RULING

IN THE MATTER OF an application by New Brunswick Power Distribution and Customer Service Corporation (DISCO) for approval of changes in its Charges, Rates and Tolls
(Motions Day)

July 16, 2007

NEW BRUNSWICK ENERGY AND UTILITIES BOARD

IN THE MATTER OF an application by New Brunswick Power Distribution and Customer Service Corporation (DISCO) for approval of changes in its Charges, Rates and Tolls (Motions Day)

BOARD:

CHAIRMAN	Raymond Gorman, Q.C.
VICE-CHAIRMAN	Cyril Johnston
MEMBERS:	Edward McLean Roger McKenzie Constance Morrison Yvon Normandeau Robert Radford
STAFF:	Ellen Desmond Doug Goss John Lawton Lorraine Légère David Young

APPLICANT:

New Brunswick Power Distribution and Customer Service Corporation	Terry Morrison Edward Keyes Nicole Poirier Neil Larlee Sharon MacFarlane

FORMAL INTERVENORS:

Canadian Manufacturers and Exporters, N. B. Division	Gary Lawson David Plante
Enbridge Gas New Brunswick	David MacDougall Len Hoyt Dave Charleson
FPS Canada Inc. (Frasers)	Charles Baird Ron Beaulieu Jennifer Little Ross Gilliland

Irving Oil Limited	Gordon Nettleton James Smellie Brent Sabean
JD Irving Pulp and Paper Group	Andrew Booker Wayne Wolfe Mark Mosher William Dever
NB Forest Products Association	Mark Arsenault Terry Noble
New Brunswick System Operator	Kevin Roherty Margaret Tracy
Utilities Municipal	Peter Zed Q.C. Dana Young Eric Marr Marta Kelly Jeff Garrett Dan Dionne Michael Couturier Charles Martin Paula Zarnett
Vibrant Communities Saint John	Kurt Peacock Dr. Kenneth Sollows
Public Intervenor	Daniel Theriault Robert O'Rourke Jacquelyn Oakley Jayme O’Donnell

INFORMAL INTERVENORS:

Agricultural Alliance of New Brunswick	Charline Cormier
City of Miramichi	John McKay
Department of Energy	Rob Murray
Flakeboard Company Limited	Barry Gallant
Self-represented	Terry MacDonald

Saint John Board of Trade	Nathalie Godbout Imelda Gilman
Times and Transcript	Rod Allen Jesse Robichaud Mary Moszynski

WITNESSES

For the Public Intervenor	Kurt G. Strunk
For the Applicant	Edward D. Kee

INTRODUCTION

The New Brunswick Power Distribution and Customer Service Corporation ("DISCO") applied to the New Brunswick Energy and Utilities Board ("Board") on April 19, 2007 for approval of a change to its charges, rates and tolls. This application was made pursuant to Section 101 of the *Electricity Act, Chapter E-4.6, R.S.N.B., 1973* as amended.

DISCO also filed a Notice of Motion and an affidavit in support thereof. It requested:

> *"that the Board make a determination whether, during the course of the hearing of this application, it is appropriate to consider evidence as to the reasonableness of the generation and certain other costs which underlie the Applicant's revenue requirement for the test year 2007/2008."*

The Board issued an order dated April 19, 2007 that required public notification of DISCO's application and motion. A pre-hearing conference was held on May 18, 2007 at which time the date for the public hearing to review the Motion was set as May 31, 2007.

The Utilities Municipal (the Municipals) asked if a list identifying the "certain other costs" was available which would assist parties in preparing argument. DISCO filed a letter with the Board identifying the "certain other costs" on May 25, 2007.

In that letter, DISCO defined "certain other costs" as:

1. assets transferred by transfer order;
2. non-fuel costs of the generators supplying to DISCO which include generators' operation, maintenance and administration costs, amortization and decommissioning, finance charges, taxes and special payments in lieu of taxes, and
3. costs with respect to inter-company contractual arrangements.

The Public Intervenor, on May 23, 2007, filed the following motion:

> *"That the New Brunswick Energy and Utilities Board take jurisdiction over the Power Purchase Agreements (PPAs) and the Service Level Agreements (SLAs) that have been entered into by New Brunswick Power Distribution and Customer Service Corporation (DISCO)."*

In the May 23 letter, the Public Intervenor stated that he would request the Board to set a date for hearing evidence and argument on the motion.

