limit anything that the Board might refer to halfway, three-quarters of the way through.

We can't anticipate what might be of benefit in this whole process today, contrary to what happens in a court of law. So we want to keep the options open. Go ahead.

MR. ZED: Well, and I think, you know, that is fine. So what I hear you saying is there isn't any evidence from the previous hearing that is automatically in unless it is reintroduced, at which point in time we will have an opportunity to cross examine or rebut or whatever appears to be necessary given the circumstances.

In other words this Board is not going behind closed doors and writing a decision based upon evidence that was filed the first time around, which was not the subject of comment or testimony at this hearing.

That would be our biggest concern, if the Board were going to take into consideration in your deliberations evidence that was previously filed on which there was no comment or opportunity to comment at this hearing. That is our only concern.

I will recognize your expertise and your previous knowledge come into play. But if there is something that the Board feels is relevant -- we have no objection during

the course of the hearing so long as it is referenced and we have an opportunity to deal with it either in evidence or summation.

CHAIRMAN: Well, I think as far as the parties to this proceeding are concerned, that is the law, that it has to be before this proceeding. But that is not applicable to what I remember about a hearing in 0.42 or something or other.

Anyway we will -- I want to hear from all parties in reference to that. But certainly the rule of thumb always has been is that if you want to refer back to something that has come before this Board previously, and perhaps save time by doing it.

But then again the applicant might say well, yes, but you are quoting out of context, or that was prepared for this purpose or whatever else.

So we want to get it out in the open hearing process, but certainly refer back, if it can save time and effort and that sort of thing. But -- yes, go ahead, Mr. Zed.

MR. ZED: Sorry. My motion wasn't by way of an objection. It was just really for clarification to have this discussion.

CHAIRMAN: Yes.

MR. ZED: So we all know -- so there is no mistake about how

we are proceeding, that is all.

CHAIRMAN: All right. We will go around the room after. That was just a heads-up that Mr. MacNutt had given me.

I do have a question at this time of the applicant. In previous hearings you have had a slide show at the commencement of your evidence. Is that your intention in reference to this hearing?

MR. MORRISON: It is. It will be brief. But it is, Mr. Chairman.

CHAIRMAN: You are going to make hard copies of the slide presentation available to the parties two weeks in advance of the date of the hearing?

MR. MORRISON: That would be fine, Mr. Chairman. Yes.

CHAIRMAN: And if there is any qualms that any of the parties have with proceeding on that basis, let me know.

None of the informal intervenors are present today. And it is quite some time away that the hearing will occur now.

But as you can see by that revised schedule, so that we will find out from them in between now and the hearing time if they actually have oral submissions they wish to make or if they just want to hand in a written brief to us.

Now Board staff approached you, Mr. Morrison, in

reference to clearing up our perhaps misreading or misunderstanding of what capacity on the MEPCO tie line is actually subject to firm contracts on a long-term basis.

And don't get hung up on the way I describe it. But you know what Mr. Goss approached the applicant about.

Are you able to provide us with a clarification of that now?

MR. MORRISON: Yes, Mr. Chairman.

CHAIRMAN: Go ahead, Mr. Morrison.

MR. MORRISON: I guess I will break it down by those energy contracts that are in existence. There is an energy contract with Select Energy for 224 megawatts. There is an energy contract with respect to Bayside with West Coast Energy for 260 megawatts. And that totals 484 megawatts.

Now there is some interrelation between these two contracts, Mr. Chairman. But it is NB Power's position that those two energy contracts obligate NB Power either primarily or contingently for 484 megawatts.

There is a wheeling contract with AVEC for 28 megawatts which totals 512 megawatts which leaves 188 megawatts as what we would see being up for the "Open Season" on the 700-megawatt MEPCO interface.

CHAIRMAN: So there is 188 megawatts that are in play here, shall I say?

MR. MORRISON: That is correct.

CHAIRMAN: Does the applicant have any problem with you filing with the Board in confidence those contracts?

MR. MORRISON: In confidence no problem, Mr. Chairman.

CHAIRMAN: Well, I'm not asking for them now. I just wanted to know what -- I'm thinking ahead in reference to Mr. Easson, if we do go the route of having him in to check figures and that sort of thing, and trying to save him as much as we can so that it won't slow down the hearing process, that is all.

Now Mr. Goss indicated to you therefore that since we know that it is 188 megawatts that is in play here, that the Board wants you to restate the income statement and prediction of surplus -- or sorry, profit from export sales on the basis of 188 megawatts that is in play.

In other words we are looking at the auction, the "Open Season". And if that is all that is in play that is all that should be in question.

MR. MORRISON: I had a discussion with Mr. Goss this morning on that. And I think we understand the evidence that he is looking for. And I think we can have that ready in a week.

