New Brunswick Board of Commissioners of Public Utilities

Motion's Day

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

Hotel Courtenay Bay, Saint John, N.B.
October 10th 2002, 9:00 a.m.

CHAIRMAN: David C. Nicholson, Q.C.

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

BOARD COUNSEL: Peter MacNutt, Q.C.

BOARD SECRETARY: Lorraine Légère

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CHAIRMAN: Good morning, ladies and gentlemen. This is a Motion's Day in reference to an application by the New Brunswick Power Corporation in connection with its open access transmission tariff. Could I begin by having appearances please? The applicant?

MR. HASHEY: For the applicant David Hashey and Terry Morrison.

CHAIRMAN: Formal intervenors. Bayside Power LP? City of Summerside? Emera Energy Inc.?

MR. ZED: Peter Zed, Mr. Chairman.

CHAIRMAN: Energie Edmundston? Mr. Gillis is here.

MR. GILLIS: I am here with Mr. Bell.

CHAIRMAN: With Mr. Bell. J.D. Irving Limited?

MR. SMELLIE: Mr. Chairman, my name -- over here, sir -- is Smellie, S-m-e-l-l-i-e, initials J.H. I appear as counsel for J.D. Irving. Mr. Dever is with me.

CHAIRMAN: Mr. Smellie, are you a member of the Bar of New Brunswick?

MR. SMELLIE: No, sir, I am not.

CHAIRMAN: What Bar?

MR. SMELLIE: Alberta and Ontario.

CHAIRMAN: Thank you. I thought I knew every member of the New Brunswick Bar.

MR. SMELLIE: I may be, sir.

CHAIRMAN: Maine Public Service Company? Maritime Electric? Northern Maine Independent System Administrator? Nova Scotia Power?

MR. ZED: Peter Zed.

CHAIRMAN: Perth-Andover Electric Light Commission? The Province of New Brunswick as represented by the Department of Natural Resources and Energy?

MR. WHELLY: Jim Knight and Charles Whelly.

CHAIRMAN: Thank you, Mr. Knight. Province of Nova Scotia as represented by its Department of Energy? Saint John

Energy?

MR. YOUNG: Mr. Chairman, Dana Young, representing Saint John Energy.

MR. CHAIRMAN: Thank you, Mr. Young. And WPS Energy Services Inc.? Board Staff?

MR. MACNUTT: Peter MacNutt with Doug Goss and John Lawton.

CHAIRMAN: Thank you, Mr. MacNutt. Just for the sake of the record, any of the informal intervenors here today, stop me I will go through the list. If anybody is here representing any of the informal intervenors, just interrupt me and let us know. Canadian Manufactures & Exporters, New Brunswick Division?

MR. PLANTE: Dave Plante, appearing on behalf of CME.

CHAIRMAN: HQ Energy Marketing Inc.? Irving Oil Limited? KnAP Energy Services Inc.? Renewable Energy Services Ltd.? TransEnergie? And the Union of New Brunswick Indians?

Well we are here today to consider two motions. The first is a motion that Mr. Gillis filed with the Board by way of a letter. And that letter was dated the 19th of September 2002. So the Board's intention, subject to what the parties would have to say, is that we call upon the mover of the motion, in this case Mr. Gillis, to address the Board. And we will go around with the various parties

to see if anybody has anything to add to Mr. Gillis' address. And then we will call upon the applicant to respond and Mr. Gillis will have a brief chance to make remarks in reference to what the applicant has said.

So, Mr. Gillis, go ahead.

MR. GILLIS: Thank you, Mr. Chairman, Mr. Morrison described myself as a country lawyer, but I'm a New Brunswicker. And the purpose of this motion is made really as a New Brunswicker rather than as a lawyer.

I put a series of questions, written questions, to NB Power by way of interrogatories in relation to the most recent application that has been filed.

The most recent application in part describes the division of NB Power into four separate units, transmission, generation, local service and nuclear.

The questions themselves really would contain the thrust of my argument. And I would propose just briefly to touch upon those questions. And there were only 11 questions. And I would perhaps start with interrogatory 38.

The question was, "Please provide a copy of the various scenarios with respect to the allocation of NB Power's existing longterm debt?"

The response was, "The only scenario for allocation of

debt to the transmission business unit was a pro rata share." I was after much more than the transmission unit.

The subsequent question, question 41, and this goes to Ms. MacFarlane. "You have applied a debt ratio of 65 percent as recommended by Panel B with respect to the transmission unit. Would you apply such debt ratio to each of the other three units, and advise what the total debt would be for the four business units?

Question number 42, "Would you thereafter add the debt of all four units together and advise if there is any shortfall with respect to the total debt as it is stated on the latest financial statements of NB Power?"

Question 43, "Would the debt ratio to be used on the other business units, generation, local service and nuclear be different than the 65 percent used on the transmission unit? What studies and/or opinions does NB Power have to suggest that there should be debt ratios on the other units different than 65 percent?"

Question 44, "Has NB Power had any discussions with the Province concerning the payment by the Province in any form of money to represent equity of 35 percent, or has NB Power prepared any note, document or memoranda of any plan to request the Province for a payment by the Province in any form of money to represent equity of 35 percent in any

or all of the business units?"

Question 45, "Has NB Power had any discussions with the Province to assume a portion of NB Power's debt, or prepared any note, document or memoranda of any plan to request the Province to assume any portion of NB Power's debt?"

Question 46, "Your evidence is based upon a policy suggesting the creation of four business units. The policy also provides that each business unit would have to be viable and would not receive any provincial government guarantee.

What analysis have you done of the cost of borrowing for the transmission unit and each of the other units. That's without a provincial government guarantee."

Question 47, "What is the total of the proposed equity in all four units? How does NB Power propose to raise such equity?"

Question 49, "What note, document or memoranda and/or calculation does NB Power have of rates to be charged its customers in 2003, 2004, 2005 if NB Power has a debt ratio of 65 percent on all four business units and no provincial government guarantee?"

Question 50, "What percent increase in rates would NB Power require if all four business units had a 65 percent

debt ratio, no reduction in the present level of NB Power debt, no provincial government guarantee, no equity investment by the Province in NB Power?"

And finally question 37, "Please provide a copy of the segregated balance sheet for the generation local distribution and nuclear business units for the test year, and any graphs for any test year or any other year?"

The questions were not complicated but rather simple. The answers are somewhat evasive, somewhat confusing and I think are totally non responsive.

The answers to those questions, and there were four in total, were that in part NB Power objects to answering this question. That was question 37. They say that the draft information is confidential.

And then question 38, they said the only scenario considered for allocation of the existing longterm debt to the transmission business unit was a pro rata share.

I was after, as I mentioned a while ago, much more than that. But if it's a pro rata share, I will apply it to all of the other units. And what I found was rather shocking.

And really the standard answer that I got for all of the questions appears in question 41. And it says, "It's irrelevant and speculative." I didn't think my questions,

as simple as they are, are irrelevant or speculative. Then they made this statement which is totally inconsistent with the evidence of Ms. MacFarlane, "The decision on debt ratios will be made by the Province of New Brunswick." Well I sort of thought her evidence quite clearly indicated the decision on debt ratio 65/35 on the transmission unit was a fact. But it looks like the Province has yet to make that determination. So the answer is inconsistent with the sworn -- with the testimony of the witness.

Then finally they say it's confidential. I must digress at this moment. In question 50 they did answer something else. I said, "What would be the percent rate increase?" They said, "It's impossible to calculate the rate increase." They haven't said it was a stupid question, because that question was focused upon a scenario that what does the rate have to go to in the Province if there is no support from the Province of New Brunswick at all and the rate may well have to double or triple, but what you are looking at is something that would be an extreme situation, and surely they must have run that scenario.

Now the argument that I have as to why I believe these questions are both relevant, germane and are of concern to

this Board, is that the application here focuses on only one of the four business units, the transmission unit. And the findings of this Board as to issues concerning capital structure for that unit and rate of return for that unit may well be determinative of the same issues with respect to the other three units.

It's worthy to note there is a number of intervenors that are not here. The concerns that I am expressing here really relate to concerns about capital structure and rate of return for the generation, local service and nuclear. That's concerns for people within the province, and also the province of Prince Edward Island because they may well suffer the same fate. But the rest of the people that have intervened probably don't have the same community of interest with respect to the answers to these specific questions on these other units.