DISCO, in a letter dated May 25, responded that the issues in the Public Intervenor's motion were almost identical to those in its motion and that both motions should be heard at the same time. The Public Intervenor, in a letter of May 29, agreed with DISCO.

At the public hearing on May 30, 2007 that dealt with DISCO's motion on interim rates, the Board, after canvassing the parties, cancelled the May 31 motions day and established the following schedule to hear DISCO's remaining motion and the Public Intervenor's motion.

Public Intervenor's Evidence to be filed	June 14, 2007
Other parties and DISCO's evidence to be filed	June 19, 2007
Public Hearing of the Motions	June 21, 2007

JD Irving Pulp and Paper Group (JDI) filed a notice of motion on June 4, 2007 asking the Board to consider the following motion on the June 21 Motions Day.

> *"That the New Brunswick Energy and Utilities Board order that the New Brunswick Distribution and Customer Service Corporation (DISCO) distribute at least quarterly, their financial statements. Such statements would be due no later than 30 days after the end of the selected period."*

JDI stated that the financial statements would enable the Board to determine whether a rebate should be issued. The motion was filed after the Board's decision on DISCO's motion for an interim rate increase.

A Motions day was held on June 21, 2007 to hear the motions by DISCO, the Public Intervenor and JDI.

The Board considers that the motions of DISCO and the Public Intervenor pertain to similar subject matter and deals with the issues raised as follows:

ANALYSIS and RULINGS

Motions by GENCO and the Public Intervenor:

The motions described above arise as a result of the restructuring of the electricity industry in New Brunswick. This restructuring established DISCO as a separate legal entity responsible for distributing electricity to customers in New Brunswick. The restructuring also established a number of other separate legal entities to perform functions that had previously been done by one company, that being, New Brunswick Power Corporation. All of these new companies, except New Brunswick System Operator (NBSO), are affiliated with DISCO. Of these new companies, DISCO, NBSO and the New Brunswick Transmission Corporation are subject to regulation by the Board pursuant to the Electricity Act. The Board does not regulate the New Brunswick Power Generation or the New Brunswick Power Nuclear Corporations hereafter referred to as "GENCO".

The restructuring was supported by legislation and various sections of the Electricity Act deal with the creation of new legal entities. During the restructuring process, DISCO entered into various agreements, referred to as Power Purchase Agreements (PPAs) and Service Level Agreements (SLAs), to obtain services from a number of affiliated companies, the majority of which are not regulated by this Board. The costs associated with these agreements total approximately 80% of the costs that DISCO proposes to recover from its customers and therefore are a very important part of its proposed revenue requirement.

The Board's jurisdiction is entirely derived from statute. To determine the extent of its jurisdiction, the Board must carefully examine the Electricity Act and the Energy and Utilities

Board Act *(*"*the EUB Act*"). The Electricity Act places upon the Board the obligation to satisfy itself that Disco's rates are just and reasonable. At the same time, neither Act provides the Board with regulatory authority over Genco. Under current market conditions, and given the present contractual relationship between Disco and Genco, the Board's lack of regulatory authority over Genco is clearly an impediment to the fulfillment of its obligation to ensure Disco's rates are just and reasonable. The task of the Board in its ruling is to determine a course to follow in light of these conflicting statutory directions. As a starting point, the Board considers that it should enquire into Disco's underlying costs in as detailed a manner as possible, without assuming regulatory authority over Genco which the legislation has not conferred upon it.

Section 156 of the Electricity Act:

Of particular significance to these motions is the meaning of section 156 of the Electricity Act and the authority of the Board to review the PPAs. Various parties made submissions with respect to the effect that section 156 may now have, particularly in light of the statutory framework and the intent of the legislature to create separate but affiliated companies.