CHAIRMAN: Within a week?

MR. MORRISON: Yes.

CHAIRMAN: What day is within a week?

MR. MORRISON: I believe that is on the tentative schedule which would be November 18th, which under the tentative schedule would be the date by which we would have to file any additional evidence. It is a week from tomorrow I believe.

CHAIRMAN: Do any of the other parties here have any questions about what it is we are asking NB Power to file? Mr. Zed?

MR. ZED: I don't have any question about what you are asking to file. But I guess I would question the Board that I assume that we will have an opportunity at the appropriate time to question whether or not those contracts are in fact backed up by third party contracts.

CHAIRMAN: Yes.

MR. ZED: Thank you.

CHAIRMAN: In addition to that as a result of the Board's review of the evidence that was filed up to last Friday we would like NB Power to file additional evidence that will show the specific amounts by relevant category of expense that had been added to the marginal costs in order to arrive at the full costs.

And in a layman's way of saying this, let me re-emphasize it's NB Power's position as I understand it that

the calculation of profit from export sales should be based upon the marginal costs, and you have provided the figures on that and what is included.

Then the Board has asked for fully allocated costs and there would be some who could argue that it's somewhere between those two figures that the actual expenses or costs of production of the electricity that is sold into the export market should be calculated on. And we just simply want to have it on the record the costs which are added to the incremental costs by specific category of costs that arise finally with the full allocated costs.

So if there is argument then we will have that on the record as to what should be used. Mr. Morrison?

MR. MORRISON: I think we understand what the Board is looking for, Mr. Chairman. And our only concern is that these are on an aggregate basis and not on a generator specific basis.

For example, the OM&A component for example, how that's allocated would be the OM&A on a global figure as opposed to the OM&A on Coleson Cove and the OM&A on -- although you may have some of that information already as a result of the ancillary services evidence, but my understanding in speaking with Mr. Goss this morning is that this would be aggregate numbers.

CHAIRMAN: Certainly from the Board's perspective, we have no problem with that and that's the kind of thing we would have Mr. Easson check on, the component figures that make up the aggregate when he goes in and does a review.

Any of the other parties have any questions about that additional evidence?

MR. ZED: For now we are certainly okay with that approach, Mr. Chairman.

CHAIRMAN: Okay. Those are all the specific housekeeping items that I had on my list. Are there any comments that any of the parties have to make in reference to the additional evidence that has been filed and the evidence we have just required? Mr. Zed?

MR. ZED: Mr. Chairman, in this -- and rather than be the subject of an IR, and that may be the appropriate way to deal with it, but just in case it raises issues with the applicant, I think it perhaps better if I raise it now.

And that is that the financial information supplied by the applicant is for a three year period. And the contracts that they are alleging are held for the benefit of third parties have considerably longer periods of time. And I'm wondering if it wouldn't be appropriate for the applicant to supply that information for the length of the contracts that they are seeking to service.

Because that's certainly a question we will ask on an IR and rather than ask it and have to come back on a motion, perhaps it's staring us in the face right now, I wonder if we could deal with that issue.

CHAIRMAN: Mr. Morrison?

MR. MORRISON: Mr. Chairman, I understand where Mr. Zed is coming from. But I think from a planning horizon point of view, NB Power doesn't make forecasts that would go out that far. As you know, a forecast's reliability will diminish over time the further out you go.

Maybe Mr. Little can address this a little bit better than I can.

MR. LITTLE: Yes. The reason we selected three years is that is -- is because that is the business planning horizon for our companies -- our new companies. The -- in the Coleson hearing for that particular project we did do longer term runs. So we may be able to address that question.

We certainly don't normally run 20-year PROMOD runs any more.

CHAIRMAN: Whatever happened to the five year plan?

MR. LITTLE: The five year plan is now a three year plan.

CHAIRMAN: That doesn't tell me what happened to it.

MR. LITTLE: Well there is one but the last one is now

several years old. But in our new faster moving world I think three years will become our norm.

Anyway, we understand Mr. Zed's question. I don't know today whether such runs exist but we will have to take that back and see what we can do with it.

CHAIRMAN: I guess it's going to be the subject of an IR, Mr. Zed.

MR. ZED: Yes, Mr. Chairman. You know, our point simply is that the applicant appears to be alleging loss of benefit over a certain period of time and I guess that period of time would relate I would think to certain opportunities that they would forego if the Board's original order were to be affirmed, and there are costs associated with those benefits. And I guess we would like to see the full picture. That's all.