Now NB Power's position that, look, it's irrelevant and speculative raises real concerns because it means one of two things. It means that NB Power has prepared projections on the capital structure of all the units and scenarios with respect to possible rates of return or they haven't. It's one or the other.

And if they haven't, I would suggest that's totally irresponsible. It defies logic and common sense for a

utility not to have made such forecasts. But so be it, if that's their mind set, that's fine.

But if the answer is the opposite, they have run those scenarios with respect to capital structure and the rate of return and they don't want to disclose it, it's because of the reason that I have stated in my request for this Motion's Day in my letter of the 19th of September, item B. I did write to you Mr. Chair -- to Lorraine Légère. If they have made such calculations, the results are so bad, that they are not prepared to disclose that to the ratepayers and the tax payers of this province.

Now what I have done, I have made a simple calculation myself based upon the financial statements of NB Power, applying the capital structure as they have suggested on the transmission unit, and applying the suggested rate of return, let's say 11 percent. And I have made a -- probably easier to read it, I can go through it.

CHAIRMAN: Just a minute. Because what you are doing here is you are introducing evidence. You are here to talk to a motion.

MR. GILLIS: Easier to talk -- Mr. Chairman, I'm not introducing evidence in the sense that it's --

CHAIRMAN: You are making it, Mr. Gillis?

MR. GILLIS: I'm not making it. It's an argument. I'm

giving you the argument in an oral and written format. But if you wish not to have it in partial written format, I will give it to you in an oral format.

CHAIRMAN: Give it to us in an oral format.

MR. GILLIS: Yes. Whether NB Power is divided into four business units or not, the total existing debt does not change. The debt for the year ending March 31, 2002 was $3.2 billion. That's in the financial statements that were provided during the Lepreau hearings that this Board would have.

Now Ms. MacFarlane, here and in the Lepreau hearing, has stated that she would expect the Province to set up the utility with a competitive structure of debt 65 percent, equity 35 percent. If the business units were to turn a profit and not receive a guarantee from the province, that's what her evidence discloses here.

Now without considering the cost of the refurbishment of Coleson Cove or decommissioning of Point Lepreau, it means the province would have to convert some of this $3.2 billion existing debt into equity or the Province would have to put cash into NB Power, one or the other. My questions address both sides of the coin.

To get a 65/35 debt to equity ratio it would mean an injection or an assumption of $1.2 billion in debt by the

Province. Take it right off the books of NB Power.

Now NB Power suggests 11 percent rate of return. 11 percent of $1.2 billion means a rate of return of $132 million per year. That's in addition to the rates being charged to the customers of NB Power.

This -- provincial power sales are 919 million, that's right off the financial statement. And 132 million over 919 million equals a 14 percent rate increase next year, without Coleson Cove, without decommissioning Lepreau. That is next year, 14 percent, if you consider all four of these units.

Now you factor in Coleson Cove and Point Lepreau decommissioning. Forget refurbishing Point Lepreau. Just the decommissioning, that is an extra billion dollars. That in itself in fact increases, because you have to inject the cash, increases the rate increase that the people of this province will suffer next year to something in excess of 17 1/2 percent.

And I have not factored in the lack of the provincial government guarantee. Because when NB Power borrows, the cost of borrowing will be substantially higher without the Province's support. So next year just simply applying the facts as they exist today, people are going to wake up to a 20 percent rate increase or perhaps more.

Now it is my position that if the utility knows of such a massive rate increase and fails to disclose it and allows this Board to go forward and make a decision on only part of the total picture, that is on the transmission, fixing capital and rate of return, NB Power is both wrong, irresponsible and the conduct really is unconscionable.

The analysis that I have gone through, and you can do it yourself, Mr. Chairman, or the Board probably has done it, is that 20 percent amounts to rate shock.

If NB Power were to answer my questions, in fact it does come out a simple calculation that look, we are looking at a 20 percent power hike next year, then because it is rate shock, I have subsidiary questions that I wish to put to NB Power.

And those subsidiary questions are what analysis has NB Power done on such a massive rate increase upon the social and economic structure of the ratepayers of this province? It is a simple question. And surely they would have thought about us.

What effect does this have upon the senior citizens of this province who have a fixed income, a 20 percent rate increase? On the corporate end of the spectrum, what effect does it have on the large manufacturing facilities

in this province who are competing with facilities outside the province? How much will unemployment increase if such facilities have to scale back or shut down? Those are substantial questions affecting everybody in this province.

The last thing I would want to do next year is be back before this Public Utilities Board when there is a substantial outcry concerning rate shock, attempting to figure out what to do and when it perhaps could be addressed at this time, if the utility were to come forward and provide information that is of concern to all the taxpayers and the ratepayers of this province.

Clearly and in addition to the relief, requesting an answer to these questions, one comes down to it is a question of schedule and sequence of what needs to be addressed.

And I would suggest the answer is twofold, that they not only answer these questions, but the sequence of determination of the issues before this Board would be that this Board would go forward and determine a capital structure or recommendation from the public interest of capital structure on all four units, what it should be.

After you make a determination of what the capital structure should be, the second step would be what would

be the appropriate rate of return on these units? This would allow input from the public sector about the social and economic impact upon the residential and commercial customer. And it might indicate how rates could be phased in or what could be done.

But for NB Power to go the way they are going and really to show up with nobody from NB Power here on this Motion's Day except some lawyers, I think speaks for itself. They really don't care. They have got their own agenda. They are going ahead.

And they either have thought it out and don't want to tell us or it is so bad they figure you don't need to know or alternatively look, we haven't done any of that, we don't know where we are going or what we are doing. If that be so we shouldn't even be here on any hearing whatsoever. And you should just shut the hearing down.

That would be all I would have, Mr. Chairman.

CHAIRMAN: Mr. Gillis, you may be addressing the Board as a citizen of New Brunswick. But you also are a lawyer. And this Board cannot go off on a frolic of its own. It has to be guided by its legislation.

And the only jurisdiction we have, and that which is being referred to in this particular application is to set an open transmission tariff for NB Power.

That does not, to the best of my knowledge, and I welcome your comments, but we have no jurisdiction over the distribution rate unless they come to us under our present legislation that as a result of requesting greater than 3 percent.

I just don't know how you can pin what it is that you want on the statute as presently written. Can you address that?

MR. GILLIS: There is a problem there, Mr. Chairman. But I think the answer simply is this, is that one, if the Board were to order NB Power to answer the questions that I have posed in the supplemental questions that would follow, it would be obvious to the public at large, including the people that are the shareholders in NB Power, that look, these questions are fundamental to all of the business units and that we must provide that authority or get that input from this Board as to what they would recommend so the politicians can make a decision on the appropriate capital structure.

I realize the end result -- I have given the Board perhaps what I believe would be the sequencing of hearings that go beyond the scope of what is before this Board at this time, and certain parts that will perhaps never be before the Board.

But I do believe that the public interest would be served by obtaining the answers. And I would think the public would pressure the politician to force the utility then to come forward in a proper format, much like you did in the early '90's with a set of generic hearings to bring the utility from being publicly-owned to being a private utility.

CHAIRMAN: Thank you, Mr. Gillis. Mr. Zed, wearing your hat of Emera Energy Inc.?

MR. ZED: Mr. Chair, we don't have any comments with respect to Mr. Gillis' motion on behalf of either of my clients.

CHAIRMAN: Okay. Thank you, Mr. Zed. J.D. Irving?

MR. SMELLIE: Mr. Chairman, J.D. Irving supports my friend's request for further and better responses to the several interrogatories which he has taken you through. And we say that for a couple of reasons. And particularly because you, sir, and your colleagues are in relatively new and uncharted waters with this application. An open and transparent discovery process is, in my respectful submission, a key to an efficient Board process.

The restructuring of the current vertically integrated utility known as NB Power is at the core of the proceeding that you have before you arising from their application. How that restructuring might work or could work in the

overall is an important element of the application that's before you. And the suggestion that information concerning that restructuring is irrelevant is, in my respectful submission, simply untenable, because it makes your process unworkable.

Surely, Mr. Chairman, in order to deal with the application for approval of an open access tariff that the utility has put before you, it will be important to know how the restructuring, which is prompting that open access transmission tariff, is going to work.

