

New Brunswick Board of Commissioners of Public Utilities

Pre-hearing

In the Matter of an application by New Brunswick Power Corporation dated June 21, 2002 in connection with an Open Access Transmission Tariff

PUB Premises, Saint John, N.B.  
November 8th 2002, 9:30 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 Légère

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CHAIRMAN: This is a -- I guess we will call it a procedural conference requested by NB Power. I will take appearances. For the applicant, NB Power?

MR. HASHEY: Thank you, Mr. Chairman. David Hashey accompanied by Bill Marshall.

CHAIRMAN: Bayside Power LP? Canadian Manufacturers & Exporters, New Brunswick Division? City of Summerside? Emera Energy Inc.?

MR. ZED: Peter Zed.

CHAIRMAN: Energie Edmundston? Mr. Gillis? J.D. Irving

Limited?

MR. DEVER: Bill Dever for J.D. Irving, Mr. Chairman.

CHAIRMAN: Maine Public Service Company? Maritime Electric?

Northern Maine Independent System Administrators? And

Mr. Zed again for Nova Scotia Power Inc.

MR. ZED: Yes, Mr. Chairman.

CHAIRMAN: Perth Andover Electric Light Commission?

MR. DIONNE: Dan Dionne.

CHAIRMAN: Province of New Brunswick?

MR. KNIGHT: Jim Knight.

CHAIRMAN: Province of Nova Scotia? Saint John Energy?

MR. YOUNG: Dana Young, Mr. Chairman.

CHAIRMAN: And WPS Energy Services Inc.?

MR. HAYES: Matthew Hayes.

CHAIRMAN: Patrick Who? Oh, Matthew Hayes. Sorry about

that, Mr. Hayes. Okay. The Board is represented by Mr.

MacNutt. Any informal intervenors? I will just quickly

go through them. It is HQ Energy Marketing Inc., Irving

Oil Limited, KnAP Energy Services Inc., Renewable Energy

Services Ltd., TransEnergie and the Union of New Brunswick

Indians?

MR. PERLEY: Ron Perley and Norville Getty.

CHAIRMAN: Mr. Getty and Mr. Perley are here. Okay. Mr.

MacNutt came out and spoke with the parties before the

Board came in. And it is my understanding that basically the parties want to stick with the issues that were raised in the correspondence between JDI and the applicant. That is that emanated from both of them. Is there a simple way that we can handle this, Mr. Hashey and Mr. Dever? For instance, can we go around the room in reference to positions on PBR and then the Board make a decision as to that. And then carry on from there and take another subject matter, hear from everybody, et cetera?

MR. HASHEY: Mr. Chairman, I would believe that it would be probably expedient to follow the list that I had presented yesterday, which I think deals with the principal two first issues and then maybe if we could deal with the panel and the PBR evidence. Then a lot of the rest of this discussion could fall into place.

I thank Mr. Smellie and Mr. Dever for giving me a heads up a bit on where they are coming from. And we have tried to prepare some answers. And it seems like the only issues that really are of significance that remain between us is the issue of defining where we are going on this PBR issue. Secondly is the rebuttal issue and how that is to be handled and the timing of it. And the next is the presentations and when things are to be filed -- further things are to be filed.

There doesn't seem to be a whole lot of difference. I think there has been a major agreement and I have had also discussions with Mr. Zed concerning how we would handle the panels as far as Panel A and D go.

So I don't think there is any great difference as it exists now as to the desire of the parties who I have spoken with, on the panel issue as to how we should proceed with the panels in a way that would be organized and most efficient for I think the Board as well as all of the parties.

CHAIRMAN: All right. Do you want to start with your correspondence and speak as to the panel?

MR. HASHEY: I think that would be the useful way to do it.

(Break)

CHAIRMAN: Okay, go ahead, Mr. Hashey.

MR. HASHEY: Mr. Chairman, thank you for giving us this opportunity. I appreciate, and I apologize if we have inconvenienced the Board concerning the timing of this. But it would be far better if we knew where we were going and we are only a week ahead of this hearing.

When we looked at the matter, it appears that it would be sensible to deal with panels A and D initially. And when we reviewed the evidence of the two parties that have put in evidence, namely -- three if you like, Emera and

Nova Scotia Power I consider more or less as one, and the JDI, that it would be -- really there is -- I am looking at some method of compromise and some method of trying to satisfy the JDI concerns and interests.

Really, Emera and Nova Scotia Power's evidence and their cross examination would generally apply to Panel D.

I am not trying to restrict them on that. But from their evidence it was apparent that they want to question issues that arise out of Panel D. Panel A, as you know, was the overview, and that is really all it was intended to be. And it would seem efficient if we dealt with the issue of those two panels during the first two weeks of this hearing so that the Board has heard that aspect of the matter, and I think it would be fairly complete. And not try to interject financial information with that. That is the request, that we could then have Panels B and C starting December 9th. And of course that is what Mr. Smellie has been suggesting as well.

I have no problem with putting Panel D on before Panel C, as Mr. Smellie has suggested. I thought it might be more appropriate in reversal, but that is -- we can waive that and go with that. We felt that the two weeks of those two panels should have matters clarified. And also, I mean, there was a bit of a selfish reason there. Dr.

Moran, who is our expert, pointed out that his final examinations that he is giving plus American Thanksgiving happens to fall on the second week of the hearing. And it would be clear if we started Panel B, that we might run into that as well.

And that would allow us to schedule witnesses similarly by starting -- or having planning that would suggest that the evidence of the witnesses for JDI go on January 6th allows their professional people to have some organization and timing, which of course, they would require.