CHAIRMAN: Okay. Understood. All right. Before we get down to the motions that you have indicated to Board counsel you wish to make at this time, Mr. Zed, are there any other matters that the -- any of either the applicant or the intervenors have that they wish to bring before us now. No? Okay. Mr. Zed, go ahead, sir.

MR. ZED: Thank you. The issues that I wish to deal with are really jurisdictional in nature. And before beginning my argument on point, I would like to say to the Board

that we are taking the following position not for any technical reason. We are not taking this for any reason other than we feel very strongly that this re-hearing, if allowed to go forward unfettered, severely undermines the credibility of the regulatory process.

We are confident that if the hearing does go forward we can marshall sufficient evidence to convince this Board to reaffirm its original decision.

We are not ducking our responsibility or the cost of so doing.

But we also wish to submit to the Board that we have looked at these issues very carefully and are of the view that the Board does not have the jurisdiction to proceed, and if the Board does assume jurisdiction, we feel there is a very compelling reason why the hearing should be restricted.

I will deal with these matters, first dealing with the simplest of the issues and that is the issue of NB Power's application.

NB Power has brought a request under Section 55 of the Act to re-open and re-hear the original application in part. It is a general principal of common law that a statutory tribunal has no authority to re-open, re-hear or revise a final decision.

After having reached a decision in the matter that is before it in accordance with its enabling statute, the tribunal is considered to have exercised its power and is, in the words of a Latin scholar, functus officio. You have no further power to proceed.

Courts have allowed three general exceptions. The first exception is when there is a clerical error. There is no allegation of that clerical error being present here. If there is statutory authority. There is no statutory authority here. Third, is there a breach of natural justice? That is a situation that normally occurs when one of two things happens and that -- one of those two things is that a party who should have been given notice of the original hearing to participate did not receive the notice or for some unforeseen reason was unable to participate. Or secondly, that there is now some evidence available that was not available at the time that would cause the Board's original decision to constitute a miscarriage of justice. There is no new evidence. It's really the same evidence recycled and augmented.

NB Power's option is simple. Under the legislation if they were unhappy with the decision they could appeal. There is a very clear right of appeal. That appeal was

not taken. And it was not taken for good reason. Because that appeal is really an appeal by way of judicial review which means that NB Power has reviewed the case, the Board has not made any error in its original decision. Therefore they decided quite rightly not to appeal.

What they are instead doing is going under Section 55 which really says that they can ask the Board to review a tariff. Well surely there has to be some practical limit on that. I mean if they don't like a decision absent a statutory direction or authorization to do so they cannot come back on a weekly basis and say, okay, would you review the tariff you have now set, would you review the tariff you have now set, would you review the tariff? It just doesn't make sense. The statute doesn't allow it and common law doesn't allow it. The application by NB Power should clearly be denied.

I move on now to the application by the government in the nature of their order-in-council. Their order-in-council was issued presumably in furtherance of the statutory language contained in 61.1. 61.1 of the Act in part 3 says, the Lieutenant-Governor-in-Council may request the Board to review all or any portion of a tariff filed with the Board in respect of the provision of transmission services or ancillary services.

And it goes on to say that once they make this request the Board has no authority but to go to 22, and 22 compels the Board to have a hearing. The hearing procedure is governed merely by the Board. I mean the Board is unfettered pretty much in how you can conduct a hearing and I don't think my friend, counsel for the applicant would take issue with that.

But it's very interesting that the wording in part 3 talks about reviewing a tariff. If you look at part 2, 46.1, it goes on to say that the Lieutenant-Governor-in-Council may within 30 days after the filing of an order or decision of the Board under this part on its own motion without any petition or application, modify, vary or reverse an order or decision made by the Board under this part.

Now it talks specifically -- specifically about an order or decision, whereas part 3 talks about very specifically a tariff. 61.1 in fact contains virtually the same language that is contained in 55. 55 allows the applicant to go to the Board and get a tariff approved. Section 61 allows the Lieutenant-Governor-in-Council to ask the Board to look into a tariff.

Now you say, what other purpose could that be unless it's to constitute a review of an order or decision? Well

in the first place I would respectfully remind the Board that the statutory language must be given its plain and natural meaning, especially when much more specific language is contained in an earlier provision. When in 46 they meant decision or order, they said decision or order. How could we now say a mere nine sections or ten, 15 sections later, that they are using different language to mean the same thing? Why would they use the same language?

Section 61 in our respectful opinion is meant to operate in a situation where there is a tariff in place that has been approved by the Board, in operation for a certain period of time. And perhaps during that period of time market conditions have changed dramatically, regulatory regime has changed dramatically, something dramatic has happened that allows for the government to say as the final arbiter of public interest, we will step in and ask the Board to review that tariff.