You can look at the information request that Mr. Gillis has put to the applicant and you will see that in some respects responses such as well the answer to this question might constitute the disclosure of possible legislation is really a little bit over the top, in my view, given the fact that Mr. Gillis is simply asking for well, what scenarios have you done? What runs have you made? What are the parameters within which I can test the evidence that you have put before this Board.

But to suggest with respect, sir, that debt equity ratios as it applies to the vertically integrated utility and to suggest that the information that Mr. Gillis is seeking is irrelevant to your process, is in my view, simply not good enough when, as I say, you are in

uncharted waters and you are trying to get, I would have thought, as much information as you can in order to make an informed decision about the various aspects of the relief that the utility has sought from you.

So for those reasons, J.D. Irving supports Mr. Gillis in his request for further and better answers. Thank you, sir.

CHAIRMAN: Good. Thank you. The Province of New Brunswick, Department of Natural Resources?

MR. WHELLY: Thank you. First of all, Mr. Gillis' motion must, we submit, be considered in the context of the proceeding that is actually before the Board, and that is an application for an open access transmission tariff. And that's all that is before the Board. Now it seems to me that what Mr. Gillis is trying to do is broaden the hearing to something far beyond the application that you are facing.

Many of the questions involve the capital structure of companies that are not involved in this particular application. And the government has not yet decided what structure will be settled on these other companies or what their capital and debt structure will be.

Now it's my belief that -- it's my submission that the information relating to the companies other than the

transmission company is irrelevant to the proceedings. You are dealing with a deemed capital structure in the application that is before you.

Now in dealing with the letter that came from Saint John Energy in August, this Board made it clear that if all relevant information was not presented to it, that this Board could adjourn the hearings until sufficient justification was provided to it for the rate application that has been put before you.

Now if this Board came to the conclusion that it needed more information about the other subsidiary companies, the Board could adjourn the hearing at the appropriate time and at that stage direct further interrogatories in answer to Mr. Gillis' question. But if at this stage it appears that those matters are not really matters to be dealt with as part of this application, it is appropriate to order that those answers not be provided.

The Province also has a concern that some of the material that is being -- that may be requested is information that is actually being prepared to provide advice to ministers and opinions to ministers. Now if Mr. Gillis made an application under the Right to Information Act to get that type of information, by virtue of (6)(g)

and (h), Mr. Gillis would not be entitled to that information, because there is no right to information under the Right to Information Act where the release of the information would disclose opinions or recommendations for a minister or the Executive Council, or would disclose the substance of proposed legislation or regulations.

So in the circumstances, it is the Province's submission that the information here, firstly, is irrelevant to the application and, secondly, is the request is so broad that it is information that should not be disclosed in any event. Thank you.

CHAIRMAN: Thank you, Mr. Whelly. Mr. Young, Saint John Energy?

MR. YOUNG: Thank you, Mr. Chairman. The information requested relates directly to the corporate and capital structure of NB Power. Typically the corporate and capital structure of the applicant would be known at the time of applying for an open access tariff. In our July 21st 2002 letter, we pointed out the difficulty of combining tariffs along with the corporatization and other significant issues in a single application. However, since we feel that the information requested will not give a significantly complete answer to the issues of the corporate and capital structure to significantly clarify

the tariff aspects of the application, we cannot support the motion at this time.

CHAIRMAN: Thank you, Mr. Young. Mr. Hashey.

MR. HASHEY: Thank you, Mr. Chairman. On behalf of the applicant, our major opposition to the this is related to relevance. We are operating under an act which was amended which caused us to file or really made it necessary for us to file a tariff application. But I would suggest further that this tariff application would have been made regardless. We don't have an open access tariff at this point in time. There is the issue of ancillary services is not contained with the tariff, so that tariff needed to be brought up to date to comply with the FERC requirements. And thus the application.

The relevance -- on the relevance issue we would have made that -- that application would have been made in any event. We are looking at a deemed capital structure for this unit, namely the transmission unit, which as you know has been operating in a way that's at least partially separate before the Province ever made any decision that they were going to go with these various levels and the various divisions of NB Power.

Now on the deemed capital structure, firstly -- dealing first with the anticipated capital structure of

the transmission entity, we submit that this information is irrelevant to the application before the Board. Under Section 57 (1) of the Public Utilities Act, the Board's role is to adjudicate upon the application as presented by NB Power. The NB Power application is based upon a deemed capital structure, which is the 65/35. Under Section 8.3(3) of the Act, the Board may accept the deemed capital structure as the basis for fixing the tariff or it may determine another capital structure as being reasonable.

It is the Board's determination of what is reasonable capital structure that will determine the tariff. Tariff decisions in Quebec and Ontario are based on deemed capital structures, I'm sure the Board staff is aware, and a target return on equity.

Intervenors in this application have an opportunity to present their recommendations on capital structure and return on equity for consideration by the Board. It is the decision of this Board with respect to capital structure and return on equity which will determine the tariff, regardless of what is the eventual actual capital structure of the transmission entity. So for those reasons we suggest that there is a real issue of lack of relevance.

Further, Mr. Chairman, on the issue of the capital

structure of other business units. The fundamental principle of an open access transmission market is that the transmission provider be independent from the generation and distribution entities. Accordingly, if the transmission tariff application were made after restructuring, the applicant would be the transmission entity and that alone. The transmission entity would have no access to, nor could it provide information regarding the costs and capital structures of the generation and distribution entities.

And then finally on the issue of restructuring. Mr. Gillis is requesting production of notes, memoranda, calculations and briefing papers relating to NB Power's restructuring. For the reasons stated above, this information concerning the restructuring of NB Power and its other business units has really no relevance to this tariff application. Moreover, the restructuring process is at a very early stage, or at an early stage at least, and all of the documents requested are prepared for the purpose of providing advice to ministers for their deliberation on proposed government policy and legislation, which of course is something that will govern a lot of things here in the other aspects of NB Power.

Details of the restructure of NB Power I think to the

knowledge of all have not yet been determined. Under the legislation providing for the restructure of NB Power, until this legislation is passed the issues raised by Mr. Gillis' motion are purely speculative and I don't think would provide any guidance whatsoever to the Board in this application.

During the Lepreau hearing there was discussion about this and it was stated I think by the Chairman of the Board, that the proposed legislation -- until the proposed legislation is brought into force providing for the reorganization of NB Power, this Board considers that it is business as usual and will continue with the hearing subject to NB Power requesting that its application be withdrawn in light of announcements.

Now we have heard Mr. Whelly's comments and certainly the Board has a wide discretion during the hearing to make decisions as to when things shall be heard, how things shall be determined, the dates of determination. The Board has a very wide discretion. But it is our position that the hearing should proceed. There have -- the evidence has been filed for a long time. There has been a massive effort put in to answering interrogatories. As you can see, there is a great number of interrogatories. And I believe that this application can proceed, should

proceed so that this open access tariff can be ready to go when the time is right, which I think is currently scheduled for April 1st.

Thank you, Mr. Chairman.

CHAIRMAN: Thank you, Mr. Hashey. We are going to take a brief recess now before we come back to you, Mr. Gillis, on this. There are certainly some very different aspects to this hearing. For instance, the largest consumer of the services of NB Power transmission, that is NB Power Distribution, are not before us as a party, which is certainly not the way we normally have intervenors in a application of this nature. Anyway, we will take a 10 minute recess and come back.

(Recess)

CHAIRMAN: The Board apologizes for taking as long as we did. Mr. Gillis?

MR. GILLIS: Thank you, Mr. Chairman. Just two points. I listened to Saint John Energy. And it is my understanding, and they can correct me if I'm wrong, they support my motion, but my motion hasn't gone far enough. So I just want to make sure there is more people on this side of the table than on that side.

CHAIRMAN: I thought you would have spoken to them in that recess to find out if that in fact is the way they feel.

Mr. Young?

MR. YOUNG: Mr. Chairman, Mr. Gillis does have it correct.

CHAIRMAN: Thank you.

MR. GILLIS: And the one point that I make with respect to the legislation, Mr. Hashey points out that the purpose of this application is narrow and that it is to determine the reasonable capital structure. And with that as a lever you can get into the capital structure of the other units. Because they have allocated a portion of the total debt of NB Power.

And therefore my requests by way of interrogatories do flow with respect to the reasonableness of the capital structure. And I think I should be entitled to the response. And there would be a series of supplemental questions thereafter, Mr. Chairman.

That is all I have.

CHAIRMAN: Thank you, Mr. Gillis. The Board will step out for two minutes and see if we confirm what we discussed during our first break. Thank you.

