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 (Includes Interim Rate Proposal) - Motion on Confidentiality

Delta Hotel, Saint John, N.B.
August 16, 2007

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Delta Hotel, Saint John, N.B.
August 16, 2007

CHAIRMAN:	Raymond Gorman, Q.C.
VICE-CHAIRMAN	Cyril Johnston
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	Edward McLean
	Roger McKenzie
BOARD COUNSEL:	Ellen Desmond
BOARD STAFF:	Doug Goss
	David Young
BOARD SECRETARY:	Lorraine Légère
ASSISTANT SECRETARY:	Juliette Savoie

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CHAIRMAN: Good morning, everyone. The purpose of today's hearing is to address the request made by the Applicant for an order that exhibit A attached to the affidavit is Sharon MacFarlane, sworn to on August 8th 2007 be held in confidence by the Board pursuant to Section 34 of the Energy and Utilities Board Act.

The Board understands the Applicant is also requesting that certain information in the John Todd report dated

August 13th 2007 also be held in confidence by the Board pursuant to Section 34.

The panel for the motion this morning consists of Cyril Johnston, the Vice-Chairman, Roger McKenzie, Ed McLean, Don Barnett and myself.

At this time I will take appearances.

MR. MORRISON: Good morning, Mr. Chairman and Members of the Board. Terrence Morrison on behalf of the Applicant and Ed Keyes, my partner, representing also the Applicant. With us at counsel table today is Sharon MacFarlane, Vice-President of Finance for DISCO and Darren Murphy, Vice-President of DISCO.

CHAIRMAN: Thank you, Mr. Morrison. Formal Intervenors I will start with Canadian Manufacturers and Exporters, NB Division.

MR. LAWSON: Good morning, Mr. Chairman, Panel. It is Gary Lawson on behalf of CME.

CHAIRMAN: Thank you, Mr. Lawson. Conservation Council of New Brunswick Inc. Enbridge Gas New Brunswick.

MR. HOYT: Len Hoyt on behalf of Enbridge Gas New Brunswick. I'm joined by Dave Charleson, General Manager of EGNB.

CHAIRMAN: Thank you, Mr. Hoyt. FPS Canada Inc.

MR. BAIRD: Chuck Baird on behalf. And with me this morning is Ross Gillen.

CHAIRMAN: Thank you, Mr. Baird.

I did have a letter from Mr. Smelley on behalf of Irving Oil Limited indicating that they would not be present this morning. Is that correct? Nobody is here from Irving? J. D. Irving Pulp and Paper Group.

MR. WOLFE: Wayne Wolfe, Mr. Chairman.

CHAIRMAN: Thank you, Mr. Wolfe. NB Forest Products Association. Nobody here? The New Brunswick System Operator. Mr. Ken Sollows.

MR. SOLLOWS: Here, Mr. Chairman.

CHAIRMAN: Thank you. The Utilities Municipal.

MR. ZED: Peter Zed and Serena Newman as counsel to Utilities Municipal. And I'm joined by Dana Young of Utilities Municipal and Eric Marr and Jeff Garrett of Saint John Energy.

MR. MORRISON: Thank you, Mr. Zed. Vibrant Communities Saint John.

MR. PEACOCK: Good morning, Mr. Chair. Kurt Peacock here.

CHAIRMAN: Thank you, Mr. Peacock. The Public Intervenor.

MR. THERIAULT: Good morning, Mr. Chair. Daniel Theriault. And joining me this morning is Robert O'Rourke.

CHAIRMAN: Thank you, Mr. Theriault. And the New Brunswick Energy and Utilities Board.

MS. DESMOND: Ellen Desmond as Board Counsel. And with me is Doug Goss and David Young.

And Mr. Chair, if I could raise one very short preliminary matter. We were just advised that there is currently no translation available. A piece of equipment is currently not working. It will be approximately one hour before translation is available.

And I believe that there has been a couple of inquiries from francophone reporters with respect to this proceeding.

CHAIRMAN: Thank you. Perhaps -- is there anybody that is present then at this point in time that does require the translation? If so please come to the microphone and identify yourself.

I'm going to continue with the appearances anyway. And I believe that David Coles is here as well, and at the present time is not registered as a Formal Intervenor.

MR. COLES: Good morning, Mr. Chairman. I act for Canadian Broadcasting Corporation and The Telegraph Journal. We would assert the position that pursuant to the July 27, 2005 decision of the Board of Commissioners of Public Utilities, which pursuant to the Energy Act is carried forward and is still in full force and effect, as we would understand it, it would be our view that in fact we

intervene on the limited topic of confidentiality and public access by right.