NB Power hasn't done it and there may be -- don't forget there is a separation, sometimes we wonder how much perhaps, but there is a separation between NB Power and government. And it could well be that NB Power is operating under a tariff that they are quite happy with, for whatever business reason, but that the government has

decided doesn't work in the public interest. Not a Board order or decision. The government was an intervenor in the last hearing, just as they are an intervenor now.

They had an opportunity there and they will have an opportunity perhaps after one or two years, just as NB Power will have an opportunity under the legislation to go back to the Board and say, things have changed, there is a reason why we should re-examine that tariff. But not now.

If we read the words, the plain words, they say the way NB Power wishes us to read those words, they say that the government has an unfettered right to ask for a review of the decision. There is no limitation on that right. In other statutes, notably the Municipalities Act in Ontario, there is similar wording and it says after the re-hearing there is no further right for the government to ask for a further hearing.

There is no such fettering of any kind of discretion in this particular statue. So if you take it just at its plain wording, presumably the government can say to this Board at the cost of thousands, if not millions, of dollars to the players and their business units, we don't like that decision, go back and review it again, review it a third time, and review it a fourth time, and review it a fifth time.

And in response to the objection from the chair, you know, I would anticipate that no, just a minute, there is a period of time that we can make rules, I would say that the time to make the rules is now. If the government had intended this Board to review a decision or order of this Board, it could have said so. It has said so elsewhere. It did not say so here.

I won't belabour the point beyond that, Mr. Chairman, except to say this. If despite the authorities to the contrary this Board does proceed, then I think there is a real interest in this Board in limiting very severely the scope of this hearing to whatever narrow issues are before it and the limiting that to as the common law would dictate evidence that was not available prior. The only evidence we have before us, with all due respect, is more of the same. They didn't give us enough detail before. They are giving us more detail now. But all of that evidence was available the first time around.

If in response to the Board's request for evidence they supply the evidence and still don't convince this Board, as I am sure they will not, that they are right and we are wrong, are we going to be back here a third time or a forth time? And for every month that we are here, other parties are suffering economic harm as well as incurring

significant costs.

So in conclusion I would just say that we bring these motion not out of any disrespect to the Board's authority but moreover in respect for the regulatory process and what we would suggest is the very unclear mandate of this Board to proceed with this hearing.

Thank you very much.

CHAIRMAN: Thank you, Mr. Zed.

MR. MORRISON: Thank you, Mr. Chairman. I will deal first with Mr. Zed's comments or motion with respect to jurisdiction under Section 55. With all due respect to Mr. Zed, his argument is premised on a conclusion which just is not correct. His argument says that when NB Power filed the letter application, as it is called, on June 29th, that it requested a rehearing of the Board's decision.

Well if you take a look at the letter application, there is nothing in that letter that requests a rehearing of the previous decision. What it requests is NB Power hereby requests approval to change the Open Access Transmission Tariff. And under Section 55 it has every right to do that.

What is the purpose of Section 55? There is only two components that trigger jurisdiction under Section 55.

There has to be a tariff in place. And there was a tariff in place as of June 19th. And NB Power has to make a request to change that tariff.

Quite frankly, Mr. Chairman and members of the Board, I don't understand Mr. Zed's argument. If he is saying that because we are changing a tariff, you are actually asking for a change of your decision. Well, the tariff is approved by a decision. I think it is really a question of semantics. And that is really all I have to say about the Section 55 argument, is that Mr. Zed's comments are founded on an incorrect proposition.

Where we really are is -- the letter application aside, where we really are is under Section 61. And again, listening to Mr. Zed this morning, he says that the order-in-council which was issued by the Lieutenant-Governor-in-Council, asks this Board to review its decision.

Again with respect to Mr. Zed, that simply is not correct. If you look at the order-in-council, it says under paragraph (a) (i), "We request the Board of Commissioners of Public Utilities to review Section 2.1 of the Open Access Transmission Tariff." So where does jurisdiction arise? How does jurisdiction arise under Section 61?

I would suggest to you that there are two criteria that must be met to establish jurisdiction in this Board. There must be a tariff that has been filed with the Board dealing with either transmission or ancillary services. And there must be a request from the Lieutenant-Governor-in-Council to review all or any portion of that tariff.

Now are these two criteria met? With respect to the first one, there is a tariff that has been filed with this Board, the June 19th tariff. Plain and simple, first criteria is satisfied.

Second criteria, has there been a request to review the tariff or a portion thereof? There has been a request by the Lieutenant-Governor-in-Council to review a portion of the tariff, namely Section 2.1 of the tariff. And this is contained in the order-in-council that is dated August 19th.

It is my submission, Mr. Chairman and members of the Board that -- and I hate to sound trite about it but this is a no-brainer. The two criteria are quite clear. And the two criteria have been met.

