

New Brunswick Board of Commissioners of Public Utilities

Hearing July 5th 2001

1:00 p.m.

Saint John, N.B.

IN THE MATTER OF AN APPLICATION for a Local Gas Producer
Franchise by the Potash Corporation of Saskatchewan Inc.

Henneberry Reporting Service

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IN THE MATTER OF AN APPLICATION for a Local Gas Producer Franchise by the Potash Corporation of Saskatchewan Inc.

CHAIRMAN: David C. Nicholson, Q.C.

COMMISSIONERS: Robert Richardson
Jacques A. Dumont
R. J. Lutes

BOARD COUNSEL William O'Connell, Esq.
Ms. Collette d'Entremont

BOARD SECRETARY Lorraine Légère

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CHAIRMAN: Afternoon, ladies and gentlemen. Before we begin summation, are there any matters that counsel want to bring up?

MR. ZED: Mr. Chairman, if I might. There were a number of undertakings that perhaps we could address. The first -- at the top of the pile, we might as well start there. We were asked to provide a list of the applicable regulations, standards, codes, specifications, et cetera.

CHAIRMAN: Right. Unless counsel opposite has a problem with it we will mark that as exhibit A, for applicant, 5?

MR. ZED: Mr. Chairman, I would just reiterate my concerns. Yesterday we put this together on fairly short notice and

it may not be complete, but it is reasonably so, I believe.

CHAIRMAN: Thank you.

MR. ZED: Can I deal with the next item?

CHAIRMAN: The next one. Yes.

MR. ZED: Yes. The next item is I'm going to file with the Board and give copies to the intervenors of a consultation plan with respect to the construction application that we believe has been approved by the Board.

CHAIRMAN: Mmmm. That will be A-6.

MR. ZED: The next item is a conversion of a number of figures that Mr. Bollman prepared.

CHAIRMAN: A version of a number of figures.

MR. ZED: A conversion.

CHAIRMAN: Conversion. I see. That will be A-7.

MR. ZED: And the next item is, as the name at the top of the first page implies, a preliminary project construction schedule. It is the most up-to-date one that we have, Mr. Chairman. It represents an update through early May, and it's a little bit more current than the one in the application.

CHAIRMAN: That will be A-8. That's it, Mr. --

MR. ZED: And, Mr. Chairman, I have one final item. We were asked to address the issue of the physical area of our application. And I have prepared something in writing

which we would be prepared to file if that is your wish?

CHAIRMAN: Yes. That's A-9. It is metes and bounds.

Those are all the undertakings that your records show you had to comply with?

MR. ZED: Mr. Chairman --

CHAIRMAN: Counsel opposite have any notes of anything that was undertaken that has not been complied with?

Any other preliminary matters. If not, go ahead, Mr. Zed.

MR. ZED: Thank you, Mr. Chairman.

Mr. Chairman, members of the Board, over the course of the last several months you have had before you the application filed on behalf of the Potash Corporation of Saskatchewan seeking a local gas producer franchise.

And over the course of these several months there have been many meetings and consultations, formal proceedings by way of IR's and responses, filing of evidence, culminating with the hearing which was commenced yesterday.

And during yesterday's hearing, both during direct and cross-examination, we heard testimony about a significant number of matters which we would respectfully submit that, while informative, may have only served to further obscure the reason for the applicant being here today.

We talked about a number of issues and -- including to

a large degree construction application, the details of which will be forthcoming in far more detail. We talked about negotiations with Enbridge, and we talked about a lot of things that really strictly speaking didn't relate to the application.

It's because of this that we think it's wise to take this opportunity to turn the page back to the initial application which you the Board are being asked to deal with today.

And oftentimes in making such submissions on behalf of a client I take the opportunity to reduce my client's requests to the simplest terms. That's a tactic we lawyers use sometimes. I don't need to use that tactic today. The application is in and of itself very simple.

The Potash Corporation is simply seeking permission to distribute its own gas to its own facility and the source of the gas and the facility are located a stone's throw from one another.

They have availed themselves of the provisions of the Gas Distribution Act, in particular Section 6.1, which permits the Board to grant such an application to a local producer where there is no evidence of material prejudice to the customers of the general franchisee.

Let us assume that the Legislature when enacting that provision intended that franchises be granted. I mean why

else would they have enacted it. And with respect we would suggest that if the circumstances in the instant case do not allow this Board to grant such a franchise, then those provisions are meaningless.

I would like to review some of the objections, qualifications or questions raised by various of the parties with respect to our application, and at the same time begin by addressing the statutory requirements.

First and foremost you, the Board, have raised the issue of whether or not we have the standing to be granted this application. The Chairman in his opening remarks raised the issue of whether or not PCS can be described as a local gas producer within the meaning of the Act.

Now if you look at the definition in the Act there is no reference in that definition to any other statutory authority. It just says, has the right to remove gas.

So let's take a very simplistic view and say, okay, as long as you are satisfied that there is something giving them the right to remove gas, then they are a local producer.

So if we look at only the farm-out agreement which was tendered in evidence yesterday, that clearly and unequivocally when looked at the agreement and the testimony and the corroborating representations of Corridor, PCS has the right to remove gas.

But that may be too simplistic of you because really the removal of gas in this province is governed by the Oil & Gas Act. Under the Oil & Gas Act under the existing regime there is provision under Section 29 for the holder of a license to explore, license to search, which Corridor has, to extract gas, in other words produce gas for a period of 60 days. Now that is just an interim period to allow somebody who is exploring to obtain the necessary production license.

As I have indicated to you yesterday the amendments have been assented to. They have received third reading, they have been assented to. Mr. Barnett has assisted us by saying they have not yet been proclaimed, awaiting regulation, but if that regime is adopted in the near future it's an even simpler situation, because under that situation Section 25, the license to explore upon gas being discovered becomes in effect a license to produce, without more.

So Corridor is in possession of the requisite license and if Corridor were here we would suggest there would be no issue.

So the only real issue is, what authority do we have to remove gas?

Under the Oil and Gas Act Section 48, it deals with the transfer of licenses. And basically there is a formal

procedure. Mr. Miller here through his counsel made a representation on behalf of Corridor that he would undertake to file the necessary transfer document.

I have given Mr. Barnett today a copy of a document, the original of which we understand is in the process of being filed, and that document will effectively transfer a 50 percent ownership in four sections to the applicant.

So you might say we can comply with that technical requirement within the next several days once the Minister gives his consent, and we understand it to be just an administrative process.

But we will take it one step further and refer the Board to Section 48.4 of the Oil & Gas Act, and I am going to read an excerpt. It says, "Failure to record a transfer, assignment, agreement or instrument affecting title to a license to search or a lease does not invalidate the transfer assignment, agreement or instrument as between the parties." And that goes on to say, however, it is void against third parties.

My point is simply this. We already by virtue of the farm-out agreement have an interest in that license. That was confirmed yesterday by the testimony. That was confirmed by the corroborating representations of Mr. Miller. That is confirmed by the provisions of the farm-out agreement. And that under those provisions we are

satisfied that we qualify as a local producer.

But us being satisfied and the Board being satisfied may be two separate things. And what we are asking Board to do is to grant the application and grant the application subject to you being satisfied, the Board being satisfied, by us providing documentation such as it may be that we qualify as a producer under the Oil & Gas Act. That may end up being a letter from a department official, more likely it will be a copy of the transfer document, but you get my point. As long as they are satisfied we would suggest that this board should be satisfied.

Now getting back to the statutory requirements of 6.1, the other statutory impediment that really wasn't discussed to any great length yesterday but it's there, it's the issue of material prejudice. Did anybody show that material prejudice would be suffered by the customers of the general distributor? We can only state there was no such evidence.

PCS's application is once again, to repeat, an application to enable PCS to utilize its own gas in its own facility in an area not presently being served by the general distributor.

Enbridge Gas New Brunswick, whether they "support" or merely "accommodate" our application are in the best

position of any of the intervenors to argue material prejudice, and no matter what they have said or done, they certainly have not complained that they would be materially prejudiced.

Interestingly enough though, even though we have satisfied the statutory requirements, the Province of New Brunswick seems to take a view contrary to that of all the parties. They seem to be inferring by their line of questioning that there are serious flaws in our application.

One of the serious flaws they raise is that we do not wish to offer service to other consumers. Imagine if we had applied to offer service to other consumers in the Sussex area. Would Enbridge then not be arguing material prejudice.

Our testimony was clear, and I think to put a proper spin on it we will, if ordered by this Board to do so, provide such service.

There is no revelation here. We have been dealing with the Public Utility Board in this matter since early this year. We have been dealing with all the parties including Enbridge, with whom we have had numerous discussions, and I might add numerous discussions not all of which were referred to yesterday, and it has been our common ground throughout those discussions that Enbridge

does not wish us to distribute to the customers other than ourselves, nor do we wish to do so.

And yet here is the Province seemingly taking the position that one of the objections to our application is that we are not prepared to offer service to the public. Well Mr. Blue is correct. That is our position.

But to help resolve this matter we would suggest another term be included in our franchise. And that term would be that after we begin distribution services, if we are approached by a customer who has secured a gas supply, we will notify the Board and Enbridge and allow Enbridge an opportunity to provide such distribution services.

We will in good faith negotiate the terms of Enbridge's attachment to our system on the basis of normal business considerations.

If after that Enbridge is not prepared or not interested in providing such distribution services, we will provide such services on terms to be decided in consultation with this Board.

The Province seems to take issue with the fact that our gas reserves are not proven for a full 20 year period.

Why should they care? Our application is absolutely clear in this regard. In our discussions with Board staff and all other parties involved we have been absolutely clear. We have already found enough gas to proceed on an

economic

basis with plant conversion.

We are confident we will find sufficient other gas for our needs for at least a 20 year period. If we fail to any extent, then we will burn lesser amounts than we have forecast, but it will be at no expense or inconvenience to the public. The inconvenience and expense will be borne solely by the applicant. Who can complain?

Counsel for the Province explored at great length in its cross examination of both Mr. Marois and PCS's panel the issue of negotiations between Enbridge and PCS. While we recognize that these matters may be of interest to some, and perhaps if a deal had been struck it would have avoided the necessity of a hearing, but the fact remains that two arm's-length business entities attempted to negotiate a deal. There was no deal forthcoming. Why that deal didn't happen really is of no importance. There was no suggestion of mala fides or anything untoward about the negotiations. The negotiations broke down. So what?

With the greatest respect for this Board and its authority, we would suggest that brokering business deals between companies like the Potash Corporation of Saskatchewan and Enbridge Gas is not part of your mandate.

There is no lawful requirement for the Potash Corporation to enter into any negotiation, discussion or agreement with Enbridge or any other company for that

matter. And in any event we feel we have explored all avenues in that regard and such a deal is not possible.