(Recess)

CHAIRMAN: Well, the Board has taken a good deal of time really to review your motion, Mr. Gillis. And we have to reject it on the basis that we don't have the legislative authority to require answering those questions.

And I have here the transcript from the adjourned pre-hearing conference which occurred on August the 20th. I will just read what the Board, or what I said at that time, is that this is after Saint John Energy withdrew its motion or didn't stick with authorship of it and tried to blame me for making a motion. But that is neither here nor there.

The Board considers it to be appropriate to proceed with the scheduled hearing as planned. Parties will be expected to address all aspects of NB Power's evidence which are of interest to them.

If all relevant issues have been properly addressed the Board will proceed to make its decision. If not, the Board may adjourn the hearing to await such justification. Or it may proceed to make its decision based upon those issues which have been appropriately addressed. I just requote that.

All right. Mr. Smellie, you have the second motion for the day. If you would like to address it for the Board, sir.

MR. SMELLIE: Thank you, Mr. Chairman and Members. I'm pleased to speak to J.D. Irving's motion, the essential elements of which, Mr. Chairman, were set out in Mr. Dever's letter to the Board of the 10th -- sorry, the

3rd of October, which was served on interested parties by e-mail. There are a number of other copies at the back of the hearing room, sir, in case anybody who is here didn't get it.

The motion seeks an order or orders of this Board amending or varying your tentative schedule so as to implement a phased approach to New Brunswick Power Corporation's application for an open access transmission tariff and the various other items of relief which are found in its evidence.

As Mr. Dever told you at the pre-hearing conference on the 12th of August, J.D. Irving is a major industrial power user in this province. The costs which it incurs in that regard are a significant component of its production expense. And your decision on the merits of this application is a matter of significant importance to my client.

There are many other interests involved in this hearing. There are merchant plants. There are energy traders. There are municipalities. There are ratepayers. There are aboriginal groups. There are U.S. interests. There are governments, including the shareholder of the utility that is the applicant. The application is important to all of them, I have no doubt.

The application is clearly an important matter for this province, as evidenced by your speedy issuance of the hearing order of June 24th. New Brunswick Power's transmission business is being subjected to your regulatory scrutiny for the first time under new legislation.

New Brunswick Power's application presumes and anticipates an initial opening of this province's electricity market to competition on April Fool's Day next.

The applicant seeks approval by way of its application of a FERC-compliant tariff, enabling it amongst other things to do business in the United States.

Unlike the practice which I'm going to tell you about in other Canadian jurisdictions, this application is not the byproduct of stakeholder consultations by New Brunswick Power, nor apparently will it be.

And the litigation process before you, Chairman and your colleagues, is therefore enhanced. That process as presently structured intends to deal in one bite not only with what New Brunswick Power needs for April 1st of next year, but as its evidence filed on July the 25th reveals, must deal with a number of elements which New Brunswick Power says it wants for April 1st of next year, but which

in my respectful submission it doesn't in fact need by that date.

Let me talk a little bit firstly before I explain why J.D. Irving believes that there are compelling reasons for restructuring your process. Firstly to emphasize what this motion is not about, in the context of recent events.

My client welcomed the New Brunswick government's 2001 energy policy and the prospects of a competitive electricity market. And my client supports a related restructuring and open access of New Brunswick Power.

Particularly in light of what we all know to varying degrees went on in such jurisdictions as California, my client welcomed the government's stated resolve and policy to proceed with the opening of this province's electricity markets on a "deliberate and controlled" approach.

To learn from other jurisdictions and to gather experience as the new regime evolves gradually and not rushed. And I'm referring, as you will have surmised, Mr. Chairman and Members, to the White paper and to the report of the market design committee with which you are far more familiar than I.

And my point in referring them to you is that these are, in my respectful submission, important in guiding policy directions for you.

In this context then this motion, I tell you, is not a veiled attempt to hijack or to delay your process for delay's sake or to frustrate in any way the initial opening of the market next April.

What the motion is about is restructuring the process by which you are going to deal with this application, to recognize the elements which are necessary for next April and those which are not and can accordingly and if necessary take a little bit longer to resolve.

And as to those elements which are necessary, make no mistake, my client wants you to adhere to a schedule based on next April's market opening.

And as to those elements which I will tell you are not so essential, what we urge you to do is simply establish a reasonable schedule for such future phases of this hearing including appropriate hearing dates.

And it will be and it is in my submission the fact that granting the motion that we have made to you will ensure a more focused and efficient process. It will make your task that much more manageable. It will ensure that the policy objectives of government of this province are met. And it won't prejudice the applicant or, indeed, any other party.

But if you conclude, Mr. Chairman, not withstanding

what I have just said and what I will say, that this motion is delay for delay's sake, dismiss it because that's not what we are here for.

I want to give you a few brief facts, Mr. Chairman. I haven't given you any affidavit in this regard, because in my submission what I'm about to tell you isn't very contentious.

Before it decided to file for a performance based rates regime, or PBR regime, it is a fact that New Brunswick Power did not consult with its transmission customers. That's what it tells you in one of its information responses.

I will tell you as a matter of fact that since it filed, it has not responded to requests for consultation at least with my client.

The filing is a one page application which sought approval of something called an open access transmission tariff. That was filed on the 21st of June. We know from the information responses that Dr. Morin was retained at least as of the 10th of April. So before my friend tells you that this information has been in front of us for a long time, that may be so, but it has been in the hands of and in front of the applicant for a whole lot longer.

Fact number 3. New Brunswick Power on the back of its

one page application filed more than 700 pages of evidence on the 25th of July. And in that evidence, if you read it carefully, as I'm sure you have or you will, there is lots of other additional relief sought. This is not a simple request to please approve our tariff. This is a request to approve a rate base. To approve a deemed capital structure. To approve a return on equity. To include financing charges and payments in lieu of taxes in a revenue requirement. To approve that revenue requirement. And, oh yes, a performance based rates regime on top of all that.

And all of this relief, Mr. Chairman and Members, is sought for three years. So on its face the application as it is truly to be understood, involves vastly more relief on a variety of complex issues than in the application.

And Saint John Energy wrote to you at the end of July to express concerns about this point. Concerns about the number of changes being sought in the single bite to which I have referred, and expressing a preference for a phased and sequential process.

Now I wasn't here at the pre-hearing conferences and I don't know what motivated Saint John Energy in that regard. But as you know, they resolved not to press that point.

Maybe they were waiting for the 750 pages of information responses that have come from the applicant on the 9th and the 19th of September.

Fact number 6. So the bulk of the record to date on a one page application, Chairman, is about 1,500 pages of evidence on a vast array of complex issues seeking diverse relief.

And you are asked to make decisions on these important matters with an eye firmly on the 1st of April next. Decisions which will be of considerable precedential value, particularly as it concerns -- as they concern the implementation of the policies of the government of this province. Those decisions must be taken after a hearing process which, as a matter of law, I submit to you, must be both meaningful and fair. And as a matter of common sense, surely should be as efficient as possible.

So what are my submissions, Chairman, the plan to swallow all of what New Brunswick Power has put before you and what undoubtedly is going to come from intervenors in one bite, will neither be meaningful nor efficient, if it can be achieved at all.

And I don't attribute that plan to anybody, sir. Your hearing order came out before you saw the evidence, I assume, and certainly before you saw the responses to the

interrogatories.

No party, in my respectful submission, not even the applicant, is going to be prejudiced. And the process will be markedly more efficient and focused and will better serve the public interest of this province if it is structured and phased in the manner that my client has suggested.

And as an aside, Chairman and Members, your process, in my respectful submission, would also be enhanced if some provision were to be made as we go forward for consultation by New Brunswick Power with its stakeholders. I submit that you have a broad discretion to require such consultation and to require reports on the outcome of those consultations.

The Government of New Brunswick suggests that it, and perhaps all of us can learn from what is going on in other jurisdictions. The applicant refers to what has gone on in Ontario, so I want to spend a few minutes highlighting how the topic of the deregulation of electricity markets has been approached by regulators and regulated utilities elsewhere. In my respectful submission, sir, that experience will be instructive to you as to the disposition of this motion.

I have chosen not to burden you with materials. All

of the references that I give you, should you wish to pursue them, can be pursued by your staff on the relevant web sites.