The issue that arises out of this is the rebuttal issue. But I would suggest that that might be something we could discuss separately. If the Board is satisfied with the order of panels, then we can -- because I think that will -- that and the PBR issue will affect a lot of these other issues that we are talking about here.

CHAIRMAN: Okay. Mr. Hashey, no hearing that I have been associated with have -- has the intervenors evidence been brought in before the conclusion of the applicant's case.

Now this hearing will set a lot of precedents, I am sure, on the way through. But I do have some problem with that, in having Emera and/or Nova Scotia Power's evidence come in there. Because my concern is that there may be a

bit of evidence that is tied in with Panels B and/or C that supplant or assist A and D's evidence. And then all of a sudden we get into a bun fight about well we have covered all that evidence in Panel A and D and you shouldn't be having these questions now, et cetera, et cetera, et cetera.

That gives me some concern. Would you like to address that?

MR. HASHEY: Mr. Marshall points out this is what was done of the Hydro Quebec hearing. That it was trying to -- and I don't see -- maybe Mr. Zed could address that maybe more efficiently and effectively than I could from the standpoint of Emera and Nova Scotia Power. You know, the general --

CHAIRMAN: That is my sole concern.

MR. HASHEY: I don't see that it doesn't focus. I think it is so their evidence is so focused on that panel that there wouldn't be a problem. And I don't have any difficulty if there is some little issue that is missed that we could revisit it, you know at some point in time.

That wouldn't be a problem for us at all. We are not trying to do a shut off on anybody here at all. It is a matter of just let's get the Board focused on one specific area, they have heard all the evidence on that area, and

not have two or three or four weeks of financial stuff and then get into the issues on Panel D again that requires the Board to go back and start picking up pieces of transcript and try to say, gee, you know, what was said a month and a half ago on that point?

CHAIRMAN: Well certainly from a practical point of view it seems to make good sense. But that is -- my basic concern is that we don't get into the bun fight later on because there has been some small piece of the evidence that has been missed or -- because frankly, the Board is here to get the best possible evidence upon which to base its decision. It is as simple as that.

Okay. Thank you, Mr. Hashey. Mr. Zed?

MR. ZED: Mr. Hashey and I have spoken on the matter and it is our view that our evidence, as he suggested, is relatively self-contained. It appears that our issues are with respect to the evidence raised by Panels A and D. And we really don't have any trouble with Mr. Hashey's suggested scheduling provided, of course, I can arrange to have our panels here in a timely fashion.

This issue was raised only within the last day or two.

And in the normal course, Mr. Chair, we expected to testify sometime in January. I have managed to secure a promise from the Nova Scotia Power Panel to be here on the



27th. And the Emera Panel are now being canvassed to rearrange a few things to try to be here that week as well. So subject to their availability, which I hopefully will have confirmed within the next day or two, we don't really have any objection.

Mr. Hashey has kindly offered that if there are some issues that are missed, that he is not going to raise any objection to our taking issue with them at a later time. But I don't think either of us really see that happening.

CHAIRMAN: I think it goes without saying that it would be marvelous if we could stick to the schedule that is here, but it just -- you know, one week may roll on into another and we just have to go with that.

Okay, Mr. Dever?

MR. DEVER: Yes, Mr. Chairman. We are happy with the proposal as put forth by Mr. Hashey as to the scheduling of the panels.

CHAIRMAN: I just want it on the record that you have heard my concern. That I don't want -- you know, we are here to hear the evidence. And I don't want to get into too legalistic a battle as to well that is infringing on Panel A or Panel B, et cetera.

Okay. Mr. Zed, you have spoken already and I presume that what you said for Emera goes for Nova Scotia Power?

MR. ZED: Yes, Mr. Chairman.

CHAIRMAN: Mr. Dionne?

MR. DIONNE: We are in agreement with the proposed schedule.

CHAIRMAN: Mr. Knight?

MR. KNIGHT: We are in agreement with the proposed.

CHAIRMAN: Okay. Mr. Knight is nodding and saying he agrees. And Mr. Young?

MR. YOUNG: We are in agreement with scheduling as proposed by Mr. Hashey.

CHAIRMAN: Mr. Hayes?

MR. HAYES: No problem.

CHAIRMAN: Mr. MacNutt, do you have anything you want to --

MR. MACNUTT: One thing that is not absolutely clear, Mr. Chairman. Mr. Hashey suggested that Panels A and D would be heard and followed by intervenor evidence and then Panels B and C would be heard, followed by intervenor evidence. Does he intend that Panels A and D sit together or in sequence, to be followed by intervenor evidence? And similarly with Panels B and C, they would sit together or be in sequence to be followed by intervenor evidence?

MR. HASHEY: The intention is that they be in sequence, not together. And that the presentations of each panel would be made at the beginning of that panel. And then they go on with cross. No, we are not trying to combine any

panels here.

CHAIRMAN: Okay. So I -- go ahead.

MR. MACNUTT: Perhaps is it understood by Mr. Hashey that he will be leading Panel B before Panel C?

MR. HASHEY: Yes.

MR. MACNUTT: He said that in his presentation. I would just like to confirm it.

MR. HASHEY: Yes.

CHAIRMAN: All right. I guess the logical thing now is to look at the rebuttal. Mr. Hashey, my recollection on the Law of Evidence is that a party, let's say the plaintiff or an applicant in this case, when you know that there is evidence coming in from the other side or from an intervenor, that you, when you call your evidence, you must cover whatever you believe -- what a reasonable person would believe that testimony that the defendant is going to bring, would cover. If in fact during the testimony of the defendant, there is new evidence that could not reasonably be anticipated on the part of the plaintiff or the applicant in this case, then you would have an opportunity to call a witness back to the stand after the defendant went down from the stand. That is my recollection of the Law of Evidence as it covers in court systems.