Section 156 of the Electricity Act states:

> "*For the purposes of the first hearing before the Board under Division B of Part V and for the first hearing before the Board under Division C of Part V, the assets transferred by transfer order or otherwise attributable by virtue of a transfer order, or assets otherwise acquired by the Distribution Corporation, the Transmission Corporation or the SO on or before the commencement of this section, shall be deemed to have been prudently acquired and useful for the operation of a distribution or transmission system or the provision of services of the SO, and any expenditures arising from distribution service contracts, standard service contracts, power purchase contracts, transmission service contracts or ancillary services contracts entered into on or before the commencement of this section are deemed to be necessary for the provision of the service."*

In addition, section 2 of the *First Hearing Regulation* pursuant to the Electricity Act provides as follows:

> *"For the purposes of section 156 of the Electricity Act, "first hearing" means the public hearing, whether an electronic, oral or written hearing, that is first held before the Board after all pre-hearing conferences and other preliminary procedural matters have been completed."*

The first hearing for DISCO before the Board, under Division B, Part V was held during 2005 and 2006 and the Board issued its decision on June 19, 2006. DISCO's current application to the Board for approval of a change in its charges, rates and tolls will be the second hearing under Division B, Part V of the Electricity Act.

As such, the Board finds that section 156 is now spent and therefore no statutory requirement exists that obligates the Board to accept the costs, as proposed by DISCO, as prudent or necessary.

GENCO:

As indicated above, GENCO is not regulated by this Board and, in the normal course its business operations would not be subject to review. It is interesting to note that judicial bodies have the power to ignore the existence of separate corporations where failure to do so would yield a result which is "flagrantly opposed to justice". While there is no clear test to be applied, the corporate veil has been pierced in situations where:

- A corporation has been incorporated to do something or to facilitate the doing of something that would be illegal or improper for the individual shareholder to do personally;

- A corporation has been incorporated to avoid statutory requirements; or

- If a corporation is merely acting as the agent of someone else (usually the controlling shareholder that is, itself, a corporation).

J. A. VanDuzer, *The Law of Partnerships and Corporations* 2nd ed (Toronto: Irwin Law Inc, 2003).

The decision of *Medjuck and Budovitch Ltd & Land Securities Ltd*. v. *ADI Limited and The Rocca Group Ltd. (1981) 33 NBR (2d) 271,* makes reference to and supports the following principle:

> *…there have been occasions when the courts have found it both possible and necessary to pierce the corporate veil. The court has done so when one company..is being used as a cloak for the actions of the other; or, for the just and equitable enforcement of a tax law. The court has also done so when it has concluded that, while the corporations are separate in law, one may be under the control of the other to such an extent that together they constitute one common unit".*

The decision of *Kinookimaw Beach Association v. R. in Right of Saskatchewan, [1979] 6 W.W.R. 84,* offers as follows:

> *…the autonomous and independent existence of the corporate structure must be accepted and respected unless it can be shown that such structure is being deliberately used to defeat the intent and purpose of a particular law or is intended to or does convey a false picture of independence between one or more corporate entities which, if recognized, would result in the defeat of a just and equitable result.*

DISCO suggested that to review the PPAs would, in effect, be extending the Board's regulatory jurisdiction to GENCO and that the Electricity Act does not support such a review. All parties recognized that GENCO is a separate legal entity and is not regulated. The Board does not believe that there is sufficient evidence to pierce the corporate veil and does not believe that respecting GENCO's corporate existence will yield a result that is "flagrantly opposed to justice".

At the June 21, 2007 Motions Day, counsel for DISCO stated:

> *"And let's cut to the chase. Both motions are dealing with one fundamental issue, and that fundamental issue is, simply put, whether DISCO's revenue requirement, and of course that's the basis for setting rates, should be based on the PPA costs or the underlying generation costs, the costs that flow from GENCO, Nuclearco and the NUGS.*

> *And I also want to be crystal clear about this. DISCO has no objection to disclosing the underlying costs. And I will say that again. DISCO has no objection to disclosing the underlying costs. Indeed, in the last rate hearing virtually all of the generation costs were filed, with the exception of the NUG contracts, and that was because the NUGs for confidentiality reasons did not want them disclosed. DISCO wasn't a party, the Board ruled they couldn't look at them.*
>
> *So this is not a case, repeat, not a case, of DISCO attempting to shelter the costs from public disclosure. I know that has been stated in the media, it has been repeated outside this hearing room in the last case and perhaps during this proceeding. It is simply not true. The issue isn't the disclosure of the information, but rather its role in the ratemaking process."* (Transcript p. 357-358)

The Board believes that disclosure of the underlying costs is appropriate and notes that DISCO has no objection to such disclosure. The Board will order DISCO to file evidence of underlying generation and certain other costs that were identified in its Motion.