Unable to come to an agreement with Enbridge we proceeded to avail ourselves of our lawful rights to bring this application. We find it ironic that the Province is attempting to short circuit its own legislative process.

Another very significant issue relates to the area of the franchise we are seeking. With respect, it appears from various discussions there is confusion about what exactly a franchise is, and how does the designated franchise relate to the actual gas distribution system.

In our respectful submission the term "franchise" can only have meaning if it relates to customer base. In other words, who does the distributor intend to service, for without customers there is no value in a franchise.

To follow this line of reasoning PCS has clearly asked for permission that it have a franchise to serve one customer, that customer is its own facility at Penobsquis.

How do we intend to service that facility? The specifics of the gas distribution system that we plan will more properly be the subject of an application for a permit to construct, but in fact it will be served by a gas distribution system.

What was included in the application, just for clarification, was an overview of the project as it was

intended at that time, and there was much made of the fact there was reference to wellhead as opposed to gas processing facilities, and I think the answer was, through the confusion, was that at the time there was one well for which a gas processing facility was not necessary.

But I would ask the Board no to confuse those issues. Those issues were intended to perhaps make things clearer and through questioning they may have made things murkier.

The actual construction is the subject of another application as you are well aware and the specifics will be dealt with at that time.

But in any event, to get back to my submissions, what we have is a facility and that facility occupies some acreage in Penobscus. And the customer PCS is situate on that acreage. Now the difficulty we had with the metes and bounds description is really twofold.

Number one, first and foremost, the metes and bounds won't be established definitely until the construction application. Nor will, as was testified yesterday, the width of the right-of-way in all respects. For example, there is an issue with NB Power now over a right-of-way that has not been resolved.

The other thing we need, and that is flexibility. And through questioning I believe from the Board, this was alluded to.

Let's say for example, it makes more sense to run a distribution line directly to McCully 3, but that distribution line really is run to the same customers for the exact same purpose.

It would be our view that that would not be an amendment to the franchise. That would merely require another application to this Board under Section 23 to relocate or extend the pipeline.

And what we have provided the Board with is the wording that we have circulated. And that wording is designed to alleviate a number of concerns. It is designed to alleviate the concern over the issue of metes and bounds.

Because it has two definite points and a right-of-way that connects those two definite points, all of those points in the width of the right-of-way will be the subject of further discussion before this Board. And the Board will have the ultimate authority to establish those points.

The next issue is what we have said is which boundaries may be amended from time to time by application to the Board under Section 23.

Once again if we have valid business reason for relocating our pipeline, let's say it's something as simple as the Department of Highways coming in and saying

they want to reopen the highway and they want us to move our pipe 20 feet.

Well, if we confine ourself to an exact metes and bounds description, and that metes and bounds description is our franchise area, you know, we don't think it fair, and we think it a waste of the Board's time and the time of the Intervenors for us to come back to a full-blown franchise hearing to move that pipeline 20 feet or 30 feet or 40 feet. Really Section 23 is designed to accommodate exactly that.

So I think Enbridge at one time, perhaps in their prefiled evidence, suggested the format which we have adopted. We have amended the wording to suit our purposes. But we have acceded to their format. They have been so accommodating with us.

But I would like to take a moment to say I'm not so sure that solves any problems under Section 15. And I will allow Mr. Hoyt to make those representations if he intends to.

But certainly from our point of view, this would allow us to operate our franchise in an effective manner. It would give us the flexibility we need in the unlikely event that we are going to have to move our gas distribution system one meter or one kilometer in any direction.

And bear in mind that the crux of our franchise is not this metes and bounds description. The crux of it is we are serving one facility. And whether we serve that facility with a pipe coming from the north, south, east or west, it is one facility.

We would ask the Board to grant this application. We think the application will not be only of benefit to PCS.

But it is the first application of its kind. It is the first application providing a use for indigenous gas in the Sussex region.

And allowing PCS to go forward with this can do nothing except enhance the exploration for similar finds in the area and can only assist the people of the province of New Brunswick.

So in summary we would ask that the application be granted subject to the four conditions I have mentioned, one with respect to proving our status as a local producer, the second with respect to our willingness to provide Enbridge with the opportunity to provide distribution services, the third being the matter of the metes and bounds description which I have most recently dealt with.

And first and foremost, and I would ask the overriding condition that has always been to the fore and that is that this application is limited to allow us to provide

service to ourselves, simply that. Thank you.

CHAIRMAN: Mr. Zed, just if you wouldn't mind going back on 15.

MR. ZED: Yes.

CHAIRMAN: Because Mr. Hoyt will address it I'm sure. But to me, and I'm open to be convinced otherwise, but it is an attempt by -- attempting to define your franchise area to overcome a provision that the legislature has put. And I doubt that that can be done.

But if you have an opinion on that I would like to hear it, so that we don't have to bring that go around again.

MR. ZED: I think it can be accomplished. I think it is very difficult to head-on deal with Section 15. And I think the wording is clear.

It talks about -- it talks about a producer -- distributor rather, which definition includes local as well as a general franchisee. It talks about pipeline.

And I will let Mr. Hoyt -- I don't want to take away from his argument. And I don't really -- I don't really have any strong opinion as to how the Board can circumvent that directly.

But what we can do indirectly, and what we have attempted to do indirectly to alleviate some of his concerns, is to say that if we are approached by a

customer really in those circumstances, then we will notify the Board and Enbridge and allow them the opportunity of providing distribution services.

CHAIRMAN: But the whole argument, as I have heard it, concerning the -- attempting to say a 15-foot right-of-way or 15 meters, sorry, is an attempt to deal with Section 15.

MR. ZED: I think the way we are suggesting to deal with Section 15 is with the condition that we have asked you to attach --

CHAIRMAN: Yes.

MR. ZED: -- that if presented with a request for distribution services, we will I suppose indirectly provide those services through Enbridge.

CHAIRMAN: So I guess you are agreeing with me?

MR. ZED: I was the one I think who brought up the issue of the right-of-way. I'm not so sure how a right-of-way affects. I mean, it talks in terms of pipeline, not in terms of right-of-way.

And I think -- I believe I used the analogy of a pipeline running straight down a farmer's field. What does a right-of-way do to insulate that right-of-way from the farmer's field? Nothing. There is still a pipeline.

I think we can get around it and alleviate Enbridge's concern by providing them in effect the right of first

refusal to provide those services in our stead.

CHAIRMAN: Okay. Thank you, Mr. Zed.

Mr. Hoyt, do you want to come up to the mike?

MR. HOYT: Thank you, Mr. Chair, Commissioners. When I got here this afternoon and heard that Mr. Zed had some conditions to propose, I thought that I might not have the opportunity to deliver this argument.

But after looking at the condition that he circulated and listening to the argument that he just submitted, there is not much in my argument that has changed as a result of that submission. And I will, sir, address or attempt to address Section 15 head on.

I would like to start though by just commenting on the unique nature of the PCS application. Clearly, its application for a local gas producer franchise is unique.

It's unique in that PCS is applying for a franchise solely for the purpose of allowing it to transport McCully natural gas to the PCS facility.

And it's particularly unique in that as PCS states at page 7 of its application, I quote, "PCS is bearing the entire financial risk of the project for its own projected benefit. Should the gas supply become insufficient, PCS is the only party affected as both a producer and customer." This theme is consistent throughout the application, the IR's and the evidence in this hearing.

Normally as Mr. Marois indicated yesterday, EGNB would strongly oppose any application for a local producer franchise. EGNB has been granted the right to distribute gas throughout New Brunswick. Any local gas producer franchise must therefore necessarily be carved out of EGNB's franchise area, and should in EGNB's opinion only be done as a last resort when EGNB is not willing or able to serve the market.

However, in this case, PCS partly owns the gas and wants to only serve itself. The application does not purport to affect any other customers. EGNB should not have the same concerns about erosion of its franchise and prejudice to its customers, albeit EGNB customers are still suffering some prejudice.

However, EGNB is concerned that unless conditions are imposed on PCS' franchise, PCS maybe granted more than what it applied for. The challenge for the Board is to determine how to accomplish what is in the public interest, taking account of what both PCS and EGNB want. Different approaches are disclosed by the evidence in how to get there.

PCS suggests that the fact its application is to serve only one customer, and we hear that over and over and over, imposes a limitation sufficient to alleviate EGNB's concern. Well EGNB disagrees. And its disagreement

really goes to Section 15.

And before I get into the conditions I would like to talk a little bit about Section 15, particularly Section 15 (1), because many of the issues in this matter are raised by the wording of that provision.

And what it says is a gas distributor shall distribute gas to any building along the line of any of its pipelines upon the request in writing of the owner, the occupant or other person in charge of the building.

PCS providing gas as a producer to PCS alone as a customer shouldn't fall within the definition of gas distributor for the purposes of Section 15 (1). The PCS franchise does not fit the classic local gas producer franchise or the definition of gas distributor.

EGNB submits that an argument exists that PCS is not a gas distributor at all within the definition of the Gas Distribution Act. A gas distributor is defined to include a person who has been granted a local gas producer franchise to distribute gas to customers in the province.

The definition of customer, however, specifically excludes a gas distributor.

When read together is a person who distributes gas only to itself outside the definition of gas distributor, because it is not distributing gas to customers. And obviously if PCS was not a gas distributor Section 15 (1)

would not be an issue.

The PCS situation really is more akin to a single end use franchise than a local gas producer franchise because the gas is for use at one specific industrial facility owned and operated by that person. That is what a single end-use franchise is defined as. Mr. Gauthier made a similar comment in his testimony yesterday.

You will note though that the Act does not define gas distributor to include such a single end-use franchise, which again would have solved the problem. However, PCS doesn't satisfy the definition of single end-user because it's not receiving gas from a transmission line. So PCS had to try and fit in somewhere else.

Although PCS not being a gas distributor may seem to be an odd result and would lead to a myriad of other issues under the Act, it is because of the unique nature of PCS' application. Gas distributors distribute gas to customers. PCS suggests we don't have to be concerned because no one else will be affected by the franchise. Remember Section 4 of its application. PCS is the only party affected as both producer and customer.

All that being said, it is just to identify a potential issue under the Act. What I would like to assume going forward though, however, is that the Board will conclude that PCS does come within that definition.

Assuming that, EGNB urges the Board to give PCS the right to serve only itself and allow the experienced gas distributor to distribute gas to everyone else.

The Board as in the past come up with practical ways of dealing with bumps in the road created by the Gas Distribution Act.

Mr. Chair, Commissioners, you may look at Section 15 (1) and think what harm could come from simply deciding that it obligates PCS to serve customers along its pipeline. It's not quite that simple.

In its answers to the Department of Natural Resources and Energy's interrogatory 4 (c), PCS indicates that where the available gas exceeds the needs of its facility, PCS as a producer is prepared to explore with other parties outside its distribution franchise opportunities to sell the excess gas. So the possibility of customers along the PCS pipeline is real.