What happens when those two criteria are met? Under Section 61 (2) the Board has no choice but to order NB Power to file an application, which it has, and then to proceed under the normal hearing process that you always

proceed under, which is under Section 22.

So in submission on those two points, Mr. Chairman, to me there is no question but that this Board has jurisdiction under Section 61 to hear this matter.

Now there is one aspect of the order-in-council, and I will concede this much. Under paragraph (a) (2), the order-in-council did go on -- and it could be argued that it asked this Board to review a portion of its decision, which was the timing of the Open Season.

You will recall that I believe your March decision said that the Open Season shall be held before -- in the last quarter of this year.

Well, that is just a practical matter. I would submit that -- well, first of all, if the Board were to proceed with the Open Season before it had a chance to determine the public interest in this matter, it would just make no practical sense.

First of all it would be a moot point because the reservations would be gone. The capacity would be gone. So there would be no point in even having this hearing. Secondly you could presumably be putting the public interest in jeopardy before determining whether there is any risk to the public interest.

So while the order-in-council probably went a little

too far in asking you to review that decision, it is my submission that you would have the inherent jurisdiction, as you have control over your own processes and jurisdiction, to order a stay of the Open Season pending a final determination of this matter. It only makes sense. In short I don't think anything turns on it.

Now I am concerned with Mr. Zed's comments and motion to fetter the evidence that this Board will hear at this hearing. He suggested in his letter on Thursday and again this morning that only evidence such as new evidence or which wasn't available at the time of the original hearing should be heard at this hearing.

I think it is important to remember how this issue came up in the original hearing. It was first raised when Emera filed its intervenor evidence. That evidence was filed after NB Power had completed its evidence and the Interrogatories I believe had all been responded to.

And the real meat of that issue didn't really come out before this Board until the Emera witnesses took the stand and were subject to cross-examination.

And the issue that was before the Board or how that issue was presented by Emera dealt with the requirements -- compliance requirements of FERC. And that is what Mr. Connors' evidence turned on or emphasized.

The issue of the public interest with respect to the impact on ratepayers wasn't really a matter in issue in the previous hearing. So that evidence could not reasonably have been anticipated by NB Power at that time.

Indeed I think it would be unreasonable to suggest that in the middle of the transmission tariff hearing that NB Power could adjourn after hearing Mr. Connors' evidence, try to find a FERC expert witness and present that additional evidence to this Board.

We take the position that the FERC evidence, if you will, or the interpretation that the Emera witnesses put on the FERC requirements was incorrect. And obviously we would want to have an opportunity to make sure that the correct -- what we believe is the correct evidence is before this Board.

Finally, Mr. Chairman, this Board has an overriding duty to protect the public interest. In discharging that duty the Board must understand the impact on New Brunswick ratepayers should NB Power lose transmission capacity on the MEPCO interface. It is my submission that that duty can only be discharged by considering all evidence filed by NB Power in this matter.

Res judicata does not apply to administrative body or administrative tribunal such as this Board. You are not

bound by your March decision. And more importantly the issues that were decided in that March decision are not now beyond reconsideration.

You may revisit those issues as you see fit and consider whatever relevant evidence you believe you must to decide the matters before you.

So it is my submission that any attempt to fetter or constrict or restrict the evidence that this Board should hear, especially in considering an important and overriding issue as the public interest should be resisted.

And those are my submissions, Mr. Chairman.

CHAIRMAN: Thank you, Mr. Morrison. Mr. Anderson on behalf of the Agent for the Attorney General, which is a different role than representing the government.

MR. ANDERSON: Yes.

CHAIRMAN: Right.

MR. ANDERSON: And I appreciate that.

CHAIRMAN: Mr. Anderson, go ahead.

MR. ANDERSON: Thank you. And so my remarks will be from a perspective of my view of the public interest, and not here to advocate either for the position of the Province of New Brunswick or any department of government.

My comments will be restricted to discussion

essentially of the question of public interest. And I think that when Mr. Zed said he was here not for a technical reason but to protect the credibility of the Board and the regulatory process, it is that comment and that argument that I wish to address.

From the perspective of the public interest intervenor, I can say nothing more than that the public interest must best be served by ensuring that all relevant information is before the Board in order that it make a determination on any issue.

And for Mr. Zed to argue that the Board should not hear evidence which may be pertinent or germane to the question before -- on the tariff, for the Board to say, in the exercise of its discretion, no, we will not hear the evidence, we will not hear the information, that would be more to -- that would do more to underline the credibility of the Board.