So bearing that in mind, would you like to address the question of rebuttal and update me on the Law of Evidence?

MR. HASHEY: I'm not sure I know about the Law of Evidence anymore, I don't think the courts follow it very much. It has been my recent experience. It seems that a lot of the principles of evidence have gone by the wayside.

But I recognize that that was your ruling I believe in the last hearing. We had one bit of evidence, not nearly as complicated. Obviously we would like to be able to rebut what we are hearing, but I don't have any problem with that ruling, if there is something that we should rebut, that we put it up front.

I have indicated to my friends that if there is things that we are going to say, that we will try to give them an indication. My big problem is presenting a whole lot more written evidence on rebuttal. That is a problem. There is just not time.

We don't get interrogatories until next week. I don't know when even we are going to get to read some of those interrogatories. It is pretty pressed. You know, we get two, well three days before the hearing when we get -- some fairly substantial interrogatories have been presented too.

And we will make our way through them, but to say that

we should do written rebuttal would be very, very difficult.

Now I think I have talked to my friends this morning, Mr. Dever and Mr. Zed, and suggested if anything comes out of that that is a surprise to them, that they obviously should have time to consider it before cross examining on it or have time to get instructions, I don't have any problem with reasonableness here.

CHAIRMAN: My only -- having read what JDI has said, and Mr. Dever, you of course get an opportunity to comment on it, is that all of a sudden if you start getting in written rebuttal, then presumably that comes in before the intervenor's panel has stepped down so that they get an opportunity to rebut the rebuttal. And it becomes just an ongoing thing.

MR. HASHEY: I think we call that an evidence surrebuttal.

CHAIRMAN: Surrebuttal, that's right. Anyway, okay. Thank you, Mr. Hashey. Mr. Zed?

MR. ZED: Mr. Chair, obviously we would prefer in the normal course to have had written rebuttal. But we sympathize with Mr. Hashey and agree that it may not be practical in these circumstances. We are prepared to accede to his request that the evidence on rebuttal be oral. Mr. Hashey has indicated that he will advise us well in advance if

any issues come to his attention that will form part of the rebuttal. And he has also advised that he will not object if we need more time by way of an adjournment to prepare cross examination should something arise at the last minute.

And based on that discussion, if that is acceptable to the Board, we have no objection to oral rebuttal.

CHAIRMAN: Thank you, Mr. Zed. Mr. Dever?

MR. DEVER: Yes, Mr. Chairman. The preference of J.D.

Irving Limited is to have written rebuttal to the evidence as filed. We believe it will be a more efficient way for us to address the evidence and allow -- and I guess avoid the necessity possibly of having to request adjournments to prepare for cross examination on what could be -- it is unclear at this point -- but what could be a lengthy session of rebuttal evidence. We believe that is consistent with what many other boards do.

Now Mr. Hashey has presented his concerns about the timing and I am not insensitive to that. However, from a procedural point of view, I believe it is the more appropriate way to proceed is to have written rebuttal.

CHAIRMAN: Okay. Where, you know, the Law of Evidence, as I recollect and tried to enumerate it to Mr. Hashey, is that it is not an automatic thing. Rebuttal is not an

automatic thing. It has to be a subject matter which a reasonable person could not have anticipated the intervenor or the defendant would bring up. And I just -- I leave -- those are my comments on that. In my experience it has been very, very rare that the parties to a proceeding such as this will not be able to anticipate and cover off an intervenor's testimony or presentation or whatever.

Thank you, Mr. Dever. Mr. Dionne?

MR. DIONNE: Yes, We have no objection to oral rebuttal.

CHAIRMAN: Okay. Mr. Knight?

MR. KNIGHT: No objections to the oral.

CHAIRMAN: Mr. Knight is too far away, so I will repeat what he said. He effectively agrees to oral rebuttal. And Mr. Young?

MR. YOUNG: Saint John Energy has no objection to oral rebuttal.

CHAIRMAN: Okay. Mr. Hayes?

MR. HAYES: No position on it.

CHAIRMAN: Mr. MacNutt, do you have any wisdom you want to share with the Board?

MR. MACNUTT: Not on this subject, Mr. Chairman.

CHAIRMAN: All right. We are going to take a brief recess and deal with this issue of the panels and get back to

you.

(Recess)

CHAIRMAN: In reference to the first matter which is set forth in Mr. Hashey's letter of November the 7th, the Board approves of the calling of the panels. And in accordance with that schedule we note that Mr. Zed can't be absolutely certain that his panels can make it at the prescribed time, but he is working on it. I understand that.

If required, rebuttal will be oral. And it's also understood between the parties and the Board that if oral rebuttals occurs, that if it appears necessary, then any of the intervenors who require it will be given additional time to prepare for cross.

Okay. Mr. Hashey, the next on your list is the PBR issue. If you want to address that.

MR. HASHEY: Thank you, Mr. Chairman. On the PBR issue we recognize the Board has set out a position on the motion.

And I also recognize that the reason that I think we were talking about delaying PBR related to the position taken by Mr. Smellie, that it shouldn't be heard at this time. As a result of the motion, there was some discussion on it. And I believe the preferred position of ourselves, and probably everyone at this point, is that all of the



evidence be presented in the way that it's filed. And that the Board can then make a ruling as to whether they want to deal with PBR or not deal with PBR. But have the evidence -- have the evidence here rather than trying to disseminate pieces of that evidence and have a great argument this is PBR or that isn't PBR. And I believe that is the preferred position of JDI and all the parties at this point in time.