Along the line of its pipeline is far from conclusive. How far can that extend? Does a customer have to be within so many feet of the pipeline? Can customers that live a fair distance from the pipeline be included? Could customers served by PCS be added to its franchise? And is such a moving franchise consistent with the Gas Distribution Act?

Such questions lead to a great deal of uncertainty as

to where PCS' franchise ends and EGNB's begins. The only way the Board can know how to apply Section 15 is if each franchise is clearly defined.

Further, how can it be in the public interest to create a situation in which a franchise holder that has no plans to serve other customers, does not want to serve other customers, and has no experience distributing gas to anyone may find itself obligated to serve other customers.

Any rights granted to PCS should be limited. And EGNB submits that can only be in -- that it can only be in the public interest to grant a franchise to PCS if it only affects PCS.

And just as importantly, if PCS finds lots of gas, and everyone hopes that there is lots of gas in the area, and offers it at attractive prices, customers, who could include large customers like a bakery or a co-generation facility or even a PCS affiliated company established to set up a co-gen facility along the pipeline, could locate along that pipeline, thereby causing additional prejudice to EGNB's customers.

So that is kind of a summary of issues that we see created by Section 15.

So what does Enbridge propose? How should this Board deal with Section 15 (1)?

It is Enbridge's view that Section 15 (1) operates

only within the franchise area of the franchisee in question. Enbridge is not asking the Board to declare that Section 15 (1) does not apply to PCS. That is not what we are asking. Rather EGNB is seeking a clear delimitation of PCS' franchise in order to confirm that for all practical purposes Section 15 (1) would not apply to PCS because (1) the purpose of PCS' local gas producer franchise is solely to serve PCS' existing facility, and (2), potential customers would be outside PCS' clearly defined franchise area.

Considering the unique nature of PCS' application to serve one customer, EGNB submits that EGNB by implication retains the sole right to distribute gas to all customers other than PCS who may wish to or could be served off PCS's pipeline. Otherwise, what is the value of EGNB's province-wide franchise?

Under the scheme of the Gas Distribution Act, the basis for everything that follows is the granting of a franchise to a gas distributor. A gas distributor cannot distribute gas outside of its franchise area.

Under Section 3 of the Gas Distribution Act, no one other than a gas distributor can distribute gas to customers. A gas distributor is defined to be someone who has been granted either a general franchise or a local gas producer franchise. And both the general franchise and

local gas producer franchise are defined in terms of area, either the whole province for the general franchisee or a specified part of the province for a local gas producer. It would be illegal for someone without a franchise for an area to serve customers in that area.

Section 15 (1) cannot allow for extensions of a franchise. How can Section 15 (1) be used to stretch franchises further and further? EGNB submits that the franchise takes precedence over everything else including the Section 15 (1) obligation to serve customers along a pipeline.

Remember that Section 5 (5) of the Act makes the grant of a franchise subject to the approval of Lieutenant Governor in Council. Surely Section 15 (1) cannot be used to extend a cabinet approved franchise. Even were you to go the amendment route to a franchise agreement under Section 10 of the Act, that requires the approval of both the Board and the Province as a party to the franchise agreement.

We submit that PCS cannot do anything, including serving customers outside of its delimited franchise area.

That applies along the width of the franchise and prevents PCS from unilaterally extending the length of its franchise. Section 15 (1) cannot be used to extend a franchise and Section 3 prevents a gas distributor from

distributing gas outside its franchise area.

The comfort the EGNB requires is merely clarification from the Board that Section 15 (1) only applies to customers within a franchise.

As I mentioned, EGNB is the province-wide holder of the general franchise. In its answer to EGNB's interrogatory 4 (d), PCS agreed that it is important to be able to clearly distinguish between the general and the local gas producer franchises. By definition the general franchise excludes any local gas producer franchise, so it has to be carved out of EGNB's franchise.

For certainty EGNB needs to know that everything outside of PCS' clearly defined local gas producer franchise remain part -- remains part of EGNB's general franchise, including the customers along PCS' line.

Without this certainty EGNB has serious problems with PCS' application, particularly because as mentioned earlier, customers who would otherwise be EGNB's could begin locating along the PCS pipeline, thereby materially prejudicing EGNB's other customers.

In his testimony yesterday Mr. Marois gave a hypothetical example where the Province had granted two general franchises, one for Western New Brunswick and one for Eastern New Brunswick, divided by a line down the middle of the province. Surely if the Eastern franchisee

built a pipeline along the boundary line, he could not then use Section 15 (1) to serve customers on the Western franchisee's area, otherwise what would be the value of the West franchise?

We ask that the Board confirm that Section 15 (1) only applies to the franchise area of the franchisee in question. Otherwise we ask under what provision of the Gas Distribution Act can Section 15 (1) be used to extend a franchise or how can a gas distributor be authorized to distribute gas outside its franchise area?

If PCS is granted a clearly defined franchise area, PCS is not obligated or entitled to serve customers outside its franchise area, and all potential customers other than PCS' existing facility remain potential customers of EGNB.

I would like to look at EGNB's willingness to serve in Section 15 (2), because again in his testimony yesterday Mr. Gauthier made it clear on numerous occasions that PCS does not want to serve these customers.

In deciding how to deal with Section 15 (1) remember that EGNB has committed to serve customers in accordance with the Gas Distribution Act and its general franchise agreement. Mr. Marois reiterated that commitment in his testimony. At page 141 of the transcript he said, and I quote, "What I'm saying is we would not treat the

customers in proximity to the PCS franchise any differently than any other potential customers in any other part of the province. There would be no discrimination. The same thing with our postage stamp rates."

Perhaps more importantly, remember that Section 15 (2), a section that really didn't get much mention yesterday. And perhaps I should just quote it because it got so little attention.

Is that upon application the Board may order a gas distributor, which unquestionably includes EGNB, to distribute gas or provide any customer service, or to cease to distribute gas or provide any customer service.

That section clearly authorizes the Board to order EGNB to distribute gas to customers along PCS's pipeline.

What is important in the public interest is that a mechanism exists so the customers along PCS's pipeline will be served if gas supplies are available.

The statutory obligation on EGNB to serve under Section 15.2 should suffice.

I would like to discuss now the conditions to the franchise. As the Board is aware, Section 5 (4) of the Gas Distribution Act provides that a franchise is subject to such terms and conditions as the Board considers necessary in the public interest.

In Schedule A of EGNB's evidence, EGNB has set out three conditions that it suggests should be imposed on PCS's franchise. And that EGNB submits are in the public interest.

The first one dealt with the only customer being PCS.

Then what the condition says is that the franchise is solely for the purpose of allowing PCS to distribute local McCully natural gas to PCS's existing facility located at Penobsquis, New Brunswick solely for use by that facility.

PCS has essentially agreed to this condition throughout its application, the interrogatories and the evidence and from what we heard from Mr. Zed this morning.

In his testimony Mr. Gauthier only took issue with the word "existing". And I noticed -- I was advised by Mr. Zed today that that word is not in the version that he provided to the Board today.

But in Mr. Gauthier's testimony he talked about -- he was concerned about existing, more in the nature of ensuring that changes to such things as equipment, like a bigger dryer, wouldn't somehow be offside by that kind of a restriction.

His suggestion of a new building within the current facility area seems to be far more than the modifications or additions PCS suggested in answer to EGNB's IR number 5 (b), and should not be permitted.

We would ask the Board to append to PCS's condition or PCS's franchise, the condition included in schedule A number 2.

The boundaries of the franchise -- and again that condition which appears as item 1 in schedule A sets out the boundaries as proposed by Enbridge. And Mr. Zed provided an alternative proposal today which I would like to speak to.

A couple of the things that I noticed on a quick read of it, I have noticed that they have made the change from the beginning point as the valve outlet of PCS wellhead facilities to PCS gas processing facility, which I think based on the testimony of Mr. Bollman yesterday, I think I would agree, that was my impression of what they intended that starting point to be.

Again in going through the wording, it then goes on to the outlet of the gas flow meter of PCS's facility. Again the word "existing" has not been included. And Enbridge would ask that that remain as part of that condition.

As to the boundaries they suggest and adopted some of the wording suggested by EGNB, referring to the permanent easement, but rather than setting it at a maximum of 15 meters, suggested that it would be determined on the construction application.

Enbridge would submit that it should be included with

a maximum of 15 meters. The actual location can be determined in the construction application.

But in terms of the evidence that was presented yesterday, we didn't see any evidence that would indicate that a 15-meter wide easement to run a 6-inch pipeline was insufficient, and would suggest that the Board is in a position at this point in time to suggest that kind of limitation.

The key point though that I'm concerned with in that proposed language from Mr. Zed, it then goes on to say "necessary to allow PCS to distribute gas to its facility."

And the difference from what we suggested as to what was suggested by Mr. Zed was we had asked that it say "necessary to allow PCS to distribute gas from the wellhead facility to PCS's facility."

So what they have done is removed the starting point and just set out the end point, which is consistent with the approach that they have taken throughout, that all they want is this customer. But they don't want to define where the processing facilities are. They don't want to define where the pipe is actually located.

In Mr. -- just a moment to find the reference. The reason this is of a concern is that Enbridge was always puzzled by PCS's insistence on limiting its franchise by

customers rather than area. It became clear yesterday why that is the case.

In answer to my request that Mr. Gauthier clarify the meaning of the last two sentences of PCS's answer to EGNB's interrogatory 4 (f) (1), he indicated that PCS's assumption has been that if only the customer to be served is specified, the location of the gas processing facilities and pipeline itself could be changed without PCS coming back to the Board to amend its franchise.

I would like to just refer to Mr. Gauthier's comment in that respect. What he said was we expect number 1 and 2 and 3 wells to provide us with natural gas for a certain period of time. If in the future another well can provide us with the same quantities that we can burn on a daily basis for a longer period of time once these numbers 1, 2 and 3 wells are say dried up, we still want to be able to use that gas, our gas, PCS gas, at our plant. So we may have to locate -- relocate the pipeline and the processing facility. So if it's defined as servicing one customer, that's what we want.

And I followed it up with a question. So the processing facility which you describe as the beginning point of your franchise and the pipeline which is part of the franchise that you are asking for would actually move to a different location? And his answer was yes.

That's simply unacceptable. The location of PCS's gas processing facilities and the pipeline and corresponding franchise area must be clearly determined and the franchise limited to that area. Any change to either must require PCS to come back to this Board for an amendment of its franchise.

And that leads to the final words of the condition proposed by Mr. Zed today where he indicated that the boundaries can be amended from time to time by application to the Board under Section 23. I would suggest that that section would in no way be relevant to an amendment that would allow them to change the location of a pipeline and in so doing change the location of their franchise.

Section 23 is designed for a distributor like Enbridge who has a wide franchise area to relocate a pipeline within that franchise. It cannot be used to extend the franchise.