CHAIRMAN: Just before we proceed any further, Mr. Johnston is going to repeat my comments with respect to translation for the benefit of all present.

MR. JOHNSTON: Nous somme informée ce matin que la Traduction simultative n'est pas disponible. L'équipment ne fonctionne pas et sera a peu près une heure avant que la traduction est disponible.

Est-ce que il y a present aujourd hui dans la salle quelqu'un qui aimerait avoir la traduction et qui pense que nous devrion attendre que a soit disponible?

Personne? Merci beaucoup.

CHAIRMAN: Mr. Coles, then if I understand your request, it is to take part in today's proceeding and to take part in any other motions which may be made to have information and documents classified as confidential?

MR. COLES: That is correct, Mr. Chairman. Our view as to our appearance is restricted to issues as when the Board is going to consider whether to receive documentation in a confidential manner and also to when the Board is going to consider going into in-camera. It would be restricted to those two issues.

I'm also -- and this may simply be a factor of our

late intervention in this regard -- I'm not aware, Mr. Chairman, as to whether any of the parties have any objection in fact to our standing to speak in a limited capacity.

CHAIRMAN: Thank you, Mr. Coles. And in fact I think what I'm going to do is to poll the parties at this point in time to determine whether or not there is agreement on this issue.

So perhaps I will do that now. I will start with the Applicant.

MR. KEYES: Thank you, Mr. Chairman. On the basis of Mr. Coles' comments we have no objection to his appearing on the conditions that he has outlined.

CHAIRMAN: Thank you, Mr. Keyes. Mr. Lawson?

MR. LAWSON: We have no objection.

CHAIRMAN: Mr. Hoyt?

MR. HOYT: No objection.

CHAIRMAN: Mr. Baird?

MR. BAIRD: No objection.

CHAIRMAN: Mr. Wolfe?

MR. WOLFE: No objection.

CHAIRMAN: Mr. Sollows?

MR. SOLLOWS: No objection.

CHAIRMAN: Mr. Zed?

MR. ZED: No objection.

CHAIRMAN: Mr. Peacock?

MR. PEACOCK: No objection.

CHAIRMAN: Mr. Theriault?

MR. THERIAULT: No objection whatsoever.

CHAIRMAN: Ms. Desmond?

MS. DESMOND: No comment. Thank you.

CHAIRMAN: Well, then I guess based on the fact that the Board has in fact rendered a decision at an earlier date, and based on the fact that the Applicant and all of the intervenors have consented, the Board will grant intervenor status to CBC and Brunswick News Inc., carrying on business as The Telegraph Journal, to today's proceeding and in all motions to have information and documents classified as confidential. The CBC and Telegraph Journal continue as informal intervenors for the balance of the hearing.

MR. COLES: Thank you, Mr. Chairman. Your ruling also applies to arguments that may be made to move your proceedings in-camera as well, is that correct?

CHAIRMAN: That is correct.

So I guess before we proceed any further, there are a number of document that have been filed with the Board which I believe have not been marked as exhibits. So that

we will have the benefit of all of the currently filed documents for use on this motion.

At this time I'm going to go through the documents and mark them as exhibits.

Mr. Morrison, I believe they are all your documents?

MR. MORRISON: I believe they are, Mr. Chairman. And the Board Secretary made me a schedule of those this morning. But I believe they are in the other room at the moment.

CHAIRMAN: Well, it would be my intention to read them out. Do you feel -- do you need to get a copy of that --

MR. MORRISON: No. I have gone over them with the Board Secretary. And I have no objection to any of them being marked as exhibits.

CHAIRMAN: Okay. We left off with exhibit A-4 with respect to the Applicant's documents. Exhibit A-5 is going to be the evidence dated June the 19th, 2007. It is the CRA report by Edward Kee re the motion on generation and other costs.

Exhibit A-6 is the additional evidence dated July the 3rd, 2007, Rate Design, Volume 1 or 2, English and French. And the document includes the following, the 2007-08 Cost Allocation Study, Rate Design and Appendix 1, 2, 3, 4 and 5.

Exhibit A-7 is additional evidence dated July 3rd

2007, Supporting Documents, Volume 2 of 2, English only. And this document includes financial statements, net earnings and PROMOD review.