Should the Board review the PPAs and SLAs?

The Board must consider the question of whether or not it should review the underlying costs of the PPAs and SLAs in its determination of whether DISCO's payments under those agreements are reasonable. If the Board finds that it should review the underlying costs, then it must consider the extent of the information necessary to conduct the review and DISCO's ability to provide that level of detail.

In considering the above, the Board is mindful of its mandate under sections 101(3) and 101(5)(a) of the Electricity Act which state as follows:

> ***101*** *(3) "The Board shall, when considering an application under this section, base its order or decision respecting the charges, rates and tolls to be charged by the Distribution Corporation on all of the projected revenue requirements for the provision of the services referred to in section 97."*

101*(5)The Board at the conclusion of the hearing shall*

(a) approve the charges, rates and tolls, if satisfied that they are just and reasonable or, if not so satisfied, fix such other charges, rates or tolls as it finds to be just and reasonable,..

The Board heard evidence and submissions that, without a thorough examination of the underlying costs, it is difficult to determine the reasonableness of the costs that flow from the PPAs and SLAs. It was stated that while DISCO may legitimately do business with its affiliates, there should be transparency with respect to those transactions.

The Board is aware that this issue has arisen in other jurisdictions. The Alberta Energy and Utilities Board, in various decisions, has used the following criteria in determining if an affiliate agreement was appropriate:

- Does the decision to acquire goods or services from the affiliate affect the utility's ability to operate safely and reliably?

- Is the affiliate the least cost alternative that meets the requirements of the utility?

- Was the purchase of goods or services by the utility at the lesser of fair market value or the cost it would take for the utility to provide similar goods or services itself?

Re Atco Group, [2003] AEUBD No. 38
Re Atco Group [2002] AEUBD No. 69

Transactions between affiliated companies, where one is a regulated monopoly supplier and others are unregulated, must be considered differently than transactions between companies that operate at arm's length. In order to protect the customers of the regulated monopoly, a regulator must be able to disallow recovery of costs by the monopoly if the regulator determines that the disallowed costs were not prudently incurred. To do otherwise would permit an affiliated company to earn unreasonable profits at the expense of the customers of the regulated company.

In examining transactions between a regulated utility and an affiliate, it may be difficult to determine if they occurred at fair market value. The Board believes that it is more difficult, in a smaller jurisdiction such as New Brunswick that has fewer service options, to determine this. Each transaction must be examined on its own merit. As a regulated utility, DISCO should demonstrate the reasonableness of any such costs.

Parties submitted that, in fulfilling its mandate, the Board can determine the reasonableness of any costs resulting from a third party transaction. In support of these submissions several of the intervenors urged the Board to consider Section 72 of the *Energy and Utilities Board Act* when determining the extent of its jurisdiction. This section bears the heading "Existing contracts and jurisdiction of Board". Its full text reads as follows:

> 72 *The jurisdiction of the Board under this Part may be exercised by it notwithstanding any existing contract or agreement or Act of the Legislative Assembly of New Brunswick.*

It is to be noted that Section 72 refers to the "jurisdiction of the Board under *this Part"*. The Part referred to is Part 3 of the *EUB Act* which bears the heading "Public Utilities". In Section 53, a public utility is defined as follows:

> 53 *"public utility" means*
>
> *(a) a person that owns, operates, manages or controls any plant or equipment for the production, transmission, delivery or furnishing of water or natural gas, or that provides such other service as may be prescribed by regulation, either directly or indirectly, to or for the public,*
>
> *(b) when specified by regulation, any municipality or rural community that owns, operates, manages or controls any plant or equipment for the production, transmission delivery or furnishing of water or natural gas, either directly or indirectly, to any person outside its own limits, and*
>
> *(c) when specified by regulation, a municipal distribution utility as defined in the Electricity Act that generates or distributes electricity. (entreprise de service public)*

Neither DISCO nor any of the other NB Power Corporations fall within the definition of "public utility" set out in Section 53. No provision of the *Electricity Act* would cause them to be "public utilities" for the purposes of Part 3 of the *EUB Act*. The use of the word "means" in the definition does not permit an interpretation of the section that would include DISCO.

The Board concludes that Part 3 of the *EUB Act* does not apply to DISCO and that consequently Section 72 is of no assistance in the matter at hand.