Section 10 of the Gas Distribution Act is clearly the section to use when amendments to a franchise agreement are required. You can't use a section like 23 that on a real stretch might seem that it has some application and ignore the clear provisions of Section 10 that are designed to deal with amendments to a franchise agreement.

Now if you just -- without reiterating that point too many times, as pointed out yesterday on a number of

occasions, the definitions of both local gas producer franchise and franchise area refer to areas of franchises.

It's essential the Board delimit the four boundaries. I think Mr. Zed's proposal today goes some way in that direction. It seems to be an acknowledgement that the concept of area has some place in this discussion of awarding of a franchise.

Before I leave this condition though I would like to address the Board's request for comments on the gathering lines.

EGNB's position is that the Board should confirm that any pipes which have been described as the gathering lines between the wellhead and the gas processing facilities are not included in PCS's local gas producer franchise. And again I took it from Mr. Bollman's testimony yesterday that that in fact was PCS's approach and I take it from the revised proposed condition today that it continues to be PCS's position.

Prior to the gas's arrival at the processing facilities it's clearly not processed gas that is ready to be distributed. The purpose of the processing facility is to make the gas ready for distribution through the pipeline. EGNB shares the Board's concern that the gathering lines should be safe and built to code. However, they should not be part of the distribution

system. If EGNB was distributing the McCully gas to the PCS facility it definitely would not want the gathering lines to be part of that system.

Because PCS always excluded gathering lines from its applied for franchise, EGNB never considered it an issue.

We have addressed the application as filed. Finding that the gathering lines form part of the distribution system could add multiple pipes to the issues facing the Board on this application and clearly compound the issues under Section 15.1.

If the Board is so inclined we would ask for the opportunity to make further submissions on this issue.

To turn to the third condition that EGNB proposes, that deals with the interconnection.

The last condition that Enbridge proposed simply provides how Enbridge would interconnect with PCS's pipeline in the event there are customers to be served along the PCS pipeline and gas supplies available.

Because the Gas Distribution Act doesn't deal with this type of interconnection issue between franchisee the Board should ensure that a mechanism is provided so that EGNB may attach its gas distribution system to PCS's pipeline for the purpose of serving such customers. Hopefully EGNB and PCS can then agree on the terms of such interconnection. And if an agreement is not possible some

mechanism must be established to impose an agreement. The logical party to play that role is the Board. It's an important issue because EGNB can only be expected to serve customers off the PCS pipeline if the terms and conditions of interconnection to the pipeline are fair and reasonable.

I acknowledge that Mr. Zed put forward an alternative proposal. I took notes as diligently as I could, but there are gaps in the wording as proposed. So rather than comment specifically on that proposal I would like to just maintain that EGNB takes the position that its condition is a reasonable approach but we are certainly prepared to take a look at the condition that Mr. Zed proposed on a break, if that would help the Board.

We have one last condition to propose as a result of the testimony yesterday, and it concerns delivery of gas to a generating station.

As a result of yesterday's testimony, EGNB suggests a fourth condition be added to the franchise if granted. In its evidence PCS indicated that it intends to look at the feasibility of building a generating station to generate electricity for the use of its facility. Little information about that facility has been provided.

EGNB has determined that if a PCS franchise contains the conditions suggested and the Board confirms EGNB's

interpretation of section 15 (1), that the PCS franchise is a prejudice to EGNB's customers that it's prepared to live with. However, if PCS reaches a point where it's prepared to proceed with a co-generation plan it probably means that a tremendous amount of gas has been found. The load would potentially be huge and substantially increase the potential prejudice to EGNB's customers. PCS should have to come back to the Board in that instance. The franchise should be conditioned so that it is clear that a co-generation plant is not within PCS's existing facility. Even if that plant were to be located within an existing PCS building as was suggested yesterday, PCS should have to come back to the Board on this issue.

Throughout its responses to EGNB's interrogatories and particularly in answer to questions yesterday about whether PCS would be prepared to include such conditions on the grant of its franchise, PCS's answers were inevitably to defer to the Board.

PCS has for all intents and purposes agreed to the second condition in EGNB's schedule A dealing with the single customer.

We believe that Enbridge has established the need for the first condition -- their first condition in schedule A which deals with the boundaries, and finally it goes without saying that if EGNB is to serve customers off the

PCS pipeline, it needs the ability to interconnect with PCS's pipeline on fair and reasonable terms, and some mechanism must exist if the parties are unable to reach an agreement on how that should happen.

EGNB is prepared to accommodate the unique and very limited franchise that PCS applied for in its application provided that the Board imposes the conditions proposed in schedule A to EGNB's evidence, the fourth condition just described concerning a co-generation plant and the Board confirms EGNB's interpretation of section 15 (1).

However, if that's not acceptable to the Board the Board should not be satisfied that EGNB's customers will not be materially prejudiced by authorizing PCS to serve part of EGNB's general franchise and deny the application.

Mr. Zed turned it around a little in his argument to imply the onus is on EGNB. My reading of Section 6 (1), it is at least arguable that it is the applicant who must establish there is no material prejudice to EGNB's customers. There is no or very little evidence from the applicant that EGNB's customers would not be materially prejudiced by the local gas producer franchise which as he correctly points out is the test to be met under Section 6 (1) of the Gas Distribution Act. In fact there is lots of potential for prejudice based on what we heard.

As a final option keep in mind Mr. Marois' statement

yesterday that EGNB is prepared to continue negotiating with PCS. If issues such as the uncertainty about PCS's right to remove gas, the lack of a franchise area, its disinclination to serve other customers, its preference not to be bound by sections 14 and 15 of the Gas Distribution Act and the confusion surrounding where EGNB's franchise ends and PCS's begins prevent the Board in the public interest from granting the franchise, send the parties back to the bargaining table with the objective of having EGNB provide distribution service to the PCS plant.

Thank you.

CHAIRMAN: Mr. Hoyt, I am going to take you up on your offer to speak to Mr. Zed during a break and make some comments on that, and we are probably going to have a break right now to allow you to do that so that before we leave here you will be able to comment further on that.

But the second thing is you indicated that if we wanted to have further input from you in reference to where the lines of demarkation are that you would be glad to submit it. We are and that will be today I'm afraid. So if you wouldn't mind doing it.

For instance, my quick reading of the legislation, everybody including the applicant has said that the processing plant is the -- where the distribution line

commences, and yet I look at the definition of works in our legislation and it says it means any building, et cetera, et cetera, et cetera, and includes a processing plant. And you go up to gas distributor means a person owning, operating, manager, controlling a gas distribution system, has general franchise, et cetera, and then pipeline, all property and works kinds used in conjunction therewith but does not include pipeline for which a permit has been issued under the Pipeline Act or transmission line. I would suggest that on my reading, not necessarily the Board's, is that the processing plant has to be included in the distribution system so that the boundary arguably is on the wellhead side of that processing plant.

Anyway, I want counsel to argue those points.

MR. HOYT: Perhaps I could just make a comment on that because I went through a similar quick read last night and essentially came to the same conclusion on that, but I think that because of the importance of the issue to base it just on obviously this afternoon a quick read of the piece of legislation that's available to us rather than to look at other jurisdictions, similar wording in other provinces, case law that might exist surrounding the issue particularly on jurisdictional questions, that it would be in everyone's interest to have a more thorough look at the issue rather than to just give our perhaps off the cuff

comments that further research might lead to a different and probably more acceptable answer to everyone.

CHAIRMAN: All right. Well I appreciate that and that may well be what happens. Now Mr. Blue has been shaking his head back there, so he obviously has some definitive comments he wishes to make on the subject as well.

However -- no, we are because we have attempted to do a quick review of things including the Pipeline Act and the Oil & Gas Act, and with frankness, there appears to be a gap, and I hope there isn't. And I hope that counsel will be able to direct our attention to where that gap can be filled. And that may in fact be due to the way that the Natural Gas Distribution Act was put into legislation and the Pipeline Act attempted to be amended to just simply move things over to the Gas Distribution Act with the Pipeline Act being amended in total or rolled in later. I don't know.

MR. HOYT: I would suggest Mr. Blue would be an appropriate person to comment.

CHAIRMAN: He will. We will take a ten minute break and you can speak to Mr. Zed and we will cover that one thing with you and then go on to Mr. Blue.

(Recess)

CHAIRMAN: Mr. Hoyt, did you have an opportunity to talk to Mr. Zed?

MR. HOYT: Yes, I did.

CHAIRMAN: Good.

MR. HOYT: And perhaps I could just for the Board's benefit just read the words that were proposed, so everyone knows what we are talking about.

"It was proposed that a condition be added saying after we begin distribution services, if approached by a customer who has secured a gas supply, we will notify the Board and allow Enbridge to apply to provide such distribution services. We will negotiate the terms of Enbridge's attachment to our system in good faith on the basis of normal business considerations. If Enbridge is not interested in providing such distribution services we will provide such services on terms to be decided in consultation with the Board."

I have a bit of a hard time reading that since it is so contrary to everything that I just argued. And I think that that goes to my reaction.

I think we are really coming at the issue from different positions in terms of our interpretations of how Section 15 applies. So Enbridge would have difficulty with that condition as proposed.

To just touch on a couple of the points that are made, it refers to if approached by a customer. Well, it implies that that customer is up for grabs somehow. And

Enbridge's position is clearly that that customer would be outside of PCS' franchise and would be an Enbridge customer.

In the second line they suggest that they will notify the Board and allow Enbridge to apply this service. Again these are customers of Enbridge. They don't have to be allowed by PCS to provide service to them.

And in the final sentence where it suggested if Enbridge is not interested in providing the distribution service PCS will provide the service, again it assumes PCS' interpretation of Section 15 (1) that it would apply in a way that would allow PCS to serve those customers. Enbridge doesn't want and the Board should not want PCS to serve those customers.

And again I would draw your attention to Section 15 (2) which in that circumstances would allow the Board to obligate Enbridge to serve those customers.

So again I would ask that condition number 3 to schedule A of Enbridge's evidence be attached to the PCS franchise if granted.

And that being said, I guess as a final qualifier, were the Board not to agree with our interpretation of Section 15 (1), we would ask that the Board consider a condition along the lines of what Mr. Zed has proposed.

CHAIRMAN: Thank you, Mr. Hoyt. Mr. Blue, do you want to

move up?

MR. BLUE: Mr. Chairman and Commissioners, the Province does not oppose this application. But it doesn't want to take a firm position on the application at this time.

Instead the Province wants to make an unusual request to the Board about PCS application for a local gas producer franchise.

The Province is asking the Board to adjourn this hearing for a short period, say two weeks to a month, and direct PCS and Enbridge to discuss in a mutually satisfactory manner, arrangements by which Enbridge can distribute PCS' McCully gas to PCS Penobsquis facilities and to avoid the need to ask the Board to grant a local gas producer franchise to PCS.