Exhibit A-8 is a letter dated July 20th 2007 from Terrence Morrison of Cox Hanson, solicitor for the Applicant, requesting an extension of time for the filing of additional evidence ordered by the Board in its July 16th 2007 ruling and for a change in the overall filing schedule.

Exhibit A-9 is a letter dated August the 8th, 2007 from Terrence Morrison of Cox Hanson, solicitor for the Applicant, attaching the following, a Notice of Motion for approval of the establishment of a deferral account, leave to amend DISCO's application for variance of interim rate approved by the Board on June 1st 2007, affidavit of Sharon MacFarlane, Vice-President of Finance and Chief Financial Officer of NB Power Distribution Corporation. Exhibit A, a complete document redacted. Exhibit B, Forecasted Revenue Requirement and Revenue Shortfall. And appendix B, Rate Schedule and Rate Application Guidelines and Harmonized Sales Tax, English and French.

Exhibit 9-C -- and the C in our numbering process stands for confidential -- is a confidential unredacted version of exhibit A referred to in Ms. MacFarlane's

affidavit of August the 8th, 2007.

Exhibit A-10 -- letter from Lorraine Légère, Secretary to the Board dated August the 9th, 2007 to Terrence Morrison, solicitor for the Applicant with a c.c. to all parties to the proceeding, requesting an explanation of exhibit A and confirming a two-day hearing for August the 16th, 17th 2007 to deal with the Notice of Motion and confidentiality involved.

Exhibit A-11 is a letter dated August the 10th, 2007 from Terrence Morrison of Cox Hanson, solicitor for the Applicant, in response to the Board's letter dated August the 9th, 2007.

Exhibit A-12 is a letter dated August 13th 2007 from Terrence Morrison of Cox Hanson, solicitor for the Applicant, attaching a redacted version of a report from John Todd.

And A-12C, letter dated August 13th 2007 from Terrence Morrison, Cox Hanson, solicitor for the applicant, attaching a confidential unredacted copy of John Todd's report.

And those are all of the documents received by the Board from or on behalf of the Applicant.

Mr. Morrison, is there anything in addition to those that I have left out?

MR. MORRISON: Not that I'm aware of, Mr. Chairman.

CHAIRMAN: Thank you. The exhibit list will be updated and distributed in the near future.

MS. DESMOND: Excuse me, Mr. Chair. I believe that correspondence had arrived this morning at the Board. It was a letter dated August 15th from Cox Palmer. I don't believe that that letter has been marked as an exhibit.

MR. MORRISON: Yes, Mr. Chairman. I did send a letter to all participants. I am not -- flexible one way or the other whether it is marked as an exhibit.

It is really an explanation as to why the relief we sought in our Notice of Motion is conditional relief, in other words why the deferral account -- proof of the deferral account as a precondition for our request for a reduction in the interim rate.

I have no problem if it is marked. I'm merely sending it along to aid other parties so that we could expedite matters tomorrow.

CHAIRMAN: Sure. I take it that it is part of an explanation as to what you are looking for and perhaps part of an argument as to why that is the appropriate remedy. Would that be a fair characterization?

MR. MORRISON: I think there is a bit of both in there, yes.

CHAIRMAN: So I guess given that there is perhaps a bit of

argument in there as well, perhaps at this time we won't mark that as an exhibit. And if we need to perhaps we will tomorrow.

So does that look after all the documents?

MS. DESMOND: I believe so, Mr. Chair. The only additional item, I would ask that when the exhibit list is finalized and circulated that an amendment be made from Cox Hanson to Cox Palmer, I believe is the correct firm name.

MR. MORRISON: Even I can't keep the names straight, Mr. Chairman.

CHAIRMAN: I just wanted to check and make sure I read what was in front of me. It does say Cox Hanson. So yes, we will make that change.

Okay. Then I guess just a couple of comments about our proceeding today. DISCO has filed a motion that requests the approval of the establishment of a deferral account. And conditional upon the approval of that deferral account, an adjustment to forecasted Revenue Requirement shortfall, and a variance to the Board's Interim Rate Decision of June the 1st, 2007 that would reduce the interim rate increase to 7.1 percent for all categories except water heater rentals and connection fees.

The motion also requests that the unredacted versions

of both exhibit A attached to the affidavit of Ms. MacFarlane and the report of Mr. John Todd that have been filed in confidence with the Board be kept confidential pursuant to Section 34 of the Energy and Utilities Board Act.

This particular request for confidentiality and a review of the request are not taking place in accordance with the Board's policy on confidentiality.

Given the nature of the motion and the prospect of being able to lower rates for the customers of DISCO, the Board thought it was in the public interest to expedite this matter.