CHAIRMAN: Are you saying, Mr. Hashey, that that include cross? Is that to deal with it totally?

MR. HASHEY: Yes.

CHAIRMAN: What happens if we haven't got time. That's the Board's concern is that PBR is a rather large body of evidence that will be coming before us. And also I think be pretty contentious in a lot of different ways. In other words, take a fair block of time.

MR. HASHEY: Well, to put it the other way, you know, we have no problem. I don't want an issue of having all of B and C cancelled out and saying this evidence is all intertwined with PBR.

CHAIRMAN: I undertake.

MR. HASHEY: I am prepared to discuss and argue that we can take PBR out if the Board would prefer. It's possible. And it's not going to rip up our evidence.

I mean it's a matter of some effect on Dr. Moran's evidence. But when I read that again yesterday it appears that in these schedules that the last schedule probably -- or its appendices, I'm sorry, the only one that it would affect that we would drop is the price cap regulation part. His other evidence deals with the issues of the capital cost, the ratio and the proper rate of return. That's all there. We can take sides out and we can deal with that, if you would prefer that.

CHAIRMAN: Yes. Well I --

MR. HASHEY: And I don't think it affects Panel C in any significant way. Because that's going to be a matter of taking the Board's decision on what is appropriate on these two topics and doing the calculations.

CHAIRMAN: Well I'm being -- perhaps I'm being too simplistic here.

MR. HASHEY: Yes.

CHAIRMAN: But the evidence of Dr. Moran leads up to a point where the rates are established with all of the various factors that are brought to bear in establishing those rates effective the 1st of April of 2003.

PBR deals with how or if it should or whatever, there will be an automatic adjustment occur to those rates at a time in the future, a year in the future, two years in the

future, et cetera.

So to me and, again, I want counsel and parties to address this. But to me that's very easily a severable portion of the evidence. I would think there is a real demarkation line there. It can establish the rates as of the 1st of April, and then anything dealing with the formula beyond that.

And we are not saying that we wouldn't necessarily hear it. The Board quite frankly in conversations that we have had before coming in here today, we would think that by the time we rise before Christmas, that we should have a pretty good feeling as to whether or not we would be able to cover PBR in the January session.

And the Board would have a discussion with the parties at that time and try and schedule it. Because we would have a pretty good estimate, I would say, as to when all the rest of the evidence will be concluded.

Now we may get into some minor adjustments. We may decide at that time that we will hear PBR sometime in March or April or something like that, depending upon, for instance, Dr. Moran's schedule. Or it may be that we can work it in towards the later part of the hearing after all the rest of the evidence.

MR. HASHEY: If you would prefer that, we certainly can meet

that request. That's not -- we don't see it as a problem.

CHAIRMAN: All right. Well I would like the parties to talk about it. I mean, I also hear what you are saying that you had planned it and JDI also said we had to meet the evidence that NB Power filed. And they have in their opinion done that and therefore proceed with everything.

Our only concern is that we run out of time. And if the parties feel that we can sever the two just to make sure we get everything covered that we want, well then that (mike problem) but we did say that we would hear the parties and instead of the open hearing, we are doing it today.

Okay. Mr. Zed?

MR. ZED: I don't have anything to add, Mr. Chairman.

CHAIRMAN: To who, me or to Mr. Hashey?

MR. ZED: I defer to both.

CHAIRMAN: Mr. Dever?

MR. DEVER: Mr. Chairman, as you correctly pointed out, we filed our evidence on the basis that we had a case to meet that was filed by the applicant. So we did so not having had any indication that there would be any change.

And having done so, we would prefer to proceed on the basis of the filed evidence. And I guess it's our belief that if we do not do that, then we feel that we are

prejudiced to a certain extent because our evidence is not easily -- we can't easily carve out the PBR portion of our evidence.

And we don't really feel that, you know, with all due respect to Mr. Hashey, that Dr. Moran's evidence is all that easily segregated either. The cost of capital and the capital structure and the rates of returns are different, as I understand it, in a PBR structure as opposed to a standard sort of cost of service structure. And I guess we would take the position that if PBR is deferred, then all of Panel B, as we pointed out, should be deferred as well. As well as the parts of Panel C that relate to it. A lot of Panel C's evidence depends on some of the assumptions or some of the evidence that's filed or opinion stated with respect to Panel D.

So in light of that and to avoid any sort of prejudice I guess to ourselves, or delays to allow us to come to grips with the decision, we would prefer to proceed as filed.

CHAIRMAN: Thank you. Mr. Dionne?

MR. DIONNE: We are in agreement with the position of the Board on this issue.

CHAIRMAN: Mr. Knight?

MR. KNIGHT: We are in agreement with the position of the

Board. As you know, we are concerned about the time that -- I mean, the market is able to open in April.

CHAIRMAN: Mr. Young?

MR. YOUNG: Saint John Energy is in agreement with the Board's position on this topic also.

CHAIRMAN: Mr. Hayes?

MR. HAYES: No comment.

CHAIRMAN: Mr. MacNutt, do you have any comments you wish to make to the Board?

MR. MACNUTT: Nothing to add on this topic, Mr. Chairman.

CHAIRMAN: Okay. The Board will take a ten minute recess.

Mr. MacNutt, would you join us?