Now it is really important for me to describe why the Province believes that such an adjournment and such a direction is a good idea.

As I said yesterday, the Province has two separate but equally important interests to play or at play in this application and hearing.

Both of these arise under the Gas Distribution Act. First the Province wants to see indigenous New Brunswick gas resources developed and be used to the benefit of New Brunswickers.

The Province wants to attract investment in high-risk

exploration and development of New Brunswick's indigenous hydrocarbon resources.

To achieve this provincial goal the Gas Distribution Act allows a local gas producer to unlock its investment in indigenous gas resources in either of two ways.

It can apply for a local gas producer franchise under subsection 6 (1) of the Gas Distribution Act. Or it can connect to a gas distributor in order to sell its gas to that distributor or to an industrial customer or to a transmission line under subsection 6 (2). And it is clear in the Act that a local gas producer must be able to produce and sell its gas.

Therefore the Province supports Corridor and PCS in their desire to see McCully gas burn in PCS' Penobscuis facility. There is no question about the Province's support for that initiative.

But we are not convinced that a local gas producer franchise is the best way of achieving PCS' goal in this particular case.

Now the Province's second interest under the Gas Distribution Act is to protect and to ensure the continued health of Enbridge's general franchise.

As part of this interest the Province wishes to ensure that we do not collectively in this hearing create any unattractive precedents.

Without taking a final position on this question today, I can say that one could make a strong case that granting a local gas producer franchise to PCS as a means of ensuring that its facility burns McCully gas would be a poor precedent indeed.

Consider what we heard yesterday. And again I want to emphasize that I am not taking a final position. But yesterday we heard that subsection 5 (3) of the Act requires a term of a franchise to be 20 years.

Mr. Gauthier told us yesterday that he has some 2.7 million cubic feet of gas a day available for only two years. That is all he had to offer at present. That is what he said in the evidence.

There are no definite plans to explore for more wells. And you will find that at Questions 141 to 156, again at 185 to 186. So PCS has not shown that it has enough gas to justify a 20-year franchise.

The next point is that in the Province's view the Gas Distribution Act requires the franchise area for a local gas producer franchise to be defined.

Franchise area is a defined term in the Act. It means the area in which a gas distributor serves customers, customers in the plural.

Paragraph 8 (1) (a) of the Gas Distribution Act describes the contents of a franchise agreement that any

gas distributor must sign with the government or with the Minister if a franchise, including a local gas distribution franchise is to go forward.

And that requires or contemplates that the franchise area will be defined. Yet despite those provisions in the Act, which everyone can read, PCS has not defined its franchise area in specific geographical terms.

Now although you, Mr. Chairman, did request a geographic description yesterday afternoon after I had done the same, I submit what the Board has received today is at best improvised and is not satisfactory.

It is pretty clear in my submission that a local gas distributor's pipeline includes gathering lines. Those aren't included.

You yourself have pointed out the problem with the processing facility. We do not have a clear geographical description. That's a problem for granting this application.

Another point is that from the evidence yesterday, PCS appears to be a reluctant applicant for a local gas producer franchise at best.

The record clearly shows that PCS wants the franchise so it can use the McCully gas at its own facility. It really doesn't want to serve other customers. It does not intend to serve the Town of Sussex. It does not want to

serve anyone but itself unless the Board orders it to do so.

Now there is nothing wrong with PCS' reluctance in the abstract. But a franchise holder who is reluctant to serve customers makes little sense under the Act. That is not what a local gas producer franchise is.

And another point is that PCS does not appear to understand its obligations under Section 14 and 15 of the Gas Distribution Act. And I canvassed that issue with Mr. Gauthier yesterday at Questions 235 to 242. Again this creature does not want to be a local gas producer franchise.

Mr. Chairman, Commissioners, the problems that I have identified in PCS' application for a local gas producer franchise are not technicalities. They are problems with PCS' position. They are problems for the Board. And they are certainly problems for the Province.

If the Board were to grant the local gas producer franchise in the terms asked for by Mr. Zed, it would face several challenges in the future.

You would have to interpret the obligation to serve customers adjacent to PCS' pipeline under subsection 15 (1) of the Gas Distribution Act as between PCS and Enbridge. That would be a nice legal question.

You would have to interpret at some future date what

was contemplated by PCS' "facilities". Would a totally new building be included? Would a totally new head frame be included? Or is it confined to only replacements or additions to existing facilities?

Imagine the challenges and the hearings and decisions and meetings that is going to produce. Your necks would get sore from looking the other way about PCS ignoring its obligations under Section 14 of the Gas Distribution Act.

And you would have to live and the Province would have to live with the difficult concept of a local gas producer franchise that to all appearances in reality a single end use franchise but isn't.

That is the problem -- those are the problems that this application causes. And asking the Board to accept these challenges I submit is asking a great deal.

The Province therefore does not believe that granting a local gas producer franchise to PCS at this time is the best way to enable it to receive McCully gas and unlock its investment.

Now yesterday afternoon we heard evidence from both Mr. Gauthier and Mr. Marois about discussions between PCS and Enbridge and how Enbridge might provide distribution service.

Mr. Gauthier said that PCS and Enbridge did not discuss costs but only the topic of costs. That was

Questions 278 and then 284 to 296. They did not discuss a compromise rate under which both could be satisfied. That is Questions 285 and 286.

PCS' evidence is not at all clear about why it ended discussions with Enbridge. Mr. Zed comes here today and says they didn't reach an agreement. But in my submission, that is not good enough. That is really a bargaining position.

Mr. Marois on the other hand said that Enbridge was prepared in effect to give PCS a compromise rate. He said that Enbridge would be prepared to allow PCS to build a 2-kilometer pipeline and control its own costs.

PCS would then, in Mr. Marois' view, transfer the pipeline to Enbridge at no cost. Enbridge would then operate it and charge PCS only its own incremental O & M costs.

I don't know whether Enbridge's position was put to PCS that plainly during negotiations or not. There is no need to get into that now.

What is important now however is that Mr. Marois put Enbridge's position on the record that plainly yesterday and it is there.

As the Province interprets it, and perhaps Mr. Hoyt can confirm this for the Board when I finish, this position means that Enbridge would earn no net revenue.

It would only be recovering its operating and maintenance costs.

Correspondingly Enbridge would be ensuring that no new net costs were imposed on its existing customers. PCS would have built its facilities and so have controlled its capital costs.

Now I ask you, Mr. Chairman, Commissioners, what is wrong with that arrangement? The Province can see nothing wrong with it.

Firstly, under that arrangement, PCS would be able to burn its McCully gas at its Penobsquis facility just as if it had a local gas producer franchise. They would unlock their investment in an indigenous New Brunswick resource.

Second, PCS would have controlled its capital costs just as if it held a local gas producer franchise.

Thirdly, PCS would still access McCully gas in the same time frame just as if it held a local gas producer franchise.

Fourth, PCS could still drill more wells to bring further indigenous gas to its facilities just as if it held a local gas producer franchise.

Fifth, PCS could form a gas marketer just as if it held a local gas producer franchise.

Sixth, PCS if it were, if it held a local gas producer franchise, would have O & M costs of its own, probably

higher than Enbridge's, since it doesn't have expertise in operating a natural gas system.

But under the proposed -- under an arrangement whereby Enbridge negotiated an at-cost O & M rate, it would have Enbridge's incremental O & M costs. And Enbridge's incremental O & M costs can't be a lot different from the O & M costs that PCS itself would bear.

Either way PCS always has the right to come before this Board and question Enbridge's rates based on those O & M costs. So it would be totally protected.

Seven, PCS would be freed of any future obligations to serve others imposed under sections 14 or 15 of the Act. And that's an obligation that it doesn't want.

(8) PCS would still be free to displace electricity in the future, just as if it held a local gas producer franchise, or would be free to build a combined-cycle generator if its gas supplies permitted.

(9) The Board would not be obliged to either dismiss this application for the type of reasons that I have suggested might give grounds for doing so. And it would not have to create an anomalous or an invidious precedent by calling this a local gas producer franchise.

And finally this arrangement would encourage Corridor and others to develop indigenous natural gas supplies because they would still be used in New Brunswick.

So the Province believes that PCs and Enbridge should take a second look at an arrangement by which Enbridge would be the gas distributor on a cost recovery basis only at no net cost to its other customers.

While Enbridge's rate, if based on O & M costs only, would be lower than its rates to others for comparable service, the Province would still support it before this Board.

It would do so because this rate would preserve the general franchise of Enbridge and it would prevent a distortion of what a local gas producer franchise is supposed to be, namely a franchise to someone who serves several customers within a defined geographic area from indigenous New Brunswick sources.

The Province therefore asks the Board neither to approve nor to dismiss the application at this time, but instead to adjourn it and direct the Power Corporation of Saskatchewan -- I'm sorry, and to direct PCS and Enbridge to discuss an arrangement by which Enbridge would be the gas distributor, obviating the need for PCS' application for a local gas producer franchise to proceed.

If further negotiations fail, we will have to argue the case then, and the Board and the parties now know the Province's concern.

Mr. Chairman, Members of the Board, I gave Mr. Zed and

Mr. Hoyt notice late yesterday afternoon that I would be making this request.

The Province would like to reserve its position on the application until the Board has decided on this request for an adjournment. But I would be happy to assist the Board with any questions it may have of me relating to Section 15, gathering lines or any other issue that you have discussed with Mr. Hoyt and Mr. Zed this afternoon.

CHAIRMAN: So I take it that you believe that the Gas Distribution Act as presently worded in fact reflects the policy of government and that an extraordinarily unique position such as PCS was just not -- that it wasn't covered. That somebody who is a local producer that wants to burn its own gas --

MR. BLUE: I'm not taking a final position on that issue today. I have explained the problems --

CHAIRMAN: Yes.

MR. BLUE: -- that this application presents. And I have said that someone might argue that. I am not arguing that today.

CHAIRMAN: It certainly is a round peg in a square hole.

MR. BLUE: No question about that.

CHAIRMAN: Second point is that what is your opinion as to the legislative authority to regulate gathering lines in a natural gas field now.

MR. BLUE: Okay, Mr. Chairman. I think the key to this is that under the Gas Distribution Act, there are pipelines subject to this Board's jurisdiction and pipelines not subject to this Board's jurisdiction. Pipeline is a defined term and you referred to it.

CHAIRMAN: Mmmm.

MR. BLUE: And a pipeline that is subject to this Board's jurisdiction in my submission, like a local gas producer's pipeline, once it is applied for would include gathering lines.

The reason I say that is the definition of distribute in the Act was in my submission worded by the Legislature in the way it was to ensure that all movement of gas was covered, including movement of gas from the well to pipelines.

If you look at the definition of distribute in the Act, it says "Means to transmit, transport, move or conduct gas by any means whatsoever." And distribution has a corresponding meaning.