Now I said electricity markets, but I'm going to double-cross myself and start with the National Energy Board which, as you know, deals with the regulation of natural gas transmission pipelines. It has been doing so on an open access basis, as you will know from the arrival of the Maritimes & Northeast Pipeline in this province a couple of years ago, for some time. Because natural gas markets in this country were deregulated beginning in the mid to late 1980s.

You will see if you choose to look at the National Energy Board's guidelines for negotiated settlement that stakeholder consultation is the rule rather than the exception. The practice of phasing litigation where necessary extends over at least 14 years.

In RH-1-88 which concerned the unbundling of Trans-Canada Pipelines transmission rates, the National Energy Board first dealt with rate design and tariffs in Phase 1 of that proceeding and reserved cost of service and other matters to a Phase 2.

In RH-2-95, again concerning Trans-Canada Pipelines, the National Energy Board dealt with cost allocation, rate

design and tariff matters in Phase 1 of that hearing, again reserving cost of service issues to Phase 2.

Can I give you examples of phasing for new pipelines like Maritimes & Northeast or Alliance? No, I can't. Because in the short history of those two recent pipelines, rate matters have been solved based on negotiated settlements, based on consultation.

So what is going on where I now practice in Alberta? You will know that Alberta's experience with competitive electricity markets began with the Energy Utilities Act in May of 1995 which required, amongst other things, specified transmission tariffs to be in place by the 1st of January, 1996. And filings by the various transmission utilities were made. And after a one-day hearing, tariffs and rates were approved by the Alberta Energy and Utilities Board.

How is that possible, you say? It is easy, I say, because they were approved on an interim basis. After that interim approval had been made, there then ensued two long hard months attempting a negotiated settlement, which unfortunately didn't work.

So the Energy and Utilities Board embarked on a hearing, a multi-party hearing, I may say, that lasted from July until October of 1996. And the Board rendered a

600-page decision, U97065 on Halloween the next year, 1997.

And in the context of the Energy and Utilities Act, which I can tell you mandates efficient and incentive-based regulation, the Board in that decision again chose to approve interim cost-based rates.

And in that proceeding, although there was no incentive or PBR proposals specifically made, there was generic evidence on the subject, evidence that included the notion that PBR is likely to occur in pieces, given that the functional industry segments differ in terms of their productivity, levels of business risk and capital needs.

But importantly what the AEUB said about incentive regulation -- it said quite a lot about it -- but I want to quote to you from page 55 of this decision briefly.

"However the Board acknowledges that the principal challenge in implementing incentive regulation will be establishing targets against which rewards and penalties will be based. As was pointed out by several intervenors the effort to develop targets, evaluate their appropriateness and measure performance year over year will need to be supported by adequate, consistent and relevant information to be evaluated year over year."

I want to talk to you a little bit about a company called AltaLink. AltaLink bought the bulk of the transmission assets of Trans-Alta Utilities effective the 30th of April of this year.

It is the second-largest transmission utility in Alberta. It is a stand-alone utility. It is also the author of the most recent rate filing by a transmission utility in this country, to my knowledge. It was filed on September 30 last with the Alberta Energy and Utilities Board.

And the filing is for a two-year period, 2002-3, 2003-4. And I want to read to you from page 9 of AltaLink's application under the heading of "Incentive Regulation".

"In Decision U99099 the Board directed interested parties to advise the Board of incentive regulation negotiations arising in the context of ensuing GRA's" -- short form for general rate application. "AltaLink did not undertake incentive regulation negotiations for this, its first GRA. This application is intended to provide the Board and stakeholders with the opportunity to test the various components of AltaLink's forecast costs throughout the test period. At the same time AltaLink remains committed to the intent of the EU Act and the principles of increased efficiencies through incentive

regulation and is reviewing relevant industry developments. However in the immediate term it is AltaLinks' understanding, based on discussions with customers and stakeholders, that they want a full testing of the revenue requirement prior to embarking on any incentive or performance-based initiatives."

That gives you some idea of what is going on in Alberta and what has gone on in Alberta.

What about Ontario, which the applicant invokes in its evidence? I will tell you, sir, that I'm relying here on information publicly available in a prospectus filed by Hydro One, the successor to the transmission and distribution business of Ontario Hydro, dated March of this year.

You will likely know, Chairman and Members, that Ontario's experience in the deregulation of electricity markets began with the Energy Competition Act of 1998 which implements restructuring principles and expanded the mandate of that province's regulator, the Ontario Energy Board, as well as providing for nondiscriminatory access to transmission.

Now Ontario has pursued a phased approach to deregulation as well. On the 1st of May of this year, as you are likely aware, the market opened in Ontario after a

three and a half year transition period. Some people there refer to it as one step forward, five steps back. But in any event, it was a transition period that began on the 1st of January of 1999.

In that transmission period bundled revenues were allocated to Hydro One and the other successor companies of Ontario Hydro based on an agreement between those companies and orders on rates by the Ontario Energy Board.

Hydro One applied to the Ontario Energy Board in December 1998 for rate orders concerning the years 1999 and 2000 in the context of a capital structure and return on equity which had been fixed by the Government of Ontario.

Hydro One proposed cost of service rates for 1999 in a PBR regime, albeit it not a price cap regime, for 2000, using its '99 experience as a base line or base year for the PBR proposal, given that Hydro One had no established historical record as it only came into existence in 1999.

What did the OAB do with that? In March of 1999 it rejected the PBR proposal for 2000 for transmission. It rejected Hydro One's cost allocation and rate design proposals for 2000. And it directed a comprehensive filing.

And your staff will tell you that Hydro One

transmission remains on cost-based rates for transmission today. Although it anticipates that a proposal on a PBR framework may commence in 2004.

I could talk to you about Manitoba. I could talk to you about B.C. But I think you get the drift.

And I want to suggest the following conclusions on what in accordance with the government's current policy we might learn from other jurisdictions. There is a plethora of extensive if not compelling precedent for the use of phased or sequential litigation processes to deal with complex utility issues such as those that are before you in the evidence of NB Power.

It is equally evident that other jurisdictions in Canada have pursued a deliberate, a measured, a controlled approach to restructuring the transmission business of vertically integrated utilities, and that indeed stand-alone transmission utilities such as AltaLink also see the merits of that approach. Those approaches are highlighted by consultation with customers and stakeholders.

It is abundantly clear that there has not been a rush to adopt PBR regimes for transmission utilities in these other jurisdictions. And it is clear that regulators, and using AltaLink as an example, utilities recognize that PBR regimes depend for their validity, for their effectiveness

and accordingly for their consequential efficiencies on reasonable base lines or cost histories.

And so now let's ask the question, how does the application of New Brunswick Power Corporation size up against this education?

With respect and in short, sir, it doesn't. It doesn't in respect of consultation. It doesn't in terms of establishing a reasonable base line of cost data to warrant a proposed PBR regime.

CHAIRMAN: Mr. Smellie, I'm going to interrupt you just for a second here. Because what I'm hearing is starting to argue the merits of or lack thereof of NB Power's proposed method of regulation, which frankly, sir, to me appears to be more appropriate to be done in the actual hearing itself.

Now if I'm misinterpreting what you are doing or saying, let me know. Otherwise I'm waiting for your ultimate proposition on how the hearing itself should be structured.

MR. SMELLIE: I'm sorry if I have misled you, Chairman. I don't think that I'm trying to put in context, in light of the policies of the Government of New Brunswick in particular whether there is a case to be made for swallowing all of what the applicant has put before you in

one big bite as opposed to doing what my motion suggests, which is to structure it somewhat differently.

And my simple point, and I will get quickly to the ultimate point, is that it is important, if you are going to deal with a PBR regime, to have a base line of cost data to have experience.

Now my friend for New Brunswick Power will undoubtedly tell me about that experience. I don't know how. Because there hasn't been any. And that is my simple point. And I don't say forever. I say now at this time, out of the gate as it were, is when you have to assess whether or not you should be proceeding in a one-bite fashion as opposed to structuring in a different way.

So when J.D. Irving looks at how the rest of the world or other jurisdictions have dealt with the opening of transmission markets or electricity markets and open access to transmission, we have a question. And the question is, or the question concerns the apparent preference of New Brunswick Power to rush to get it done.

I'm certain that nobody in this room wants to fall into the pitfalls that California found. But you have got to ask yourself the question, if other jurisdictions in this country are getting it done slowly, using transition periods, using interim rate orders, why is New Brunswick

Power in such a rush?