So if parties are wondering about the Board's confidentiality policy, it is pretty much ready for release. But I guess everybody is aware of the reason that we are here today and that we will proceed to deal with these documents.

So the purpose of today's proceeding therefore is to determine if there is any other information that is related to a review of DISCO's motion that DISCO considers should be kept confidential, and if so specifically identify such information to hear submissions on the need for confidentiality and to hear submissions on how the Board should proceed should it determine that certain

information should be kept confidential pursuant to Section 34.

In addition the Board has made available, I believe they have anyway, copies of a confidentiality agreement.

Ms. Desmond, has that been circulated?

MS. DESMOND: I believe Ms. Légère did circulate that to the parties before the commencement of the hearing.

CHAIRMAN: Thank you. So the Board has made available copies of a confidentiality agreement that it believes would be appropriate for use in this case should the Board determine that certain information should be kept confidential.

It is the intention of the Board that only the Formal Intervenors would be permitted access to the confidential information and only after having signed the confidentiality agreement.

At this point I guess I'm going to ask whether or not any of the parties have any comments with respect to this proposed confidentiality agreement?

MR. MORRISON: No comment, Mr. Chairman. That is fine.

MR. LAWSON: Mr. Chairman, Gary Lawson for CME. I must profess that I just received it a few minutes before we started. And I haven't had a chance to look at it.

So I would like to have an opportunity to comment if

need be prior to the hearing proceeding with -- and the disclosure.

CHAIRMAN: Sure. Perhaps maybe the best way to handle it then would be for anybody who has comments to perhaps make those comments after we have a break this morning.

I think certainly at this point in time we may not even need the document. We don't know. We have to obviously conclude the hearing.

But in the event that it is determined that certain information is to be kept confidential then the Board would plan to conduct a review of that information by way of an in-camera hearing.

So if the parties could have a look at that agreement. And if they have any difficulties, problems or suggestions, they can -- those suggestions can be made after we have a break later this morning.

Mr. Morrison, then I will ask you to proceed.

MR. MORRISON: Thank you, Mr. Chair. As you indicated, DISCO is here today requesting an order that portions of exhibit A which were attached to Ms. MacFarlane's affidavit of August 8th and portions of the John Todd report which we filed on August 13th be held in confidence pursuant to Section 34 of the Energy and Utilities Board Act.

DISCO is also requesting that any hearing or deliberation by the Board in connection with the establishment or approval of the proposed deferral account be held in-camera so as to preserve the confidentiality of the items I just referred to.

And the basis for our motion is Section 34 of the Energy and Utilities Board Act. And I will just paraphrase it. But essentially what Section 34 says is where information obtained by the Board that is by its nature confidential, such information shall not be published or revealed in such a manner as to be available for the use of any person unless in the opinion of the Board such publication or revelation is necessary in the public interest.

It is my position -- my client's position that the redacted portions of exhibit A contain confidential information relating to the settlement of a lawsuit between New Brunswick Power Holding Corporation and Petroleos De Venezuela S.A., or which is commonly referred to as PDVSA -- and that concerns the supply of fuel to the Coleson Cove generating station.

The question to be answered in this confidentiality hearing is really quite a straightforward one. Is the

redacted information contained in exhibit A in the Todd report confidential?

If the answer to that question is no then it can be released to the Board and to the public. However, if the answer to that question is yes, that it is confidential information, then we submit that it must be dealt with in accordance with Section 34 and the Board's confidentiality policy.

Now Ms. MacFarlane's affidavit explains that the settlement of the lawsuit resulted in a cash payment being received together with a new fuel supply agreement, the particulars of which are set out in the said exhibit A attached to her affidavit and which are used in the calculation of a deferral account being proposed to pass on the benefits of the settlement of that lawsuit to DISCO's customers.

Part of the settlement being the new fuel supply agreement contains provisions obligating the parties to keep the terms of the fuel supply agreement confidential. These confidentiality provisions have been circulated to the parties here today and to the Board in accordance with the Board's directions of last week.

In order to comply with the terms of the settlement of the lawsuit requiring details on the new supply agreement

be kept confidential, DISCO has filed with the Board a redacted version of exhibit A. And that exhibit A is entitled "Deferral Account Explanation".

The settlement of the lawsuit and the terms of the new fuel supply agreement were negotiated in good faith and were not, we submit, entered into merely on the understanding that they be kept confidential, but were done so on the basis of a contractual obligation that they be kept confidential.