CHAIRMAN: Yes.

MR. BLUE: So a distribution system would include gathering lines moving gas from wells to the distribution system if -- in the case of a local gas producer.

Now there are local gas producers who do not have a distribution franchise. And that is subsection 6 (2),

local gas producer.

CHAIRMAN: Mmmm.

MR. BLUE: And subsection 6 (2) says that a local gas distributor may connect his pipeline to a gas distribution system.

That local gas distributor's pipeline, someone who simply has wells, has gathering, takes it to a point and then sells it to a third party, would not be subject to your jurisdiction but is subject to the Oil & Gas Act.

CHAIRMAN: I can see that. I don't know what is in the Oil & Gas Act that would cover it. And I am looking at it from the point of view of safety inspection, all of those things.

MR. BLUE: Yes.

CHAIRMAN: And they used to be covered under the Pipeline Act.

MR. BLUE: This act repealed the portions of the Pipeline Act dealing with natural gas lines.

CHAIRMAN: So does that not leave the situation you have just brought up of where for instance if PCS were not a local producer franchisee but was a local producer and therefore was not under the jurisdiction of the Gas Distribution Act, does -- are there provisions in the Oil and Gas Act that would then leave with the Minister the authority to regulate and inspect the gathering line?

MR. BLUE: There, Mr. Chairman, I'm not entirely familiar with that law and so I can't assist you on that point. I am instructed by a lawyer in Justice that it is covered by that Act, but that's -- I can only say --

CHAIRMAN: Okay. Well I'm not familiar either --

MR. BLUE: -- Justice is --

CHAIRMAN: -- but that's one of the things that in our scenarios we have, you know --

MR. BLUE: But there is no -- but I want to be clear. A pipeline system owned by a local gas producer includes gathering lines, includes the processing facility, includes everything.

And one of the problems we have with the definition of franchise, which we say should be in a geographic area, is that it is has got to include all the area covered by the gas field, the gathering system. And you would want to have it described to cover the potential area where the company might explore. We don't have that. So that is a problem with the application.

CHAIRMAN: All right. We are going to take five minutes and go back to Mr. Zed and go through counsel again.

One of the things, and Mr. Blue, you alluded to it vis-à-vis gas supply, the legislation indicates that a franchise is a 20 year franchise.

Is there statutory authority in which the Board could

as one of its restrictions to a franchise, put in a sunset clause such as that somewhere during this proceeding somebody suggested when the gas runs out the franchise is exhausted, if you pardon the pun, or something of that nature.

Or if it turns out ultimately that there is a gap in the legislation -- and the specific difficulty that we have with this particular application, because of the unique factual situation, should be covered by a change in the legislation, that the Board would be able to insert a condition in the franchise agreement, that the franchise agreement if the legislation were changed to cover this particular factual situation, that the franchise agreement would expire sometime after the legislation had been proclaimed.

I'm really just grasping at straws here and asking counsel if they can to assist us in approaching any one of these different problems.

MR. BLUE: Mr. Chairman, Section -- the principle of interpreting the Gas Distribution Act like any statute, you have got to read the statute as a whole and all sections in it to gain assistance.

And Subsection 5 (3) says the term shall be 20 years, Subsection 5 (4) entitles you to attach terms and conditions as you consider necessary in the public

interest. They are in the same provision. They have got to be read together.

The proper legal conclusion that I would come to is that you could put a sunset condition by way of a condition under -- you have authority under 5 (4). Then again in your general powers, Subsection 75 (1), Upon any application to it the Board may make an order granting the whole or part of an application, make a conditional order or grant further or other relief besides instead of the applied for as --

CHAIRMAN: Yes.

MR. BLUE: And I submit that those -- that provision also gives you the power to put in that type of a clause.

CHAIRMAN: Okay. Thank you, Mr. Blue. We will take a 10-minute recess and come back so counsel can comment on anything they want to.

MR. BLUE: Mr. Chairman, I have copies of my text if anyone wants to review what I said as opposed to their notes.

CHAIRMAN: Would you give Board counsel a copy?

MR. BLUE: Sure.

CHAIRMAN: Thank you.

(Recess - 3:00 p.m. - 3:25 p.m.)

CHAIRMAN: We are missing Mr. Hoyt.

MR. ZED: He said I could speak for him, Mr. Chairman.

CHAIRMAN: I have absolutely no doubt of the truthfulness of

that.

All right, Mr. Zed.

MR. ZED: Mr. Chairman, just a point of procedure. Is this final rebuttal after which nobody else will have a further say, or are there other matters that we are going to address?

Just when you left you said we will hear from various lawyers, of the lawyers when we come back. I'm just wondering what you intend for the --

CHAIRMAN: What I intended was that I -- the Board had thrown a whole pile of issues out at everybody. And some had an opportunity to comment on it and some did not.

If you have a final thrust that you wish to save to the end, well then save it. And just comment on the matters that have been brought up now. And you can --

MR. ZED: Okay. No, I'm just curious, that is all.

CHAIRMAN: -- have final rebuttal.

MR. ZED: Yes. I will deal first with Mr. Hoyt's presentation, try to do it in point form.

One of the issues that we have discussed with Enbridge and is apparent is the issue of whether or not we want service to our facility or our existing facility. And we would merely say that once the gas hits the meter it is in our facility.

And we would suggest it would not be proper for us to

have to come back here to say we want to put a third dryer or a fourth dryer or whatever.

Now having said that, whether the dryer is located in an existing building or we build a new building, we would take the same position.

Now there comes a time when I suppose, you know, people start thinking about co-generation and we are going to build a massive generating station on site.

We were up front about that. It was in our application. It said that was one possibility subject to any regulatory approval that is required.

But we don't want to be limited to any use we might make of this gas on our site. And we would suggest with respect that the Board wouldn't want to embark upon that kind of an analysis anyway.

The issue of the right-of-way being 15 meters, I mean, the evidence is clear, and I hope it is acceptable. But the construction application is not yet filed. And whatever rights-of-way are required under the construction application because of highways or guy wires or farmers or whatever will be apparent in that construction application.

If the Board feels at anytime that any of those rights-of-way are excessive for any reason, then we can discuss the matter at that time. And our suggestion

really leaves it to you to decide what those limits are.

But we just feel it is premature now to concede that 15 meters or 25 meters or 10 meters or whatever is appropriate. It may well be that we don't have an issue with the 15 meters. But that will become apparent on the filing of the construction application.

Now the issue of the franchise agreement that Mr. Hoyt referred to, he indicated that our evidence was that we didn't feel we had to come back to the Board to move our pipeline.

And the evidence, I think to be fair, may have appeared to be that way in the testimony. But it was much clearer in the IR's, when it was very clearly indicated that while we did not wish to come back to the Board to move our pipeline under a franchise application, we recognize that we would probably have to come back under an application to move the pipeline under Section 23.

So there is no issue with that. And that is what is reflected in one of the conditions that was proposed to the Board, just for clarification.

Prejudice, the issue of prejudice. Frankly there are a lot of things in any kind of an application that much is made of. And there are things that not much is made of. And usually in the latter case are things that are relatively obvious.

Our application contains a number of statements indicating that we are a sole customer. We are located in Penobscus. There is no ability for us to be serviced by the general distributor. The general distributor has no plans to provide such service.

When we engaged in the interrogatory process, they confirmed that the only ability they would have would be is if we sold them enough gas that they could set up another branch of their distribution company.

But really -- it says in 6 (1) that the Board is to be convinced. The wording of the Act -- forgetting about whose -- where the burden falls, there is no evidence of prejudice of any kind.

With respect to the issue of the right-of-way and the issue of Section 15 and our proposed condition that would refer the matter, refer, pardon me, any such requests from a proposed customer to Enbridge and the Board, that is not an attempt to do anything other than accommodate Enbridge and accommodate our own interests.

We have recognized that there is a difficulty with Section 15 (1), 15 (2). We differ with Mr. Hoyt as to what the Board may or may not do with that interpretation.

And we merely offered the condition to accommodate Mr. Hoyt. I think we were both trying to get at exactly the same thing in a different way.

The issue really is one of what do we want to do? If we have to offer services to other customers we will offer those services. And we will offer those services in conjunction with a direction from the Board as to how we should offer those services.

We would prefer, we will say once again, that Enbridge be offered those services. But in light of the wording of 15 (1) and 15 (2), we don't necessarily agree on what Mr. Hoyt has suggested.

And that is why we would ask this Board to adopt the condition we have suggested with respect to our willingness to refer such customers to the Board and to Enbridge for service.

Dealing with a couple of Mr. Blue's points, the evidence that we have -- the evidence is that we have sufficient gas for our purposes. The evidence is that we are further -- doing further exploration. The evidence is that we have reduced -- we may have reduced quantities if we find no further gas, but that we have sufficient gas for that period.

This business about qualifying the length of the franchise -- and I beg to differ with Mr. Blue -- but I think if you read Section 5 (2) it says "The Board may grant a general franchise, a local gas producer franchise or a single end use franchise to a person who has

submitted an application." 5 (3), "Subject to 11 (1) the term of a franchise granted under subsection (2) shall be 20 years."

If you look at 11 (1), 11 (2) says "Where the term of a franchise agreement has expired or will expire within one year, the Board may renew the franchise or extend its term for such period of time and upon such terms and conditions as it considers necessary in the public interest."

Now that is specifically to deal with this situation of transition. Our 20-year period is expiring. We come back to the Board. The Board is uncertain whether we deserve another 20 years. So they say look, we will grant you another six-month term or one-year term. That will give us time to sort through and either award a 20-year franchise or not.

It is a little bit like being pregnant. I mean, you either are or you are not. And with the greatest of respect there is no authority in this Act for the Board in our submission to shorten that period, however desirable such may be.

Now the issue of gathering lines. If you read --

CHAIRMAN: Mr. Zed, I'm going to ask you to focus on that again. If you look at 5 (4), "The grant of franchise under subsection (2) shall be subject to such terms and

conditions as the Board considers necessary in the public interest."

MR. ZED: And with respect, Mr. Chairman, we may disagree on that interpretation. I just read that to mean the term is for --

CHAIRMAN: Okay. What happens if we say something that this franchise -- if there is no longer economically feasible gas to produce, this franchise will expire?

Why should the term of the franchise go for a full 20 years if there is no gas to distribute?

MR. ZED: Well, I think you may be able to do it by making a term of the franchise -- I suppose you could approach it on that basis. But it would be my opinion that it is for a period of 20 years.

CHAIRMAN: Well, I agree with when it is issued it is for 20 years. But one of the conditions is that it shall sunset upon the occurrence of certain things or the lack of doing of certain things and --

MR. ZED: Well, let's explore that for a moment. Let's even say you could make such a term or condition. What would be the nature of it?