The Board, as I read the statute, has an unfettered discretion to approve or not approve tariffs. NB Power has filed a tariff. And the question is whether the Board will approve that tariff. And determining whether to approve that new tariff, the Board is the master of its own process. It can have a hearing. It can seek to determine what information is relevant to that question,

and to proceed as it has done to date. That in my view is the best manner in which to protect the public interest.

Indeed Mr. Zed's argument would be to fetter the Board's discretion as to the manner in which it is going to deal with the tariff once filed and to construct some kind of limit in the manner in which the Board may respond.

Is the Board to adopt a policy that it will not examine a tariff because it has within three months or 16 months or seven months looked at the same issue?

I think that the argument, that kind of line of argument of Mr. Zed, is flawed and it indeed undermines the power of the Board and the manner in which the Board should consider each case.

The Board should approach each case and each fact situation by looking at the information which may be available and exercising its unfettered discretion. I believe you can proceed to make whatever determination to which, to take whatever process you wish to determine whether it will approve the new rate application by NB Power.

And indeed that is what I consider to be the issue. There is a rate application by NB Power on July 29th by way of its letter. And I believe the Board is entitled to

proceed in the manner which will best protect the public interest by hearing all relevant information to make that determination.

That is the position of the public intervenor.

CHAIRMAN: Thank you, Mr. Anderson. Bayside Power?

MR. MCELMAN: Bayside Power has no representations to make on the issue.

CHAIRMAN: Thank you. How about WPS Energy Services? We might as well lump you in there.

MR. MCELMAN: None for WPS either.

CHAIRMAN: Thank you. J.D. Irving is not represented nor is Maritime -- I beg your pardon. J.D. Irving is represented. Mr. McCarthy?

MR. MCCARTHY: We have no representations to make, Mr. Chairman. Thank you.

CHAIRMAN: Thank you, sir. Maritime Electric is the one who is not represented.

And Mr. Gorman, the Municipal Utilities?

MR. GORMAN: Mr. Chairman and members of the Board, the Municipal Utilities believe that it is in the public interest to resolve this issue before and not after the open season comes into effect, that any evidence that is heard should not be restricted to new evidence but that all relevant evidence should be considered by the Board.

Mr. Zed, I guess in putting forth his interpretation of Section 61, says that there has to be a tariff in place. And he suggests that a dramatic change must have taken place.

But quite frankly the plain and natural language of the legislation does not say that. It is our belief that Section 61 does confer jurisdiction on this Board to proceed. And we would urge the Board to do so.

Thank you.

CHAIRMAN: Thank you, Mr. Gorman.

Mr. Zed, do you have anything -- any comments on the other parties?

MR. ZED: Yes, I do, sir. First I would say that I never at any time said the credibility of the Board is in issue. It is not in issue. The credibility of the process is.

The second point I would like to make is that my learned friend Mr. Morrison misstates Emera's position with respect to the FERC evidence.

I think a review of the transcript will simply show that Mr. Morrison put a number of excerpts to our witnesses from FERC orders and asked what they thought they said or meant.

And I think our witnesses answered those questions truthfully. And that was the extent of the quote, unquote

"FERC evidence" tendered by Emera.

I will say -- and I will leave you with this last point. In a case -- and it is a case that was decided by the Federal Court of Appeal.

It is called the "Director of Investigation and Research and Air Canada and the Consumers' Association of Canada as Interveners" which stands for the clear, uncontradicted, unamended proposition that a statutory tribunal, when faced with such a request for a re-hearing of a tariff by the applicant or a re-hearing of a tariff by the Lieutenant-Governor-in-Council must have evidence of a change in circumstance before proceeding.

The law is clear. Boards such as yours have not, should not, cannot proceed absent a change in regulatory framework, a change in market conditions.

And I will leave the Board and my learned friends with a copy of this case.

Thank you.

CHAIRMAN: The Federal Court of Appeal is always a very verbose court. They could learn something from Lord Denning, I will tell you.

Mr. Zed, just thinking back to one of your concerns in reference to the hearing, and not having evidence from previous hearings sprung upon you, I must comment, it

would have been easier if we had been given a copy of this case to review prior to the summation here. Or did you just find it?

MR. ZED: No. I am sorry. I did have intention of raising the issue two weeks ago. And then sorry, the hearing got cut short. So I apologize for that.

CHAIRMAN: Thank you. I think what the Board would intend to do is to break until 1:30. And that will give a bit of an opportunity for us all to look at this particular case. And if I remember correctly, there were some conversations that -- or sorry, that there was some information that you could approach Mr. MacNutt on. I believe that was the exhibit list during this time. So that when we come back after lunch if you have any problems with the list that Mr. MacNutt has passed onto the Board, then you can bring it up. Otherwise, the Board will go ahead and mark the exhibits in accordance with Mr. MacNutt's tentative list.