Particularly in the face of the policy of the government of this province to approach restructuring on a measured basis in order to get it right.

The point, sir and Members, is that knowing the real scope of this application with the benefit of the interrogatory responses and the evidence, in our respectful submission there is some risk of not getting it all done at all by the 1st of April of next year. And there is a real risk of not getting it right.

And while you will be cognizant of the many diverse interests which have a stake in this matter, there is but one overriding interest which ought to govern how this process unfolds, and that's the public interest of New Brunswick, which shouldn't, in my respectful submission, be exposed to these risks. Particularly if there is another option.

New Brunswick Power can and should have a FERC-compliant tariff by the 1st of April next. New Brunswick Power doesn't need to have a PBR regime by the 1st of April next to be FERC-compliant. Certainly Hydro One doesn't.

Other jurisdictions have rejected PBR regimes out of the gate, i.e., they have deferred their adoption pending

the establishment of adequate base lines. And during which periods transitional cost base regimes have been put in place.

There are a huge number of questions that are going to be asked in your process about the evidence that has been put before you.

The problem is of substantial proportion in my view. It's about the same as the size of the apple that you are asked to swallow in one bite, based, Mr. Chairman, on a process which didn't anticipate -- you set down a hearing but without seeing the evidence, without seeing the interrogatory responses. And what we say is that it's a better approach to cut the apple into some smaller pieces, one of which ought to include a FERC-complaint tariff and a cost based revenue requirement for next April. That piece can be dealt with on an interim basis consistent with the transition period that New Brunswick is in.

You have the legal authority to do so. The Public Utilities Act, Section 8.6, in particular refers to your authority in that regard.

Now what about the other pieces? What about capital structure? What about equity returns? Those in my submission ought to be scheduled in a deliberate and measured fashion. Do they have to be scheduled before

April 1 or sufficiently so that you can make decisions on them by April 1? No. New Brunswick Power provides transmission services and earns revenue on it now. It can do that under transitional and interim rate orders that you can put in effect.

The trappings of the restructuring, the New World as it is sometimes referred to, can be dealt with on a structured and phased basis. And indeed when the appropriate base line data is in place, you can either ask New Brunswick Power or more likely it will proffer to you a performance based regime which can be appropriately evaluated.

Is that three/quarters of the way through next year? Maybe. That's going to be up to you and them to decide. But we are going to spend a huge amount of time talking about the legitimacy of the implementation of a PBR regime where there is no historical base line, it seems to me and, with respect, for no good reason.

And while the ultimate structure is for you to decide, Chairman and Members, whether it's cost of capital first or rate of return second or vice versa, the important thing is what is needed when the market first opens on the first of April next can be put in place now.

So it's for those reasons that we submit that an order

or orders amending or varying the tentative schedule should be granted on this motion.

Those are my submissions. Thank you.

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

MR. ZED: I will speak on behalf of both Nova Scotia Power and Emera to save some time, Mr. Chair.

My clients really take the position that what is being asked is, despite the articulation that Mr. Smellie has just gone through, revisiting the Saint John Energy letter/motion of several months ago.

It may well have been that had we had the benefit of Mr. Smellie's representation months ago we would have agreed and the Board would have agreed that perhaps a different process should have been implemented. That for obvious reasons did not take place and was not possible.

It is our view that having embarked upon a tentative, we thought firm schedule, that will enable the tariff to be approved by April 1st is very difficult at this time to accede to any request to change that schedule. It would be our view that during the course of the hearing if issues arise that require adjournment, rescheduling or restructuring of the hearing, then we are quite confident that the Board is capable at that time of making those changes and changing the schedule if necessary.

It is also very important to both of my clients that by April 1st there be some certainty in the marketplace and it would be our preference to have not an interim tariff, and I will leave open the question of whether such an interim tariff is possible, I will leave that for others to argue.

So in summary we would not support the motion and we would ask that the present schedule be affirmed.

CHAIRMAN: Thank you, Mr. Zed. Mr. Gillis.

MR. GILLIS: Yes. Thank you, Mr. Chairman. I speak in support of the motion.

Mr. Smellie indicated that -- and it's a decent approach -- the splitting into smaller pieces would allow a FERC-compliant tariff to be in place by the 1st of April. In those issues that I have raised which are more of a fundamental nature to the entire undertaking of NB Power of capital structure and rate of return could be spun off and dealt with after the 1st of April. So you could still be FERC-compliant and those issues perhaps by then it will be much clearer to NB Power and they could answer interrogatories or questions and we can have a hearing on capital structure perhaps, rate of return, and more significantly on what the rates will be next year for the entire undertaking.

So on that basis I support the motion because it does give me some relief and gives everybody a chance to have some sober second thought as to exactly where this train is going.

Thank you.

CHAIRMAN: Thank you, Mr. Gillis. Mr. Whelly?

MR. WHELLY: Thank you. As the Board is aware, the government has stated as its policy that the market should be open by April 1st 2003. The government therefore would prefer that this Board have the opportunity to hear the evidence and come to a decision before that date on this application.

If I understand Mr. Smellie's comments correctly, it is the use of an interim tariff that will allow a phased approach to the hearings so that an interim tariff would be applied but hearings themselves would be conducted long after April 1st.

A concern that we have is that -- it is our submission that this Board does not have authority at this stage to impose an interim tariff. As the Board is aware, there were provisions in the Public Utilities Act from 1989 to 1982 that allows -- 1992 -- that allowed the imposition of interim tariffs, but they were removed at that time with the repeal of Section 41. We are now dealing with an

application under part III of the Public Utilities Act and if I could refer to Section 55 in that part of the Act, it says, "Unless approval to do so has been obtained from the Board under this part no public utility shall charge or change any charge, rate or toll or any tariff in respect to transmission services or ancillary services."

So before there can be any imposition of a tariff for ancillary services there must be an application under this part. Now you have an application and 57.1 of the Act says that once you get the application, you have to proceed to hold a hearing under Section 22.

So you are forced to move forward into a hearing.

Now once the hearing is complete I believe the Board has very wide latitude in terms of the orders it can make and tariffs that can be established, and may at that time impose an interim tariff. But not at this stage. I don't think that -- it's our submission that that authority does not exist.

There is no doubt that this is a complex application, but that in itself does not mean it is something that cannot be handled by the Board. There are procedures the Board has already established through the exchange of interrogatories, as an example, that has been -- that allows this process to move forward and allows

participants to understand what is going on.

The applicant here, JDI, took advantage of that opportunity and filed interrogatories and has received answers.

I must say that I agree with the comments of Mr. Zed that this very much appears to be a restatement of the concerns expressed by Saint John Energy included in their letter from July of this year, and those concerns, after Saint John Energy clarified them, were dealt with by the Board in their ruling on August 20th and you read from that earlier on.

And I think that the approach the Board took at that time is equally applicable at this time. That if the applicant in this case is not able to satisfy the Board that it has provided sufficient justification for the approval of a tariff, the Board has wide latitude in what it wants to do, including adjourning the hearing.

As well at that time the Board, if it felt necessary, could impose interim tariffs, but it is our submission that it cannot do so at this time and as a result the very foundation for JDI's request, the interim tariff, isn't available.

For that reason it is our submission that the Board should proceed with the hearings as presently scheduled

and deal with the issue of interim tariffs at a later date if the Board considers it appropriate.

I will not address the issue of performance based regulation because I believe that is a question that the Board addresses in the context of the application before it, and it should not be addressed in the context of this application.

Thank you.

CHAIRMAN: Thank you, Mr. Whelly. Mr. Hashey?

MR. MORRISON: Mr. Chairman, thank you. I'm not going to lecture you on Ontario or Alberta procedures or laws, I'm not qualified to do so. I am qualified, however, to make some comments on New Brunswick law and I will do that shortly.

Mr. Whelly has raised the point, and I want to reemphasize it, that JDI had this evidence now for some three months or more. There has been an extensive interrogatory process.

There were pre-hearing conferences. JDI was represented at those on August 12th and August 20th. So I question the timing of this motion at this time.

Mr. Smellie alludes to the fact that JDI waited until all the interrogatories were answered and questions posed and then it realized, the lights went on and said this is

a complex application. We had better get this thing phased over an extended period of time.

I would like to point out that Saint John Energy certainly was able to grasp that this was a complex application. Brought a motion on ostensibly raising the same issues that JDI now raises. That motion was disposed of by the Board.