The concern regarding the confidentiality of this agreement and the disclosure of the terms of that agreement relates to the prospective effect of the fuel supply agreement. It is a commercially sensitive document with provisions that the parties have agreed must remain confidential.

Section 34 of the Act, which I referred to just a moment ago, states that where information is obtained by the Board concerning the costs of a person, in this case DISCO, in relation to the operations of the person, being DISCO, that are regulated by this part, and DISCO is, such information shall not be published or revealed in such a manner as to be available for the use of any person unless in the opinion of the Board such publication or revelation is necessary in the public interest.

It is our submission that the opening premise of the section must be that if the Board receives information it is to be held in confidence only, and only if it is clear to the Board that it is in the public interest that it not be held in confidence, only then can it be disclosed.

I would submit that the onus is not on DISCO, or for that matter any of the parties to the fuel supply agreement to defend the maintaining of the confidentiality. But rather the onus is on those persons seeking to make the information public.

In this case I believe it is the Public Intervenor and Mr. Coles on behalf of the CBC and The Telegraph Journal that are seeking to make public the redacted portions of exhibit A and the Todd report.

Just for the record, Mr. Chairman, DISCO has no objection to the redacted information contained in exhibit A and the Todd report being shared with the Formal Intervenors, subject to compliance with the terms of the Board's draft policy on confidentiality, with the following stipulation, that the unredacted information be made available to the solicitors for the Formal Intervenors once they have executed the confidentiality agreement as contemplated in the Board's policy. And I'm referring of course to sections 3(6), 3(7) and 3(8) of the

Board's draft policy.

Also, Mr. Chairman, DISCO is prepared to allow the Board's expert, and I believe that is Mr. Logan, to review the terms of the settlement agreement with respect to the lawsuit and confirm that the figures used in exhibit A were accurately transposed from the settlement agreement into exhibit A and the Todd report.

This independent review of source documents was done in the past by the previous Board, and I would submit is a practical approach to dealing with the concerns of all parties.

DISCO opposes placing the settlement agreement itself, which includes the fuel supply agreement, on the record even in confidence.

Now I don't know this for sure. But I'm anticipating that we may hear arguments this morning that the confidentiality clause under the fuel supply agreement permits the Board, by virtue of the operation of law, and for the quasijudicial body, to release the unredacted versions of the document.

While this instance is contemplated by the confidentiality terms, it is DISCO's position that the underlying confidential information must be protected, as the fuel supply agreement is a commercially negotiated

agreement between unregulated parties who, for specific business and legal reasons, decided that the details must be kept confidential.

The Board should be aware that disclosure of this confidential information that is contained in the redacted exhibit A and the Todd report could seriously and negatively impact the business interests of the counter party thereto, being PDVSA.

In other words the disclosure of the arrangements of the fuel supply agreement may lead to other customers of PDVSA obtaining commercially sensitive information that could affect the business operations of PDVSA.

If PDVSA's business interests are compromised it could have ramifications for DISCO. While the confidentiality clause contains the usual legal proceeding exclusion, we must not lose sight of the fact that there is a legal outcome and there is a business outcome to be considered.

DISCO, given the importance of the settlement, does not want to do anything which would jeopardize its business relationship with PDVSA. PDVSA should not be treated any differently than any other supplier. The fuel supply agreement was entered into in good faith by PDVSA and should be respected.

Just to give you some sense of the business sensitivity, I looked at and I saw an article in The Telegraph Journal on August 9th. It was a former Venezuelan Minister was quoted as saying -- and I'm quoting -- he says that this settlement was "very bad for the people of Venezuela and very good for the people of New Brunswick."

There is a risk here that the release of this information could cause some elements in Venezuela to seize the opportunity to deny the people of New Brunswick the benefits of what he describes as a very good deal. I guess to quote an old adage, let's not let curiosity kill the cat.

I want to reiterate and be very clear that DISCO wants to be as open and provide as much information as it possibly can in this matter. The settlement of the lawsuit was entered into by a nonregulated entity, NB Power Holding Corporation and PDVSA and others.

We are not at liberty to disclose to the public the details of this fuel supply agreement, which form part of the calculations in support of the deferral account. Furthermore I don't believe a review of the details of the settlement entered into between nonregulated entities is contemplated by the Act. And I will speak a little bit

more on that in a moment.

In any event DISCO cannot be put in a position that it is consenting to the release of this information. Because that could result in a claim that the contract was breached, which could result in the benefits of the settlement being lost.