And he wants the microphone. Go ahead, sir?

MR. MACNUTT: Mr. Chairman, I believe you also mentioned that you were going to canvass the participants with respect to the matter of the bringing forth of evidence in previous hearings and making it a part of this hearing.

CHAIRMAN: I think I heard all that. We are doing this again. Bring that mic' in a little closer, Mr. MacNutt?

Great.

MR. MACNUTT: Thank you, Mr. Chairman.

CHAIRMAN: Well I will ask after the break at lunchtime, I will ask for the parties again to -- I would like it -- I think it's -- I guess where the Board, this panel is coming from, from what I have spoken to my fellow Commissioners, is that we want to have whatever is the best evidence to come before us. And if that comes from a previous hearing, fine. But also we think that we don't want any ambushes. And so that we probably should have some ruling that it must be brought out in the actual open hearing, and not saved to for summation.

But anyway we will address that after lunch. So we will come back at 1:30.

(Recess - 12:00 p.m. - 1:30 p.m.)

CHAIRMAN: When we broke at lunchtime, Mr. Zed shared with us a Federal Court of Appeal case. And I just wonder if any of the parties have any comments they wish to make on that.

Mr. Morrison?

MR. MORRISON: Yes, Mr. Chairman. I have read the case. And Mr. Zed is correct. It stands for the proposition that the tribunal shouldn't change an order unless there is some change in circumstances.

But it doesn't have the broad application that I think Mr. Zed suggests. In that case it was dealing with a consent order and a variance of a consent order under Section 106 of the Competition Act.

And the very legislation upon which the order was based basically said that the tribunal -- it can change an order if the tribunal finds that (a) the circumstances that led to the making of the order have changed.

Well, it is a specific legislative criteria in that case which isn't found in the Public Utilities Act. So on the basis of that I would say that it is clearly distinguishable from the circumstances that are before the Board in this matter. That is my only comment.

CHAIRMAN: Thank you, Mr. Morrison. Anybody else any comments?

Mr. Morrison, that was the interpretation that this panel put on that case when we had our noon hour break. So we are now in a position to consider both of Mr. Zed's motions which he made on behalf of Emera, the first of which was that the Board find that it has no jurisdiction to consider and rule on what has been called letter application.

And (2) that the order-in-council 2003-255 is a request that the Board re-hear a final decision of the

Board, that is our approval of the OATT tariff.

And due to the fact that these have no -- there is no statutory authority for the Board to rehear a matter, the Board should rule that it does not have jurisdiction to consider and respond to the request made in the order-in-council.

The Board has considered the submissions made by Emera, NB Power and the Agent for the Attorney General and rule that (a) it doesn't have jurisdiction to deal with the letter application and (b) that it does have jurisdiction to respond to the request to review contained in the order-in-council due to the express provisions of Section 61 of the Public Utilities Act.

With respect to the request made by Emera that the Board confine itself in the review of Section 2.1 of the OATT tariff to evidence submitted in the rehearing which has not been before the Board in the OATT hearing itself, the Board has determined that it will hear and consider all evidence which it considers relevant and of assistance in complying with the request made in the order-in-council.

Now when we broke for lunch I indicated that Mr. MacNutt had copies of the tentative exhibits to be -- sorry, tentative marking of the exhibits.

And does anybody have any problem with those exhibits as we have given the tentative marking to? All right.

Then we will -- immediately upon the conclusion of the hearing I will mark exhibit -- A-1 will be NB Power proof of publication, a Board order directing the hearing.

A-2 NB Power prefiled evidence dated September 29, 2003 which includes the letter application, additional evidence dated October 31, 2003, addendum to additional evidence dated November 6th 2003 and the affidavit of Darrell Bishop dated November 6th 2003.

Exhibit A-3 will be NB Power's letter of October 20, 2003 in response to the Board's letter of October 17, 2003 requesting additional information and evidence.

A-4 will be the Open Access Transmission Tariff approved by the Board June 19, 2003 to be effective September 30, 2003.

And A-5 will be NB Power's annual report for 2002/2003, that is for the year ending March 31, 2003.

The Board will mark as Public Utilities Board exhibit 1 its letter to NB Power dated October 17, 2003 requesting additional information and evidence. PUB-2 will be a one-page document produced by the Board staff and circulated to participants on October the 22nd 2003 entitled "For each transmission link to Nova Scotia, P.E.I., Quebec and

Maine provide as of date", with a list of eight numbered questions. And PUB-3 will be order-in-council number 2003-255.

Now will Board counsel or any other parties help me out with anything that still remains to be done before we conclude this hearing and look at in detail the tentative schedule which was passed around?