(Recess)

CHAIRMAN: We have taken a few minutes to discuss the second issue, which is PBR. And the evidence is -- the evidence has been filed and it includes evidence on PBR, and of course that will stand. The Board will defer the cross examination and any intervenor evidence that may be forthcoming in reference to PBR to a date to be -- and as I indicated, and I reconfirmed that I believe that when we get ready to adjourn for the Christmas recess, we should be able to give some indication as to when we will be able to revisit the PBR evidence with cross and intervenor evidence if necessary.

MR. HASHEY: Mr. Chairman, could I ask for one simple clarification on that? I assume that you would wish us to remove or be able to give the Board an indication as to what portion of our evidence wouldn't be relevant at the initial hearing, and that any presentation that we make we would defer that part of the presentation to the subsequent time as well?

CHAIRMAN: Answering the latter first, yes, we prefer that and whenever we do start into PBR, then you have an opportunity to have your -- a slide show in reference to that, the whole -- the whole nine yards. I don't, you know, as to the first portion of your request for clarification, Mr. Hashey, I don't want us to get into a bun fight either about what is in reference to PBR and what isn't. Let's just --

MR. HASHEY: I understand.

CHAIRMAN: You know, we will deal with that as the questioning comes up. It's a --

MR. DEVER: Mr. Chairman?

CHAIRMAN: Yes.

MR. DEVER: As I expressed in argument, when we filed our evidence, we really feel that our evidence is appropriate to a PBR application and not a -- not the application that I understand now you are indicating will be met as you --

in terms of our evidence being filed by our panel in both -- and in terms of cross examination, I guess, to a lesser extent.

Under those circumstances would the Board agree that we would be able to file evidence that is more appropriate to the application than now we are being asked to meet?

CHAIRMAN: I wish you had mentioned that before we took our recess, that if we did rule this way that that's --

MR. DEVER: I should have thought about it at the time --

CHAIRMAN: -- but as Mr. Sollows points out, it is in the letter. Yes, but anyway, that's all right.

Let's just examine that a little more closely. What are we talking about timewise? When would this occur?

MR. DEVER: As soon as possible. I --

CHAIRMAN: Would this be a revision of the evidence that has been filed, or is it a complete new cut at it?

MR. DEVER: It would be evidence appropriate to address a case where the -- Dr. Yatchew, who is the expert that we have engaged, is an expert in PBR matters. And we would probably look to have that evidence modified or find some way to get appropriate evidence to the -- to a sort of standard case, without a PBR component, which we don't believe that which I am advised our evidence does not respond to. It's difficult for me to say without



conferring with others I guess what -- how long it would take us to prepare that. But, obviously, the hearing is upon us.

CHAIRMAN: The Board is going to take a recess. I am going to ask you to confer with whomever it is that you need to confer --

MR. DEVER: Yes.

CHAIRMAN: -- so that we have some definite timelines here that you can share with counsel opposite and the other parties who are here and with Board counsel. So we will give it 20 minutes or so and see how you make out.

MR. DEVER: That's fine. Thank you, Mr. Chairman.

(Recess)

CHAIRMAN: Mr. Dever, how did you make out?

MR. DEVER: Well, Mr. Chairman, I had some discussion on it and then I had some further discussion with Mr. Hashey. What I had proposed to him was to see whether it would fit in with his timing, I guess, is that if we could have until the beginning of the second week of the hearing, which is November 25th, to provide our evidence on Panel D. He indicated that that would suit him, except to the extent he may have rebuttal evidence. He may not be able to prepare rebuttal evidence by the beginning of -- or by the end of Panel D, which starts December 9th. That he

may want to defer the rebuttal evidence into the new year.

That's fine from my point of view. But that was the timing that I was hoping to get.

CHAIRMAN: Let's go and talk to the other -- Mr. Hashey, do you want to add anything to that?

MR. HASHEY: Well there is the issue of interrogatories that we really didn't I guess settle completely. But one of the reasons suggesting that we might have to rebut further on that is that this would be brand new evidence and we have to have time to file interrogatories. And we are compressing that -- there is a free week in here, which would have to be compressed to that point. Do what we can do.

CHAIRMAN: Well as we all understand, interrogatories are basically an attempt to narrow the time in the hearing by basically written cross examination, is what it amounts to.

MR. HASHEY: Yes.

CHAIRMAN: I just point that out. So let me hear from the other parties as to what they feel about this. Mr. Zed?

MR. ZED: No comment, Mr. Chairman.

CHAIRMAN: Mr. Dionne?

MR. DIONNE: No comment.

CHAIRMAN: Mr. Knight?

MR. KNIGHT: No comment.

CHAIRMAN: Mr. Young?

MR. YOUNG: No comment.

CHAIRMAN: Mr. Hayes?

MR. HAYES: No comment.

CHAIRMAN: The Board is going to retire again for a minute.

Mr. MacNutt, could we talk to you.

(Recess)

CHAIRMAN: Things are in a state of constant flux, as I understand it. Mr. Hashey, what has happened during the recess out here?

MR. HASHEY: Well the more we talked, the more complicated this gets and the more I believe that by withdrawing PBR from the whole scenario and if a new witness is substituted, and I don't see the reason for the new witness, but I don't know -- I mean, just consulting with Mr. Marshall, if it's Dr. Yatchew that says I would have done something a little different, it makes it fairly simple and probably agreeable. But if it -- because the interrogatories are in and there is not a big issue, we have a whole new witness, a whole new area -- a new expert. To examine that expert and what he is saying, is where we started to run into really serious difficulties with this compressed timetable.

Now the way we see it, if Dr. Yatchew is an expert on the PBR thing, he must be an expert on the standard rate of return issue that he is adopting with respect to the PBR.