I mean, surely it wouldn't be -- if your gas usage fell below, you know, 2,000,000 cubic feet a day or 1,000,000 cubic feet. I mean, I don't know on what basis you would --

CHAIRMAN: I don't know. For argument's purpose you can say that if in the fiscal period there has no longer been any distribution of gas pursuant to this franchise, that the franchise will expire. I don't know. But I'm just saying --

MR. ZED: I'm not going to say anything more about it than that, except to leave you with that.

CHAIRMAN: Yes.

MR. ZED: The issue of gathering lines, the only thing, Mr. Chairman, I can really add to the debate is I have talked to a number of people.

And I don't mean this the least bit facetiously or sarcastically. But I have talked to the same people two days in a row. And they have come to different conclusions.

And I would only say that if you read all of those definitions together and try to make sense of them, you can come to a number of different conclusions.

And my understanding is that gathering lines in the industry are not normally part of a gas distribution system. And I'm sure others here will take a different view of it. So it may well be that it is something that the Board would require further submission on or invite further submission on.

I'm just throwing that out. Because I don't have

anything more definitive than that. I mean, I can point to some definitions that allow for the interpretation, they are not included, and others that say it is.

I mean, for one thing the definition of gas, how does that play into it? The definition of gas in here appears to be in a liquid form. So I'm just not sure --

CHAIRMAN: I'm sorry?

MR. ZED: Well, it says "Gas means any hydrocarbon or mixture that a temperature of 15 degrees Celsius and absolute pressure is in a gaseous state."

CHAIRMAN: Yes. Gaseous --

MR. ZED: Okay. I'm just not sure what is coming out of the ground is always in a gaseous state in some of our gathering lines, that is all.

CHAIRMAN: Well, I would suggest, and that is only having spoken to people far more knowledgeable than I, that you may get some liquids.

But you will -- if you are looking for natural gas then the only time you produce or get anything out would be -- some of it would be in the gaseous state.

MR. ZED: I would agree some of it would be -- and I'm just saying that that suggestion has been made to me. And if you look at the distribution, gas distributor or gas distribution system, it means all or part of the gas pipeline up to and including the meter.

And if you look at pipeline it means any pipe system or arrangements within the province for distributing gas.

So are you distributing gas if it is a different animal before the processing plant, after? I think some people might argue that the distribution of gas is distribution of gas for use as opposed to prerefined, the raw gas.

So I'm not going to add -- shed any more light on it other than to say I understand that there is some concern with all parties as to whether they are included or not, and suggest it may be helpful for the Board to invite further submissions on the topic, that is all.

The final item that I will address for now is the issue raised by Mr. Blue on behalf of the Province, who is not opposing the application, thank heavens.

The applicant was engaged in significant discussions and negotiations with Enbridge for a period of some months up to and including sometime in April or May.

We had two very knowledgeable, large corporate entities negotiating in good faith. Those negotiations did not result in an agreement.

We had a party who was not privy to those negotiations, at least to our knowledge, was not involved at any stage of those negotiations, at least to our knowledge, asking questions of two gentlemen who were only

two of several individuals who were involved in those negotiations, asking them to recall events that occurred some months ago, and in fairness events that were not properly the subject matter of this inquiry. I mean, they weren't in the normal course before this Board. No pun intended. But they came out of the blue.

And the gist of what I'm getting at is really -- I don't see how this Board or any other entity can second guess the business decisions made by these two parties.

And I have a very difficult time understanding how this Board could hope that delaying this matter any further will produce an agreement between these two parties.

I mean, over the course of these several months they came to a decision not to do a deal.

Now we have heard that the reason for the Province putting forth this proposition is that there are a number of deficiencies in the application. And some of those deficiencies relate to the Province's view of what a local gas producer should be about.

Well with the greatest respect, when I went to law school they taught you to look at the legislation. And what somebody sitting in an office in Fredericton thought the legislation should have said was irrelevant. The legislation you have before you today doesn't make mention

of many of the things that were raised.

You know, where is there an obligation that the local gas producer must serve a number of customers. Is there a positive obligation that says before you can apply you must have more than one customer? I mean, other than the obligations imposed by 14 perhaps, and 15 definitely, there is no such obligation. And we have in our evidence and in our argument indicated how we propose to deal with that. And how we propose to deal with that is really designed to be an accommodation to Enbridge.

I mean we can't have it both ways. If we came in here with an application as a local producer and said we have the Town of Sussex as our customers, well then Enbridge would be complaining. We come in here and say we are the only customers and now the Province is complaining.

So how do you reconcile those two positions? And we would suggest that this Board is very capable of reconciling those positions by take a commonsense approach. We are stuck in the middle of nowhere in the world of natural gas in this province. We have discovered gas on a -- in a well which is a stones throw from our property. And we have the ability to construct the necessary facilities and operate the necessary facilities, to provide a benefit to a New Brunswick enterprise with the indirect benefit that exploration in the province is

going to be enhanced. And the only thing that can result from that is a development of future gas fields.

There is not going to be an application before this Board that is any cleaner. If we came in here trying to serve two customers in an area where Enbridge is, I mean how could that be better? So really what Mr. Blue is saying, and what position he would have you take, is that why don't we just put a big black mark through the local gas producer provisions because there is no such thing. Because you either don't have enough customers or you have too many.

So we would say, with respect, we have entered this process in good faith. We have provided the Board with sufficient information to grant the franchise. There will be another phase to these proceedings, we hope, and that will be the construction application. Many of the obstacles raised relate to construction and they will be dealt with in the normal course.

If we meet with Enbridge and don't come to a deal, is this situation going to be any better or is the decision going to be any easier in two weeks time. We think not. And we really think it would be fruitless to embark upon such a delay. And ask you respectfully to grant the application as requested.

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

MR. HOYT: I take it there is three issues the Board is looking for comments. The first is the issue of the gas supply and the 20 year franchise and the fact that there is a statutory provision obligating the Board to grant a franchise for that period of time.

And our suggestion is, and it's consistent with what the Chairman spoke of before the break, is that if there is a condition of the franchise referring to the distribution of McCully natural gas which you will find in the suggested condition that EGNB has proposed in its evidence, that says solely to distribute local McCully natural gas, that when the gas runs out, we believe the franchise would necessarily be terminated. So we would support that type of condition to try and address that issue.

The issue of gathering lines, this is a large issue for Enbridge. I would like to just confirm my unresearched comments that I made during my argument. I would like to emphasize particularly the comments that if the gathering lines are included, there is a huge potential issue for Enbridge in terms of how Section 15 (1) might apply.

I think it's clear to the Board from our representations during the last couple of days, the nature and the magnitude of the concerns we have with only PCS's

pipeline. But that's magnified a tremendous number of times by gathering lines that could be located in any parts of -- who knows how close they have to be in the vicinity to these McCully fields. That there wasn't a lot of detail in terms of where that might -- where those fields might end.

So the number of potential customers along those lines is really limitless as far as EGNB is concerned. Provided that the Board were to interpret Section 15 in a way other than we have suggested.

Enbridge could lose customers over a very large area depending on where those lines end up being located.

Mr. Blue's comments were based on a Justice Department opinion, which I assume was well researched and thought out. And, again, would again make the offer to submit additional comments on this issue if that were to be the Board's wish.

And I will also suggest that if the Board were to determine to take Mr. Blue's suggestion of an adjournment up, that this is an issue that could be canvassed by the parties more thoroughly during that period of time as well.

It's unfortunate that Enbridge wasn't aware of this issue coming into this proceeding. I understand obviously that the Department of Justice is giving opinions to

Natural Resources that has obviously been on their mind. And in conversations I have had with Mr. Zed previously, he mentioned that it was least topical. But because it didn't seem to come out in the IR's, we certainly didn't see it as an issue. Because the application was limited from a point of the processing facilities to -- to where the customer is located.

Mr. Zed just suggested again that there is no prejudice to Enbridge's customers. And, again, whenever that statement is made he goes back to the fact that they just want to serve the single customer. And I don't dispute for a minute that that is their objective. But the problem is, and for whatever reason they won't acknowledge that this Section 15 (1) potentially could lead to PCS serving an awful lot of customers.

I would have said a lot of customers at the beginning of the afternoon, but now they are on gathering lines. It is potentially a tremendous number of customers. And based on that, I would suggest that based on the information before the Board, if the Board were to disagree with our interpretation of Section 15 (1), that the Board cannot be satisfied based on the evidence before it that the customers of EGNB will not be materially prejudiced by granting a local gas producer franchise to PCS that includes the gathering lines which could spread

over a very vast area seriously compromising EGNB's franchise.

The consequences, as I said, are potentially -- potentially limitless. With that result if, again, if our interpretation of Section 15 (1) is not accepted, EGNB would have to ask that the application be denied. And again we would make further submissions on the issue.

The last point that I think the Board is looking for comments on is Mr. Blue's suggestion or proposal that the hearing be adjourned for a period of time. That's something that at the end of my argument as well, I indicated that in testimony yesterday Mr. Marois indicated that Enbridge is prepared to negotiate, would be prepared to use such a period of time to try and do that with the objective being that Enbridge would distribute this McCully gas to the PCS facility. So I would support Mr. Blue's suggestion for an adjournment.

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

MR. BLUE: Mr. Chairman, Mr. Zed is the applicant's counsel and he has an onus on him and he has given a very full reply to my comments already, so I don't want to prolong this.

Let me make three points.

With respect to the Board's knowledge about negotiations. The Board knows only what it learned from

the evidence yesterday and I have given you the references on pages 5 and 6 of my notes of what questions they are. That's the only thing that you know and that's what you should base your decision on.

Point 2, Mr. Hoyt is wrong. The position that I put to you about gathering lines being included in the local gas producer franchise owner's pipeline were my submissions to you. What I had a Justice memo on was that a local gas producer's gathering lines not part of a local gas producer franchise is subject to the Oil & Natural Gas Act, not the Gas Distribution Act. Okay. I don't know how much turns on that.

And thirdly I say that if it would be helpful to the Board the Province would be happy to file its submissions on any of these issues to analyze in greater detail.

Thank you very much.

CHAIRMAN: Mr. Zed, did you have any final comment?

MR. ZED: Nothing out of that, Mr. Chairman.

CHAIRMAN: The Board wants to take about a ten minute recess and I will ask you to stay around.

(Short Recess)

CHAIRMAN: The Board has taken a few minutes to discuss various matters that have been argued in front of us.

Let me preface everything that I will say on behalf of the Board by saying that this is going to be an extremely

difficult decision for the Board.

First of all it flies in the face of the normal concept of a regulated public utility in -- and that concept and the basis in North America for the last hundred years of awarding franchises has been that the state awards the franchise and gives the exclusive right to the franchise holder to perform that public utility service for whatever the defined area may be.

And as a direct result of that there is an obligation imposed upon that franchise holder to perform certain services and functions for the public, and the public has a right to depend upon that.