And, Mr. Chairman, you read your decision with respect to the Saint John Energy motion earlier. I can only say that I think that decision is a commonsensical decision.

Basically what the Board has said is we are going to hear this application. And if there are -- if for some reason NB Power hasn't made out its case on an issue, it's the Board's prerogative to say we are not granting that relief or we are not granting that order because you haven't provided the Board with the appropriate evidence.

Or you have control over your own procedure. You can adjourn, ask for further and better particulars. That is the logical common sense way to approach this application.

And to bring it up now with only a few weeks before the hearing after everyone has done an extensive amount of preparation, I just don't think is appropriate at this time, Mr. Chairman.

One of the issues that Mr. Smellie raises that -- and

he has, I think, strayed into the merits of the argument which is on performance based regulation. Again the issue is this. And it seems clear to me from the interrogatories that have come from the intervenors and, indeed, from the Board itself, that the Board has some concerns about performance based regulation.

And indeed as we proceed through the hearing, it may very well be that this Board is not prepared to implement a performance based regulation regime. That is the Board's decision after it hears the evidence. It should not be determined at this stage on a motion.

There was also Mr. Smellie in his argument alluded to a lack of consultation. And I think we should be clear as to what the process is under the Act.

A tariff is not negotiated bilaterally in New Brunswick. I'm -- as I said earlier, can't lecture you on what happens in Ontario or Alberta. Whether those boards and tribunals have procedural rules that have some type of alternative dispute resolution or consultative processes, I don't know.

I do know that they don't exist in New Brunswick. And the Act clearly says that the applicant is to file an application. The Board is to have a hearing. The Board is to adjudicate.

I believe it's a slippery slope if we get into bilateral negotiations on a tariff thereby usurping the Board's authority which should be an open public and transparent process.

To call it litigation, I guess it's litigation in a way. But really the purpose of the Public Utilities Board and the hearings is to provide an open, public, transparent forum for these issues to be debated rather than having -- and I don't want to cast aspersions on a consultative process. We don't have one in New Brunswick that I'm aware of.

But those issues get fleshed out in the light of day in a public hearing. So I don't think it's -- I don't think anyone should draw the conclusion that NB Power is attempting to shut out any interested party by not consulting with them.

But the process is laid out in the Act. And I believe it's fair to say that NB Power has been careful to make sure that things are done in this process rather than in some other process which may not be quite as open.

And JDI's argument is that, and they have stated it and I have no question -- no reason to question it, that they don't want to thwart the government's policy of having an open market by April 1st. And they are

suggesting to this Board that we can delay this hearing beyond April 1st. This Board can implement an interim tariff. I'm going to reiterate to some extent what my friend Mr. Whelly said. This Board has no authority to implement an interim tariff.

I don't know what the legislation in Ontario or Alberta is. But I do know what the legislation in New Brunswick is. And in New Brunswick under Section 57 of the Act, when an application is made the Board has a hearing under Section 22.

When the hearing is concluded, the Board can then make a number of orders including the power that Mr. Smellie referred to in Section 8.6. But it is also clear when you look at Section 55 that there can be no interim tariff. And I will just repeat it.

Unless approval to do so has been obtained from the Board under this part, which is part 3, no public utility shall charge or change any charge, rate or toll or any tariff in respect of transmission services or ancillary services.

So until the Board has a hearing and makes a decision, NB Power is stuck with the existing transmission tariffs.

CHAIRMAN: Mr. Morrison, if I might on that point, in your opinion though, if we do go through a hearing and we

decide that the transmission tariff is -- should be set at a certain rate, but that upon being available, further evidence in reference to something else that was not available at the time of the hearing, if we then said that this tariff shall have application until such time as that becomes public knowledge, at which time the hearing will be reconvened. Is that possible in your --

MR. MORRISON: I haven't gone through that scenario, Mr. Chairman.

CHAIRMAN: Well what I'm going to do then is --

MR. MORRISON: But I believe that you probably do have that authority.

CHAIRMAN: All right. Well I'm going to -- the Board will take a break when you are concluded what you have to say. And then we will probably revisit that scenario at that time. And of course Mr. Smellie will have his opportunity to comment on what you said. But I just wondered about that. Go ahead, sir.

MR. MORRISON: Well in conclusion, Mr. Chairman, I think everybody is in agreement that the first building block to a competitive electricity market is the open access transmission tariff.

We are looking at an open market in April of next year. If it was possible, and I'm not for a minute

suggesting that there is any authority to do so, but if it was possible for the Board to implement an interim tariff, presumably such an interim tariff would be subject to some adjustment once the final tariff was ordered. Retroactive roll backs, retroactive increases.

First of all, if there was an interim tariff which was subject to some retroactivity in terms of roll back, it is clear that that would present an unacceptable risk, financial risk to my client, NB Power.

And I would suggest it would also discourage market participants. And I believe Mr. Zed indicated this. That there would be risks, unacceptable risks for those who want to access the open market as well.

In conclusion, Mr. Chairman, I believe that we have a process. There is seven weeks set aside for this hearing. There has been an extensive interrogatory process which should have refined many of the issues.

Yes, it is a complex application. I believe we can get through it in seven weeks. If there is an issue that comes up like performance based regulation, which the Board is not satisfied has been dealt with properly, then the Board has control over its own procedure.

It can deal with it either by rejecting that argument outright or asking for further particulars. And it is our

submission that this hearing should go ahead as scheduled.

Thank you, Mr. Chairman.

CHAIRMAN: Thank you, Mr. Morrison. The Board will take a recess.

But Mr. Smellie, one point I wanted to bring to your attention -- oh, I have forgotten Saint John Energy. I'm sorry. Mr. Young, go ahead.

MR. YOUNG: Thank you, Mr. Chairman. And as JDI's motion indicates, a number of the concerns raised, originally raised by Saint John Energy in its letter of concern to the Board, dated July 31st 2002, we agree with their observation that the concerns have not materially changed and in fact are much clearer with the completion of the Interrogatory process to date.

As a result of discussions following our July 31st letter, we are persuaded that the government has the intent and the ability to put in place before April 1st 2003 the legislation and regulations that are implied and the assumptions made by NB Power in the application.

As such we responded on August 20th of this year, the second hearing Motion's Day, expressing our faith in the Board's ability to ensure that issues were appropriately phased within the existing process, that approvals would be made conditional where necessary.

While we would not object to a more formal phasing process, we cannot support the particular sequence of phases outlined in the motion put forward by JDI.

In fact we believe the sequence should be reversed, since it is necessary to determine the underlying corporate and financial structure of the applicant, JDI's Phase 3, and other revenue requirement matters, Phase 2 of JDI's submission, before a rate can be designed, which is JDI's Phase 1.

Accordingly we cannot support the entire motion as presented in spite of our agreement with many of the concerns it raises. SJE could support the entire motion if the sequence of phases in the motion were reversed.

CHAIRMAN: Thank you, Mr. Young.

Mr. Smellie, this Board is well aware of the structured settlements which to my recollection started in British Columbia and then moved to Alberta and came east from there.

Mr. Morrison has referred to an open and transparent process. And one of my concerns as the Chair of this Board is that that certainly is government policy. And you are familiar with the White paper and what it said.

But there is a very basic difference in my opinion between this jurisdiction and certainly the three that

have been mentioned, i.e., B.C., Alberta and Ontario.

There they have a well-funded and long-established method of interventions, so that every group in society presumably can be well represented in the structured settlement, meetings and that sort of thing, whereas in New Brunswick that is not the case.

There is only one party that could receive funding for its intervention in the statute, and that is the public intervenor. Mr. Gillis at one time was the public intervenor in our process. So that is a very different thing. And we have to be very cautious.

The only time that this Board has come close to that kind of -- to a structured settlement was really an alternative dispute resolution method whereby we hired a facilitator in the design of the market -- or sorry, the rules applicable to the local gas distribution companies, the marketplace, with the various marketers, et cetera.

And that worked rather well except that we ran into difficulty because on the two or three subject matter that we have referred to that committee to look at, that they could not agree on.

And they were bound by a confidentiality undertaking so that they didn't want to argue in front of us in an open public hearing. Otherwise we gave scrutiny to what

they had done. So we are aware of that method. We know it has some very strong positives. But it also has down sides.