But in fairness to Mr. Dever, in the shortness of the moment, he can't get that determined any more than I can get ahold of Dr. Moran and consult and say what does this mean to you?

So based on that, it's a -- it seems that -- and we get into the timetables and the fact that we would have to bring Dr. Moran back, because we really probably wouldn't have enough time for him to review the evidence and see any interrogatories that might come forward, it seems that we are back to square one, and maybe we should run -- and probably we will make this hearing shorter if we -- if we just go with the evidence as it is filed and the evidence that we received.

CHAIRMAN: Now, Mr. Hashey --

MR. HASHEY: We could block a week or something at the end of it, if we need the extra week.

CHAIRMAN: -- yes, Mr. Hashey, when Mr. MacNutt brought the message back in to us, why I conferred with my fellow Commissioners, and I will just toss it out for comment to everybody here, is that in fact we do go back to the

original proposal and we hear all of the evidence and I have instructed -- I will instruct the Board Secretary to make hotel reservations, and translation, and all other, for a number of more weeks in January and even in the first part of February, because it's the Board's intention to conclude this hearing and get its decision out so that the parties who want to go into the market can do so.

But I do have to say that JDI was a party here in August and this has all occurred when you changed counsel.

And we want to get on with the hearing and have it heard and no more argument after argument about things. We want to go straight ahead and hear the best evidence, and I mean the best evidence. That doesn't mean that I want to get into great legal arguments concerning whether or not somebody at an appropriate time. I want people to work together as ladies and gentlemen and work in a co-operative fashion so we can get this thing done.

So we will go back to the original way of dealing and we will deal with PBR in the ordinary course. I don't think that affects the ruling that the Board had on the panels at all.

So, Mr. Hashey, what is the next item on the list here? I am sorry, I indicated and I should do so, as we give all counsel an opportunity, since we are doing a

flip-flop on that, if they have any great problems with it, they have an opportunity to address the Board on it.

Mr. Zed?

MR. ZED: No comment.

CHAIRMAN: No comment. Mr. Dever, I am sure you don't have any comment either, do you?

MR. DEVER: No, Mr. Chairman.

CHAIRMAN: How about Mr. Dionne?

MR. DIONNE: No comment.

CHAIRMAN: And Mr. Knight?

MR. KNIGHT: No comment.

CHAIRMAN: Mr. Young?

MR. YOUNG: No, comment.

CHAIRMAN: Mr. Hayes?

MR. HAYES: No comment.

CHAIRMAN: Mr. MacNutt doesn't either.

MR. MACNUTT: Yes, he does.

CHAIRMAN: Yes, he does. Go ahead, Mr. MacNutt.

MR. MACNUTT: Just to clarify for the record, Mr. Chairman, the Board denied the JDI motion at an earlier session and then concluded that it would separate in that same order that PBR would be separated. You are now --

CHAIRMAN: Reversing ourselves.

MR. MACNUTT: -- revising that position. I just wanted to

be clear.

CHAIRMAN: That's right. We are reversing that decision.

Having heard further argument and realizing the implications of doing that, we -- it's better now to back up and start again. So, thank you for clarifying that, Mr. MacNutt.

Mr. Hashey, next on your list is intervenor presentations.

MR. HASHEY: Yes, there are fairly minor points I think after these ones. The only question was -- you know, I thought it would be -- and I see intervenors -- oh, yes, that's the date. And I don't have any big issue with Mr. Dever on that. He indicated in the letter that we received from Mr. Smellie, that's where that arose from, that he said if the Board agrees to hear the JDI evidence in the week beginning January 6th, JDI ensured the presentation or file served two weeks in advance not later than December 23rd, I just ask if at all possible if they could do it on the 20th, which is the -- so we don't run into that Christmas week problem.

CHAIRMAN: Mr. Dever, you know, I mean --

MR. DEVER: No problem.

CHAIRMAN: -- it's not an unreasonable request? Certainly.

MR. DEVER: No, not at all, no.

CHAIRMAN: And does your panels -- are you going to do that, Mr. Zed, do you know -- your witnesses?

MR. ZED: I don't anticipate, Mr. Chair. Mr. Hashey and I didn't discuss it. I mean, the evidence that my panels will testify to is very straightforward, clear, and I don't see the need to do a summary unless required to do so.

CHAIRMAN: Okay. All right. That's fine. Well, all right, then, you know, Mr. Hashey, unless there is other parties have a comment on it, both Mr. Dever and Mr. Hashey see eye to eye on that and that would be fine from the Board's point of view.

MR. DEVER: It's fine with me, Mr. Chairman.

CHAIRMAN: Next you talk about rebuttal evidence. I think we have already --

MR. HASHEY: We have dealt with that.

CHAIRMAN: -- dealt with that, yes. Order of cross examination, again, I -- Mr. Zed, you are the one who should probably address that right now. What is your -- you now have your witness panels, and you presumably know your client's positions. And do you -- you know, I don't think it's appropriate for you to have two kicks at the cat, frankly. And, you know --

MR. ZED: Mr. Chairman, if I can just bring this to closure.



I intend to prepare my cross examination separately, but I have no qualms about doing them consecutively, and whatever you have to call me, I will do all my cross at that time.

CHAIRMAN: Good. That settles that then, thank you. Pre-marking of exhibits?

MR. HASHEY: That's just a question of whether you wanted something done on that, Mr. Chairman.