I guess maybe there is the question of sending in the Board's consultant Mr. Easson to review the evidence that NB Power has claimed to be confidential, to see that the inputs into the PROMOD model are correct and he reviews the evidence based upon an undertaking of confidentiality and is therefore able to report to the hearing that he has traced that primary evidence through the PROMOD model and that the aggregated information supplied in the hearing by NB Power is correct.

Is that a fair way of characterizing it? Mr. Zed, do you have any problem with that?

MR. ZED: No. As I indicated earlier, we don't have any trouble with that process subject to maybe we have questions when the result is obtained, that is all.

CHAIRMAN: No problem. Okay. Now you have in front of you the tentative schedule. Does anyone see any difficulties with that which we have set forth there?

MR. MORRISON: We have no problem with the proposed schedule, Mr. Chairman.

CHAIRMAN: Okay. Mr. Zed?

MR. ZED: I spoke briefly with Mr. Anderson. And it is not so much a problem with the schedule. It is surrounding an issue that may or may not be a problem.

And that is I questioned Mr. Anderson as to whether or not there was going to be filed any evidence on behalf of the Attorney General with respect to public interest.

And I guess my concern is that if and only if there is evidence filed that might properly be characterized as evidence of the applicant, then we would want an appropriate time to respond with rebuttal evidence.

And I don't want to do any more than -- Mr. Anderson I think, and he can speak for himself, but has not -- he has asked the question. And there really isn't any intention, as I understand it, that they adduce evidence at this point. But I'm merely raising that.

CHAIRMAN: Okay. Mr. Anderson has always spoken for himself. And on this occasion would you like to do so?

MR. ANDERSON: Thank you, Mr. Chairman. And that is correct. At this point there is presently no intention of adducing evidence.

And I appreciate if at the time that it arises if it

can be properly characterized, as Mr. Zed has, fairness would permit him to have some rebuttal.

But that is going to be a question of fact to be determined by the Board at the time, in control of its own process.

CHAIRMAN: Okay. Does that sound satisfactory, Mr. Zed?

MR. ZED: It does.

CHAIRMAN: Any comment at all, Mr. Morrison?

MR. MORRISON: No, sir.

CHAIRMAN: Okay. All right. Then this will be the schedule. The Board Secretary has indicated that she has checked with the hotel and that the week of February the 2nd is open.

Mrs. Legere, how about the week following that? Do you know? I'm not in any way suggesting we go two weeks. I'm just covering all the bases here.

MRS. LEGERE: I'm not sure about the week after. I just know that the first is available.

CHAIRMAN: All right. She just indicates for the sake of the record that the week of February the 2nd is open. She will have to check and reference the other week.

Anything else that I have failed to cover?

MR. MACNUTT: Mr. Chairman, I'm not sure. It may have been fully canvassed. I'm not sure if it has been fully

canvassed this morning. Perhaps it was.

It was my understanding that you were going to ask other parties to comment on the Board's proposed method of handling evidence in previous decisions and previous hearings and how it would be considered in this hearing.

Now Mr. Zed commented on it extensively. I'm not sure that you canvassed the other intervenors.

CHAIRMAN: The shorthand reporter got the last of that I presume? Yes. Okay.

You are absolutely right, Mr. MacNutt. I did want to call on the parties. I have attempted to give an overview of how the Board has proceeded in the past to try and get the best evidence in.

But if you are going to refer to any documents or whatever from a previous hearing, it should be done before the close of the record and prior to summation.

Any parties got any comments on that?

MR. MORRISON: Mr. Chairman, I have no problem with Mr. Zed's proposal, if you will. Certainly from our point of view, if for some reason there may be an excerpt or an aspect of evidence that was heard in the OATT hearing, certainly we would -- in fairness to the other parties, we would bring that before the Board, reference it by whatever method is deemed appropriate. And that way

everybody knows what is before the Board and what the Board is considering.

If Mr. Zed or others want to cross examine on it, they can or adduce evidence. I have no problem with that at all.

CHAIRMAN: Anybody else? One thing that struck me, and again my memory may be incorrect, but I believe there was a pretty detailed cost information that was provided to us in the OATT hearing about generation costs.

We had started off with surrogate units and then went to actual units, as I recollected anyway. And that might be very useful.

All right. If there are no other matters then we will stand adjourned today, to be reconvened in accordance with the schedules.

So for example, perhaps on Friday the 19th of December, if it is -- if we are notified that on the 18th of December the Motions Day will be necessary. Otherwise it will be at 10:00 a.m. on Monday, February the 2nd, in either this ballroom or one of the other ballrooms in this hotel.

And please note that if we do have to have a Motions Day we will pack you all into our boardroom premises. Okay.

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□