The Board has general supervisory authority over entities that fall within the definition of "public utility". In general, this authority is derived from Part 3 of the *EUB Act*. The Electricity Act does not confer general supervisory authority over DISCO to the Board.

During the course of the hearing, the Board heard evidence from two expert witnesses, offering opposing points of view.

Mr. Strunk, a witness for the Public Intervenor, stated that contracts between affiliated companies raise concerns for regulators because of the possibility that the utility's customers may be paying too much as a result of contractual terms that are overly favourable to the affiliated company. He stated that since the PPAs have not been reviewed by any regulatory body, have not been subject to market competition and have not been justified by a comparison to other contracts subject to competition, a review of their specific terms and conditions is warranted. In support of this position, Mr. Strunk made specific reference to the rules and guidelines that have been developed in the United States by the Federal Energy Regulatory Commission (FERC) with respect to affiliate transactions.

Mr. Strunk also said that it is quite possible that the terms, prices and conditions are in fact just and reasonable but that a review is required to determine if this is the case. He stated that DISCO may be entitled to a presumption of prudence but if parties raise reasonable doubts as to the prudence of DISCO's purchasing, the burden of proving that its behaviour was prudent would revert to DISCO.

Mr. Kee, a witness for DISCO, stated that the details of the PPAs were decided upon by the Government and were imposed on DISCO. Because of this, there are no issues of prudent management related to the terms and conditions of the PPAs for the Board to review.

Mr. Kee further stated that the rules and guidelines developed by FERC apply only in cases where there is potential for an investor-owned state-regulated monopoly to subvert state regulation by purchasing wholesale power from an affiliated generator that is outside the jurisdiction of the state regulator. He submitted that these rules and guidelines are not relevant in New Brunswick because the FERC rules do not apply to affiliate transactions of government owned utilities.

The Board recognizes that the situation in New Brunswick differs from the experience in the United States but believes that there is value in closely reviewing affiliate transactions. At various times throughout the hearing, DISCO indicated that these transactions were "imposed" on it but no evidence was submitted in support of this. The Board, in any case, does not consider that the imposition of costs is a guarantee of "reasonableness" or "prudency". The Board is of the view that DISCO must demonstrate that the costs which it proposes be recovered from customers are reasonable.

The Board considers it important to clearly distinguish between the Government acting as the sole owner of DISCO and its affiliated companies and the Government acting in its legislative capacity. The Board does not believe that the Government, acting as the sole owner, would attempt to thwart the intent of the legislation. It is the view of the Board that the legislation clearly intends for the Board to review all of DISCO's proposed costs and to disallow any costs that it considers to be unreasonable. To suggest that the Government, in its ownership role of DISCO and its affiliated companies, could require that any costs that it chooses be passed along to DISCO's customers without any regulatory review flies in the face of the legislation that requires DISCO to have its rates approved by the Board.

A requirement that certain costs must be accepted, without the possibility of being reduced by the Board after a public review, can only be done by way of legislation. In the absence of such legislation, the Board believes that the onus is on DISCO to prove the reasonableness of its

proposed costs. This position is clearly supported by Section 125 (2) of the Electricity Act that states:

> *"In an application regarding charges, rates, tolls or tariffs, the burden of proof is on the applicant."*

DISCO must demonstrate that it has taken all reasonable steps to minimize its costs. With respect to the PPAs and SLAs, DISCO must explain what it is doing to minimize the costs to it that flow as a result of its administration of these agreements. Further, DISCO must identify what it has done to determine that the costs that arise from the PPAs and SLAs are in fact its least cost option. In other words, DISCO must show that it cannot receive the same service from another supplier at lower cost.