CHAIRMAN: Well, frankly, what I think to a certain extent that you are suggesting is an appropriate way to proceed, Mr. Hashey. I will ask the other parties to comment on it. Do you -- you and other parties and Board counsel sit down and draw up a tentative list of exhibits and the marking of them and then at the commencement of the hearing itself, why the Board will mark the exhibits and reserve the right to change a bit of the order if we feel that what you and Mr. MacNutt and the other parties have come up with doesn't really suit. But if it does, which I am sure it will, we will mark them that way.

MR. HASHEY: The only -- the question I would ask on that -- and I do have a list and I could -- I will sit with Mr. MacNutt, and maybe it could be agreed that he and I could meet on this in the next day or two -- or first of the week and then send something out to everyone else and say

this is what we proposed. Would that be simple? And then you can make a determination when we sit?

CHAIRMAN: Yes. That sounds good to me. Any party any problem with that?

MR. DEVER: Not here, Mr. Chairman.

MR. HASHEY: And I think it's a pretty easy exercise. The only question is that I -- the intent would be that the exhibits, just so that there is no surprises, that we would be really dealing with the affidavit for the newspapers that we would deal with, and then there would be -- on the publication, I'm sorry. Then there would just be the direct evidence, the interrogatories, and the intervenor submissions that would be really parts -- and then the power point presentations.

And I should say that on the power point presentations, there is an issue that still exists between Mr. Dever and myself. There is the issue that we probably should talk about on that one.

CHAIRMAN: Yes. That's not on your --

MR. HASHEY: No.

CHAIRMAN: -- that's not on your list?

MR. HASHEY: It is in -- it is in Mr. Smellie's.

CHAIRMAN: It certainly is an issue and I know that. The only thing left is witness availability?

MR. HASHEY: The only comment I had on that is all our witnesses are available, except there is one part day that Ms. MacFarlane will be asked to be excused from her panel.

The panel could continue, but her part -- and that is just the morning of the 17th of December, which is a -- she has to prepare and present a budget to the Board of NB Power at that time. And there is no -- no changing that.

That's the only problem we have. And as you can understand, her -- right now what she is involved with is pretty -- pretty extensive. And I can't imagine --

CHAIRMAN: We can invite the Board here and she can present.

MR. HASHEY: So I think that's a relatively minor --

CHAIRMAN: Certainly from the Board's point of view, and if it's a morning, and something, I don't see a great problem with that. It may turn out to be a problem as we get closer to the event. We will just have to handle it as best we can. But certainly -- what is the 17th? Is it a Monday?

MR. HASHEY: Tuesday.

CHAIRMAN: It's a Tuesday. Okay. Well I appreciate your letting us know that now, Mr. Hashey.

MR. HASHEY: And it's the second week. I assume it's probably a Panel C time and there are a lot of people on Panel C. But if somebody wants to cross examine her,

obviously, any time.

CHAIRMAN: Anybody -- anybody any problems with handling it in that fashion?

MR. DEVER: No, Mr. Chairman.

CHAIRMAN: No. Good. Thank you. So we are down to the slide presentation. Have we got a list -- do you gentlemen know what ones -- Mr. Hashey, do you know what ones are in the contentious mode at this time?

MR. HASHEY: Mr. Chairman, I don't believe there is anything contentious on A or D. That is an issue that's not -- I mean these are short presentations. The intention of these presentations is not to give new evidence. The intention of the presentation is to put before you, hopefully, an explanation of our evidence in an understandable fashion to base a general sense on it. It's complicated. And it seemed to me, it would be easier. I am assured that there won't be any panel that would go beyond an hour on the presentation. This is not going to be a whole long strung out thing. That would include Dr. Moran, who would appear to be the longest. I will come to him last, if I might, because I think that's where the contentious issues are.

The issue of Panel C, we have talked to Mr. Dever this morning and he mentioned there was one -- one slide that

he felt was something that went beyond the evidence. But in fairness, that slide is something that was -- that came from interrogatories, which are part of the evidence. And it was felt as a result of an interrogatory, which I think came from Nova Scotia Power, that that should be dealt by way of a brief explanation in that slide. That's all there is on C. I don't think C is an issue any more, frankly. And Mr. Dever, obviously, has the right to tell me I am lost on that.

The issue is Panel B. I have Mr. Smellie's letter. It arrived in my office mid-afternoon yesterday. I immediately went to NB Power and contacted the finance people and had a meeting with them. And one young lady spent a long time last evening and prepared for me a list of what she believes, and our position is, is that things are in there with the exception of one slide, which unfortunately may have been contemplating some of the rebuttal evidence. But -- and I have provided Mr. Dever this morning with this document. It arrived at my house at 12:38 this morning. Okay. So to say we have had time to really think about it is not -- not there.

Mr. Dever and I have agreed, I believe, subject he can direct me, that he will provide me with where he thinks his problems are. I will -- I have provided him with this

-- with the pages listed, where it is referenced by Dr. Moran, and we can then debate it.

There is the one other issue of whether Dr. Moran is entering into argument -- I don't really believe so -- there is reference in one slide or so to a -- it may be a legal authority. But all we are saying there is this is what we believe is what the law tell us we have to do. That's what he is saying what he believes what the standards are that he has to look at and follow, which I think is fair. I mean if my friends can cross examine him and show us another standard, he is off base, as well, that's going to be pretty harmful to my evidence. And a lot of these slides, although they look to be too many in number -- that bothered me at the first when I saw them -- but when you look at them, a lot of them are one-liners that could have been combined and maybe consolidated. And I am assured by Dr. Moran that his presentation is not going to be a long, long, long -- half day, full day, or anything like that. It's an hour's presentation probably at most. But I would suggest that this issue be left that -- that's his one issue that maybe we could address at the first morning of the hearing, after we have had the opportunity of sharing our respective views on that and get a ruling at that time, which would be lots of time,

because this is not affecting a panel that comes forward until the third or fourth week here.