So this becomes extremely difficult in that context for this Board to wrap our heads around how we are going to award a franchise, if in fact we do.

It's also difficult and will be a difficult decision because in our opinion issues still remain unclear and how to handle it.

Now as a result we will be here next Wednesday morning at 11:00 a.m. to deliver an oral decision in reference to N.B. Power and we are going to do two things. And that is first of all we are going to ask counsel to prepare and file with the Board by Tuesday at noon a -- their opinion as to two things, one, the question of gathering lines, and secondly, how that opinion will affect how a franchise

area should be defined.

So if I heard Mr. Blue's submission then he will come forth indicating that if we do award the franchise to PCS as requested, then it is going to be including the gathering lines. If in fact it comes through, as I understand it, if Enbridge were to build it then -- and operate it as the general franchisee distributor, it would not include the gathering lines.

Anyway, that's the way in which we appreciate Mr. Blue's presentation to us. And in that regard I would ask the company, that is, the applicant, to have a metes and bounds description which would include both of those situations.

As a preliminary thing and a preliminary look, what has been filed as exhibit A-9 I believe it was -- anyway, it's the -- yes, A-9 -- is not sufficient. And I say a metes and bounds description is, as an engineer in our midst called it, a surveyable area of land. So that if in fact we go that route after looking at A-9 and do grant the franchise, we will have those available to us. They should be available for us next Wednesday.

And we will adjourn this hearing until that date. We will very strongly suggest that the applicant again approach EGNB, it has been two months or more since you have talked, and see if you are able to come up with a

conceptual agreement as to how you might proceed.

We will still be seized of jurisdiction to deliver a decision if that does not happen, but we would be very hopeful that you can approach the subject matter again.

First of all the briefs will be in by 12:00 noon on Tuesday of this coming week and we will reconvene the hearing at 1:30 on -- actually I think that's kind of early -- I think it will be 2:00 o'clock on Wednesday the 11th. And at that time we may ask counsel if they wish to orally -- no, I think we will stick with the written briefs. If we have any questions at that time we will pose them. But that's all.

Mr. Zed?

MR. ZED: I have a question now, Mr. Chairman. The metes and bounds description you are looking for, perhaps this is some of the confusion. Are you looking for a metes and bounds description of the gas distribution system or of the facility?

CHAIRMAN: I don't care about the customer.

MR. ZED: That's fine.

CHAIRMAN: I am talking about the distribution system.

MR. ZED: That's fine.

CHAIRMAN: And that varies depending on the interpretation as to whether gathering lines are involved or not.

MR. ZED: One of the difficulties we have, as we have

stated, is we have a construction application that is pending and has not actually been filed yet, and the metes and bounds description of that pipeline is going to be dependent upon the description contained in that application.

So we can provide a surveyable description of what we know now, but that might change between now and the time of the filing of the application. And that's the difficulty that we are -- any applicant is going to be faced with because of the --

CHAIRMAN: You can do it that way, Mr. Zed.

MR. ZED: Okay.

CHAIRMAN: I have no problem. But I also want you to do it in a more general fashion. I suggested what about the old parish system, et cetera, or if on the subsurface rights there is a grid system that is established, I don't know, I have no idea, but use your ingenuity --

MR. ZED: All right.

CHAIRMAN: -- and come back to us so that if in fact it's the gathering system, then you can't go with just where the pipeline itself is and all of the concerns that EGNB has if the gathering system is included, I don't think they are going to wake up in the middle of the night about whether -- if in fact it's a quarter mile wide corridor along the distribution line or not because of all the

gathering system that's out there and that includes an area of it.

So you see the quandry of the Board. And I'm not -- we are not making any decision on that now. We could very well go with what is in A-9, but I am just saying I think that those options should be available to us, particularly where we believe there is a real question and each of you has a slightly differing opinion as to whether or not gathering lines are involved or they are not.

So we want to have the material there so that if you are unsuccessful in your approaches to Enbridge to come up with something conceptually that's agreeable to the parties, that we have in front of us what is necessary to deliver a decision.

Can you give us ten copies of your brief?

MR. ZED: Yes.

CHAIRMAN: Mr. Blue?

MR. BLUE: Mr. Chairman, Commissioners, I'm not clear about what will happen at 2:00 o'clock next Wednesday. Did you anticipate asking counsel questions or having the issue argued orally as well?

CHAIRMAN: I was going to suggest that but then I realized that some of you may have conflicts and I backed off that.

So you submit your brief to us by noon on Tuesday and we will deal with that.

MR. BLUE: Okay. There will be no proceeding on Wednesday next then?

CHAIRMAN: No. There will be no need for counsel to be here, sir.

MR. BLUE: Thank you.

CHAIRMAN: We would like to have a representative. If counsel wishes to be here they can, particularly -- you know, we are suggesting that PCS and EGNB sit down.

And if they come back to us on Wednesday and say, we have got this conceptual agreement that we say is going to -- we will probably in two weeks time be able to have it on paper and we want you to adjourn over until that's done, or whatever, we want to be able to do that.

MR. BLUE: Sir, I want to be clear. The Province wants to help in any way it can. I am happy to be here assuming I don't have a conflict -- if you can give me five minutes I could check -- but I won't do that if you don't believe that you need counsel to assist you next Wednesday.

CHAIRMAN: No, we will have to go ahead next Wednesday.

That's our time frame, that's our slot, that's all we have got.

MR. BLUE: All right then. Could I have a few minutes to check?

CHAIRMAN: Yes, go ahead.

MR. BLUE: And again just so we are clear, the following

Wednesday there would be some sort of a direction or decision from the Board? Not necessarily on Wednesday?

CHAIRMAN: The following Wednesday -- well said, Mr. Blue, yes.

MR. BLUE: But not necessarily on Wednesday?

CHAIRMAN: No. This is an extremely difficult decision. The Board will as it normally is be as quick as it possibly can, but there are -- we see a lot of difficulties. Period. That's all I will say on that.

Mr. Hoyt, do you have anything you want to --

MR. HOYT: Just a couple of questions, Mr. Chair, will PCS provide the metes and bounds description to the other parties prior to the hearing?

CHAIRMAN: I suggest that you should, yes. Now, I know that everybody is going to be scrambling here. So I think that if you were to get it on the morning of the 11th would that be sufficient for your being able to review it? Give them all the time you can.

MR. HOYT: Yes. It would be nice to just get it by the end of the day on the 10th if at all possible.

MR. ZED: I mean, Mr. Chairman, we will -- I think we have always provided Mr. Hoyt with copies whenever we could.

CHAIRMAN: All right.

MR. ZED: You have given us till Wednesday morning to have

it -- I understood your comments. If we get it done

earlier, we will circulate it. I thought you said

Wednesday with respect to the metes and bounds?

CHAIRMAN: I did.

MR. ZED: You did. Yes.

CHAIRMAN: Yes. The metes and bounds we don't need to have that on Tuesday.

MR. ZED: That's what I thought.

CHAIRMAN: No.

MR. HOYT: It would be useful, Mr Chair, though to have it by the end of the day on Tuesday, just so that we don't see it for the first time when we get here, if the Board wants comments --

CHAIRMAN: Mr. Zed, will you make your best effort to get it to Mr. Hoyt?

MR. ZED: We will have it Wednesday positively. And if we can get it done by Tuesday, we will have it done and circulate it.

CHAIRMAN: Even E-mail it to him on Wednesday --

MR. ZED: Yes, I will. We will make every effort.

CHAIRMAN: -- before he comes down. Okay.

MR. HOYT: That will be fine. And are the parties to provide their submissions on the gathering lines to each other by noon Tuesday as well?

CHAIRMAN: I think you all have E-mail. Why don't you just make up a list and fire it out.

MR. HOYT: And the reason I ask is would the Board then be looking for -- open to comments in reaction to what others have provided in their briefs?

CHAIRMAN: Normally I would say yes. But again has Mr. Blue been able to do any -- you haven't checked as to whether you can be here or not?

MR. BLUE: I am going to be here if I can.

MR. HOYT: And from --

CHAIRMAN: Well, my suggestion is that we say yes, but if Mr. Blue can't be here have them written -- the comments written and delivered to us at 2:00 o'clock in the afternoon on the 11th, which would give Mr. Blue an opportunity to do something and get the Department to file it with us.

MR. HOYT: And the last thing, I think I know the answer, will the Board be looking for a status report on the EGNB/PCS positions?

CHAIRMAN: Absolutely.

MR. HOYT: Thank you, Mr. Chair.

MR. LUTES: That will be the first thing we would like to hear.

CHAIRMAN: Mr. Blue, do you have anything else? Do you want to go check so we know definitely whether you are available?

MR. BLUE: If I may. It will just take me a second.

CHAIRMAN: Yes, okay.

MR. ZED: During that couple of minutes might I confer with Mr. Hoyt, something I want to --

CHAIRMAN: You can confer with Mr. Hoyt. Go ahead, please.
(Off the record)

CHAIRMAN: Mr. Blue?

MR. BLUE: Mr. Chairman, I can be here next Wednesday.

CHAIRMAN: Great. Thanks. Okay.

MR. ZED: One final item, I hope?

CHAIRMAN: Well if not, I have got more.

MR. ZED: Oh, from me, Mr. Chairman. You are always welcome to make final comments.

CHAIRMAN: Thank you, Mr. Zed.

MR. ZED: If we, we being PCS, do engage in discussions with Enbridge, we want to make it clear that they are on a completely without prejudice basis and we would not want the parties subject to any examination as to the contents of those, or what negotiations took place, or he said, she said, because otherwise it doesn't encourage any frank discussion.

CHAIRMAN: The oral part of this hearing is closed. And there will be no request -- we just simply believe that after all of the issues that have been addressed over the last two days have come to everybody's attention, and what the Board has to say about our appreciation of the

matters, and the difficulties of the decisions that we would have to make, that it deserves another opportunity for EGNB and PCS to sit down with that knowledge in mind and see if in fact it's a practical solution to the problem. That's all.

I mean the Board is here to do its duty and will do so. But we felt -- and if we had -- if we had -- we would have liked to have given you a little longer time frankly.

But we don't -- I am not talking a month, but I am saying let's say a week, a week and a half or something, but we just were restricted, it's that time of year, et cetera. So we thought give them an opportunity to sit down face to face again and explore it on a conceptual basis and we can go from there.

MR. ZED: Thank you, Mr Chairman.

CHAIRMAN: I want to -- I will just reiterate our times here. Noon on Tuesday for the -- for counsel's submissions to us on those two issues. If you have comments on other counsel's submissions, you can make them orally at 2:00 o'clock if necessary on Wednesday. We will reconvene the hearing at 2:00 on Wednesday.

And you are going to provide copies, and I think everybody here has E-mail, so you can do it by E-mail. Good.

Well, thank you very much for your co-operation and we

will see you next Wednesday.

(Adjourned)

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

Reporter