DISCO is obligated to provide sufficient evidence to justify its revenue requirement. If DISCO is unwilling to supply relevant information with respect to affiliate transactions, the Board can order DISCO to produce the relevant documents and information. The authority for this is provided in Section 77 of the *EUB Act* that states as follows:

> "**Production of documents and information**
>
> *Any person over whom the Board has jurisdiction under this or any other Act and to whom the Board makes a request for documents or information of any kind that relate to matters over which the Board has jurisdiction shall furnish the required documents or information to the Board without delay."*

The Board notes that each of the PPAs contains wording similar to the following:

> "**1.11 <u>Amendment</u>**
>
> *Except as expressly provided in this Agreement, no amendment of this Agreement shall be binding unless executed in writing by each of the parties. Notwithstanding the foregoing and sections 12.1 and 12.2, for so long as the Buyer, NB Power Holdco and the Seller remain directly or indirectly wholly-owned by the Province and/or any wholly-owned Affiliates of the Province, any party may submit in writing any concerns or issues relating to the terms of*

> *this Agreement to the Board of Directors of the Electric Finance Corporation (the "Board") for its consideration, provided that such party provides a copy of any such submission to the other parties at the same time it is provided to the Board. Provided that the other parties are permitted to deliver a reply submission to the Board and that all parties are given a reasonable opportunity in the circumstances to provide the Board with additional written or oral submissions with respect to the concerns or issues raised, the parties acknowledge and agree that the Board may, in its sole discretion, amend the terms of this Agreement to protect the financial integrity of the parties, to prevent undue hardship for consumers, or to facilitate a third party investment in or Transfer of the Facilities and/or the Other Facilities. If the Board amends the terms of this Agreement, each party shall promptly do, take, execute or deliver or cause to be done, taken, executed or delivered all such further acts, steps, deeds, agreements, written amendments, assurances and things as may be reasonably required for the purpose of giving effect to the amended terms directed by the Board and shall take all such steps as may be reasonably within its power to implement to their full extent the terms of any amendment made by the Board."*

The Board believes that this section allows DISCO to propose amendments that would permit it to take advantage of lower cost options should such options exist. Further, the Board considers that this section would allow appropriate adjustments to occur so that DISCO need not operate at a loss should the Board determine that certain costs as proposed, with respect to transactions with affiliated companies, were not prudent.

When DISCO provides evidence on the matters described above, it is the responsibility of the other parties to examine the costs and the rationale provided in support of them as submitted by DISCO. If they consider that any such costs may be unreasonable they have an obligation to provide evidence that can be tested as part of the hearing process. As with any tribunal or quasi-judicial body, the Board must consider the evidence that is placed before it and should not rely entirely on submissions that are made without an evidentiary foundation.

It is the responsibility of the Board to carefully review all of the evidence on costs. The Board must only allow DISCO to recover from its customers those costs that the Board considers necessary in order to provide service.

The Board must also be mindful of the intent of the legislation, which creates a tension between the monopoly power of DISCO and the objective of having GENCO operate in a competitive marketplace. Should a competitive electricity market develop, these principles may be reconciled. At this stage however, there is little competition for GENCO and the purchase of service is not occurring in a true competitive market.

The Board has carefully considered the evidence and the comments of all parties. In the absence of any statutory requirement that states that certain costs are to be considered as prudent or necessary, the Board must determine if all of the costs that DISCO proposes be recovered from customers are necessary in order to provide service. This obligation arises by way of section 101 of the Electricity Act.

To fulfill this responsibility, the Board considers it essential that all of the major costs that DISCO proposes to be recovered from its customers be reviewed in detail. The Board is of the view that such examination is particularly relevant in a situation where the cost is for a transaction between DISCO and an affiliated company and where the cost has not been subject to any market test, such as a *"request for proposals"* process.

The costs represented by the PPAs and the SLAs with affiliated companies meet both of the above tests. The Board does not consider that the mere presence of a contract that requires the provision of services and payment for same, is in any way a guarantee of prudence. The Board therefore considers that these costs should be carefully examined in the public hearing process to consider DISCO's application for rates for 2007/2008.

Mr. Strunk had suggested that the scope of the review for the PPAs should consider whether the purchased power costs were prudently incurred and whether the rates paid by DISCO under the PPAs were just and reasonable. He stated that conducting a review for prudence would require that detailed evidence be filed on the calculations for the energy prices, monthly and annual true-ups and adjustments as well as an investigation of alternative sources of energy.

Mr. Strunk identified three alternative methods that could be used in an examination of the prices and terms of the PPAs to determine just and reasonableness. Of the three methods, he proposed that a cost based review of GENCO would be the most practical and appropriate approach for the New Brunswick market. This would require that GENCO's costs be filed as evidence.