CHAIRMAN: Just so I am -- what you are planning on doing then is each panel will have its own overview, of course, and they will give that when they are called to the stand?

MR. HASHEY: Correct. Thank you.

CHAIRMAN: So that's -- so it seems -- is it just the B and then that one thing in reference to C that is in contention here, or are there other panels and their slides that there is a difficulty?

MR. DEVER: Mr. Chairman, we have only identified issues with Panel B and one slide in Panel C. And I agree with Mr. Hashey's approach. He has provided us with some indication of where they feel the material is covered in their evidence and it would make sense for us to go back and refer to those pages and see whether we can narrow down the issues that we have between ourselves, and if we can't narrow them down to zero, then we will ask the Board to assist.

CHAIRMAN: I can tell you I don't even have to talk to my fellow Commissioners about that approach. Anything that -- where you can narrow down the issues, so much the better for us.

I will ask Mr. Zed, have you any difficulty with that

approach?

MR. ZED: None whatsoever.

CHAIRMAN: And I presume Mr. Hashey has provided you with a copy of that -- or can do, at least --

MR. ZED: He will.

CHAIRMAN: -- should probably -- will make some copies --

MR. HASHEY: No, I can make copies for everyone. In fact, I might ask the Board's office --

CHAIRMAN: Sure.

MR. HASHEY: -- to do that. I am down to one last copy.

CHAIRMAN: Oh, no, we will do that after we rise. Mr. Dionne, is that all right from your point of view?

MR. DIONNE: Yes.

CHAIRMAN: Okay. And Mr. Knight?

MR. KNIGHT: Yes.

CHAIRMAN: Mr. Young?

MR. YOUNG: Yes.

CHAIRMAN: And Mr. Hayes?

MR. HAYES: Yes.

CHAIRMAN: Now, Mr. Zed, are there any other matters that you wanted to bring before the Board at this time?

MR. ZED: No, not at this time, Mr. Chairman.

CHAIRMAN: Thank you. Mr. Dever?

MR. DEVER: I have no other matters to raise, Mr. Chairman.



CHAIRMAN: No other matters. Good. Okay. Mr. Dionne?

MR. DIONNE: No other matters.

CHAIRMAN: Mr. Knight?

MR. KNIGHT: No other matters, Mr. Chairman.

CHAIRMAN: Mr. Young?

MR. YOUNG: Just one issue, Mr. Chairman. Throughout the hearing, there are a number of areas that might be overlapping between ourselves and the other municipal utilities. Instead of us reiterating the same few issues three times, would it be appropriate or allowed that one of us speaks for the three at that --

CHAIRMAN: Oh, yes.

MR. YOUNG: There is not a lot of them, but there are a few that --

CHAIRMAN: Yes. Well, no, no, absolutely, if you -- if the parties can agree to speak as one voice in reference to any particular matter, that's fine with the Board. And I am sure that the applicant and the other intervenors would not object. That is just fine.

MR. HASHEY: Fine.

CHAIRMAN: Mr. Hayes?

MR. HAYES: No matters.

CHAIRMAN: Okay. Well I think Mr. MacNutt is going to raise his finger on that one. Do you have some matters that you

would like to remind the Board to cover?

MR. MACNUTT: At this stage, Mr. Chairman, I think we have canvassed all the one question raised by JDI in correspondence with the Board, and that was clarification on the point in time at which argument would be made with respect to the overall matter. Would time be made available by the Board between the end of the evidentiary portion of the hearing and to allow time for preparation of argument. And secondly, would argument all be oral or would it be a combination of oral and written submissions, either pre-oral or post-oral on the record?

CHAIRMAN: All right. Taking that -- the Board's normal way of proceeding is that at the conclusion of the evidence, we take a break of say a day or so, before summation commences and then after we have gone around all the parties, we then take a half a day. The reason for that being is that counsel and the parties -- we like to have an opportunity to sit down as a Board and see if there is some matters that none of you have touched upon that we think may be of importance, or just some of you. So that we, first of all, give everybody the opportunity to get their argument together. And that may be a day or two, or whatever it seems to be convenient at that particular time. And then after we have gone around with argument

from counsel, we take another short break, which is probably a half a day and then the Board comes back and says to all parties, please address these particular matters in your final summation.

We tend not to call for written briefs, because that adds time. And again there is some urgency in reference to us being able to arrive at a decision. The only time we normally would consider a written brief is if it had to do with a point on the law, that's all, having a legal brief there. But as to the facts and the presentation, not so. Is that sufficient guidance? And as we get closer, we will talk about that again.

Did I cover everything, Mr. MacNutt?

MR. MACNUTT: I have no further items.

CHAIRMAN: Thank you very much. All right. Any other matters? Nothing. All right. Well we will stand adjourned until -- when is it a week, Monday?

MR. DEVER: Mr. Chairman, what time on the week, Monday?

CHAIRMAN: I don't know.

MR. MACNUTT: Mr. Chairman, the timetable is published August 20 calls for November 18th at 10:00 a.m.

CHAIRMAN: November 18th at 10:00 a.m., sir.

MR. DEVER: Thank you, Mr. Chairman.

CHAIRMAN: Well thank you all for your co-operation today.

We will adjourn.

MR. HASHEY: Thank you, Mr. Chairman and Board members.

It's great assistance to have these things settled a week  
in advance.

(Adjourned)

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

Reporter