Now I just want to make certain that I understand your proposition completely. And that is that you -- are you suggesting that this Board should establish an interim rate schedule, not having had a public hearing?

Or are you saying we should go ahead with the public hearing to establish the interim rate schedule based upon a review of just let's say three or four of the six different items that you say are there for us to bite?

MR. SMELLIE: The latter.

CHAIRMAN: The latter?

MR. SMELLIE: I don't -- you anticipated my reply, Mr. Chairman. And I will think about it during the break.

CHAIRMAN: Yes.

MR. SMELLIE: But I don't know where anybody got the idea that I said you shouldn't have a process before you do anything on an interim or any other basis.

That is not part of the JDI position. You should have a process. I referred you to the Alberta decision. They had a one-day process.

CHAIRMAN: Yes.

MR. SMELLIE: And if you are concerned about cost claims, as

people seem to be, well, that is a possible -- but I will come back to that in my reply, sir. But I definitely --

CHAIRMAN: All right. I just wanted the Board to understand that --

MR. SMELLIE: Yes.

CHAIRMAN: -- when we took our break. And you might also indicate what should be covered in that one day or that process that you are speaking of and be particular.

There is no question that you want to have the PBR deferred to a later date, et cetera. But what is it that you think should be covered then and what covered later?

The Board will take hopefully a 10-minute recess.

(Recess)

CHAIRMAN: Go ahead, Mr. Smellie.

MR. SMELLIE: Thank you, Chairman. I am feeling a little peckish, so I promise I will be brief.

As I understand my friend, Mr. Zed's concerns, one of them at least is that we are just re-hashing the Saint John Energy motion. Well we are not re-hashing the Saint John Energy motion, because the Saint John Energy motion as it was written was never argued. Saint John Energy didn't withdraw that motion. They changed it. I think your term, Chairman, was significantly and you made a ruling on what was then put to you. But with respect to

my friend, so what. We are not having a res judicata argument made here. The issue is on the table.

Mr. Zed, as I understood him says we need certainty in the marketplace, and therefore, there shouldn't be an interim tariff, or there shouldn't be interim rates. If by that he means there should be only a tariff and rates approved for three years, then there will be certainty. There will also be the considerable risk in my submission of a significant price that may be paid for such certainty.

Interim rates, interim tariffs, I am sure you are aware, Chairman and members, are well utilized tools of regulatory bodies. We shouldn't be frightened of them. They are there to meet the convenience of the public and the interests of the public and certainty at a time of market opening, is I suggest something of an elusive target.

I didn't come here to lecture anybody about any law at all. I don't do that, Chairman. And I don't like being lectured to either. We haven't had the sake of the New Brunswick Power evidence for three months or more. There is no need to exaggerate. And if I have understood my friend, there hasn't been consultation, because the law doesn't require there to be consultation. Now I am not

from Missouri, but I feel like it. That just doesn't make any sense. The law doesn't prohibit consultation surely. It is an equally growing useful tool for regulated utilities to achieve goals common to themselves and their stakeholders.

Let me see if I can unpack this interim tariff thing. Number one, I didn't say ex parte, Chairman. I said interim. I don't want you to go and make a ruling without holding a hearing. That's not part of our motion. If I have conveyed that sense to anybody in the room, apologies.

What we want you to do is adhere to your schedule and deal with some things up front. And you ask me to tell you what we want you to deal with and I am going to in a minute.

That will satisfied your duty to hold a hearing. But there is every authority, in my view, for you to make interim orders. My friend says well look at Section 47 of the Act, it was repealed. Well Section 47 of the Act is in part 2 of the Act, which doesn't apply to the transmission anyway. So that's no big help. Section -- if you look at subsection 3 of Section 53, which is in part 3, which does deal with transmission, it sets out a number of sections of the Act, which don't apply to New

Brunswick Power, vis-a-vis transmission. You will notice that Section 8, isn't one of those that doesn't apply. Therefore, in Missouri-like fashion, I conclude that it does apply. What does Section 8 say? In particular, Section 8(6) says, upon any application to it -- and of course, we have gone through the dance of if there is an application, you have got to have a hearing, so we are away from that -- the Board may make an order granting the whole or part only of the application, make a conditional order -- and I think you alluded to that, Chairman, before the break -- or grant further or other relief besides or instead of that applied for as fully and in all respects as if the application has been for such partial, further, or other relief. You may not be able to drive a truck through it, but I can sure fit an interim order in there, Mr. Chairman, without trammelling the language of part 3 and the regime that you have to follow.

All that Section 55 says, and I will just read it for the record, unless approval to do so has been obtained from the Board under this part, no public utility shall charge or change any charge rate or toll or any tariff in respect of transmission services or ancillary services. That doesn't prohibit you from making an interim order. All that says is that New Brunswick Power in respect of

transmission services can't charge or change a rate unless you say they can.

If I am wrong with respect, Chairman, I suggest you go about getting it fixed quickly, because if you are going -- if we are going to deal with the competitive electricity market and the restructuring of New Brunswick Power, you need authority to make interim orders. Your hands will be unduly tied. But in any event, I think you have that authority.

My friend says, well we have set aside seven weeks. Seven times four is 28 days. It's not very long, Chairman, to get all of this done.

Now you asked me, sir, two questions -- or you made the point that in New Brunswick there is not a regime for cost recovery. Quite so. Once upon a time, there wasn't such a regime in the jurisdictions that I'm familiar with and it has developed over time.

So I can't help you on that other than to say that a more focused process, a more efficient process, will allow those parties who can't recover costs to perhaps pick and choose the portions of the hearing that they need to. Certainly phasing the hearing or structuring it in the way that we have suggested is not going to result in more costs before intervenors.

So at the end of the day if you are disposed to grant my motion, Chairman, what is it that should be heard beginning next month? That was your question to me. What should be the subject matter of that hearing?

The subject matter of that hearing should be governed by what New Brunswick Power needs for April 1. They need a FERC-compliant tariff. And so the tariff should be on the table.

And a FERC-compliant tariff, under which they operate on April 1, 2003, is not going to be very good if they are not recovering their costs.

And so there is an indicator of the second item of what should be on the list.

They should be recovering cost-based rates. What are cost-based rates? Those that aren't deemed. Therefore, operating, maintenance, amortization expenses, interest expenses. If the utility wants a return, say so. Should it be a deemed return? No. Should you be dealing with PBR? No. Payments in lieu of taxes? No. That's a deemed concept. It's not cost-based. Capital structure? Not necessary. Not as long as you are dealing with interest or debt and if they want to have a return they can talk to you about it.

So in essence that's my answer to your question,

Chairman, as to what the boundaries, if you will, of the first go-round should be.

And let me just conclude that I'm not suggesting and shouldn't be taken to be suggesting that everything else goes away to some pinpoint of light post April 1. I mean March is there. February is there. April is there. These things are long. They are sometimes unfortunately tedious. I have sat through lots of them. But they got to get done in a structured and phased fashion.

Thank you, Chairman. Those are my reply remarks, unless you have any questions.

CHAIRMAN: Thank you, Mr. Smellie. We are going to take a quick recess here for a moment before we come back in. Frankly, what I'm thinking of in particular, and I want to share it with my fellow Commissioners and see what their approach is, is to ask for a brief in reference to the statutory authority in reference to interim orders. But there may be some other matters that we want to include.

Anyway, we will be back in a minute.

(Recess)

CHAIRMAN: The Board will reserve its decision in reference to the JDI motion. We will ask any party that wishes to do so to submit a brief to the Board in reference to our authority to approve an interim tariff, as Mr. Smellie has

argued that we can do.

We would like to have the brief from the parties at the Board's -- well I guess everybody that is a party here has e-mail capability. So the brief can be by e-mail and it would be no later than 12:00 o'clock local time on Thursday the 17th, which is one week from today. And we ask that the response briefs that the parties may file with the Board will be no later than 12:00 o'clock noon on Wednesday the 23rd of October. And, of course, as is the case with all pleadings or matters in this hearing, the responsibility is on the party producing the document to ensure that it's served upon all the other intervenors and the Board. So we will stand adjourned until the -- at present the opening day of the hearing.

MR. MACNUTT: Mr. Chairman you identify the date by which to reply -- briefs could be submitted, but you didn't identify the date on which you were going to reconvene to render the decision.

CHAIRMAN: No, because that will be done in writing, Mr. MacNutt.

MR. MACNUTT: Thank you.

(Adjourned)

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

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