The Board does not consider it appropriate to conduct a review of the efficiency of GENCO's operations. However, as discussed above, the onus is on DISCO to demonstrate that the costs that flow from the PPAs and SLAs are reasonable in light of the options available. To assist in determining if the costs related to the PPAs and SLAs are reasonable the Board makes the following orders.

ORDERS with respect to the DISCO and Public Intervenor Motions

As a result of the foregoing **the Board orders DISCO to file evidence that will explain why its costs under the PPAs and the SLAs are reasonable and should be recovered from the customers of DISCO. This evidence is to be filed with the Board and other parties by July 30, 2007. The evidence, at a minimum, must:**

1. **Identify all sections of the PPAs and SLAs that affect the costs to DISCO;**
2. **Describe in detail the steps DISCO is taking to minimize its costs in relation to these sections;**
3. **Identify the lower cost options to the PPAs and/or SLAs that may exist and for those that DISCO has considered, provide the details of its calculations for those options, and**
4. **Describe in detail what DISCO has done to reduce its costs, if it has identified a lower cost option.**

As stated earlier in this Ruling, the Board considers it appropriate for DISCO to disclose the underlying generation and other costs and notes that DISCO has no objection to such disclosure. **The Board therefore orders DISCO to file detailed evidence on the underlying generation costs and the "certain other costs" that it identified in its motion.**

This evidence will be subject to the normal interrogatory and intervenor evidence process in accordance with the schedule currently established.

Motion by JDI:

With respect to the motion of JDI, the Board considers that two issues are raised.

The first issue is the filing of DISCO's quarterly financial information. Currently, financial information is only available in the course of a rate application proceeding. In addition, DISCO submitted that, in its opinion, there was no obligation and no authority for the Board to order the information to be provided.

Notwithstanding DISCO's submission, the Board considers that Section 77 of the *EUB Act* does in fact provide it with the authority to require the filing of financial information. Further, as DISCO is a regulated monopoly, the Board believes that filing information on its financial performance during a rate hearing is appropriate and that DISCO will not be harmed by the provision of such information.

JDI in its motion requested that the financial information be filed no later than 30 days after the end of the period. JDI stated at the hearing that a governance section in the NB Power Group's ("*the Group"*) annual report indicated that the Group had worked to be consistent with guidelines set forth by the Toronto Stock Exchange ("*the TSX"*). JDI stated that under securities legislation that companies listed on the TSX are required to file interim financial information within 45 days after the end of the interim period. The Board finds that following the TSX timeline for filing financial information is appropriate.

Filing the financial information will allow all parties to compare DISCO's operating results to its forecast revenue requirement. **The Board orders DISCO for the test year to provide it with quarterly financial statements starting with the results for the April 1 - June 30, 2007 quarter. The first quarterly statement must be filed within 45 days of the date of this ruling and subsequent statements are to be filed within 45 days from the end of each successive**

quarter. Such information can be properly labeled so as to clearly identify its nature and will be available to the public. The Board will review these statements and direct DISCO to change the format and content, if necessary.

The second issue is whether such information should be used to order a rebate. The full public review of DISCO' rate application, that is currently scheduled, will provide an opportunity for a thorough examination of DISCO's projected financial results for the full year 2007/2008. A review of quarterly financial statements would not provide a similar opportunity to examine the forecast for 2007/2008. The Board considers that any decision on a rebate can only be made after the full public review of the application.

The Board notes that JDI's request to use DISCO's quarterly financial statements for rebate purposes could be seen as a request to vary the Board's ruling on interim rates. If it is JDI's intent to request such a variance, then JDI should make an application, complete with supporting evidence, requesting that Board use its authority under section 43 of the EUB Act to vary its decision on interim rates. Upon receipt of the application, the Board would establish a process for hearing the application.

JDI's motion raises the issue of potential rebates. The Board believes that it is important for parties to be aware that it intends, during the full public hearing, to address the issue of whether it would be appropriate for the Board to order that interest be added to any amounts owing should a rebate be found to be necessary.

Dated at the City of Saint John, New Brunswick this 16th Day of July, 2007.

Original signed by

Raymond Gorman, Q.C., Chairman

Original signed by

Cyril W. Johnston, Vice-Chairman

Original signed by

Edward McLean, Member

Original signed by

Roger McKenzie, Member

Original signed by

Constance Morrison, Member

Original signed by

Yvon Normandeau, Member

Original signed by

Robert Radford, Member