It is our position that the parties in this room must act responsibly in terms of their comments and actions on this issue. To state that the public deserves to know the confidential details of the fuel supply agreement when they know that the release of these details could result in the loss of hundreds of millions of dollars to the ratepayers and taxpayers of New Brunswick, I guess in my view you have to look at whether that is responsible or irresponsible conduct.

I also want to make it very clear that we take the position that these details are released to the public which eventually results in the loss of hundreds of millions of dollars, together with the loss in savings afforded by a reduction in the rate increase. No one should point the finger at NB Power. The responsibility for that will lie elsewhere.

Just looking at a press release the other day, the Public Intervenor stated that he can't do his job until he

is satisfied that the details of the settlement are correct.

And I sympathize with that position. I understand completely where Mr. Theriault is coming from on that.

Our suggestion to have the Board's expert Mr. Logan confirm the details of the settlement should, I submit, satisfy the Public Intervenor's concerns.

There is a precedent, Mr. Chairman. The previous board refused to order that the NUB contracts be place on the record even in confidence. And if you read that decision it was because they were entered into with an unregulated party, in that case GENCO.

In this case a settlement agreement has been entered into by HOLDCO, also an unregulated party. And it appears that in your July 16th Order with respect to generation costs, the Board, at least appears, to be respecting that precedent.

As I said earlier, I have a great deal of sympathy with the position of Mr. Theriault and I suspect the position of Mr. Coles. Clearly the rule of thumb should be that all deliberations be open and public.

But there is a reason there is Section 34 in the Act, there are situations albeit hopefully rare situations where you have to balance the interest of the public,

which is a legitimate interest, against the consequences of the release of confidential information, and in this case the legal obligations and the genuine business interests of certain parties. And it is a balancing act.

I suggest in this case, given the risks involved, that the balance should tip in favor of confidence. While still enabling the intervenors to test the underlying data in those redacted exhibits. And again this is not a unique situation.

Confidentiality and in-camera hearings are routine. In other jurisdictions, I recall three years ago in Nova Scotia they had at least a week-long in-camera session dealing with fuel costs, which I would suggest is as well a sensitive thing the information that we are seeking to have kept confidential in this proceeding.

There will be no problem in having exhibit A and the Todd report on the record for parties in this matter to use confidentially. But we object to it being put in the public domain where the disclosure could violate the terms of the confidentiality provisions of the settlement agreement.

We believe the disclosure of the information to the parties in accordance with the confidentiality policy, as

I suggested earlier, is a workable resolution in this matter.

Upon the signing of the confidentiality agreement that the Chairman referred to earlier, the information would then be available this afternoon -- we have it here -- for use by the intervenor solicitors in preparation for the in-camera hearing tomorrow.

For all of these reasons, Mr. Chairman, DISCO requests that the redacted information contained in exhibit A and the Todd report be held in confidence and be disclosed to the solicitors for the parties in accordance with the provisions of the Board's draft confidentiality policy for use in tomorrow's in-camera hearing of the motion.

Those are my submissions, Mr. Chairman. Thank you.

CHAIRMAN: Mr. Morrison, you have offered to make the information available to the solicitors for the Formal Intervenors.

At least one if not more than one of the Formal Intervenors, I guess there would be several, are not represented by solicitors. How would you suggest that that be handled?

MR. MORRISON: I took a look at -- Mr. Keyes actually took a look at the confidentiality policy in greater detail than I did in the last few days. And that seems to be an

omission in the policy.

I would suggest -- I think the issue that is trying to be addressed is that you don't have a situation where intervenors, officers, directors, full-time employees, have access to information which otherwise they would not be entitled to look at.

In the situation where an intervenor is not represented by counsel, I think it would be appropriate for one representative of that intervenor to have access to the confidential information upon signing the confidentiality agreement. I think that would only be reasonable.

CHAIRMAN: Thank you. Any questions from the panel?

MR. BARNETT: Mr. Morrison, last time I believe there was an opportunity for the solicitor to confer with an expert. Maybe the solicitors don't have the wherewithal -- not to undermine the solicitor's capabilities, but maybe the solicitors don't have that capability.

And where they have to lean on an expert, how would you see that be treated?

MR. MORRISON: Again the policy doesn't address that issue, Mr. Barnett. And I understand that is a difficulty. If the Board were to proceed down that road, I think it could be dealt with by having the expert also execute an

appropriate confidentiality agreement.

MR. BARNETT: Thank you.

MR. JOHNSTON: Mr. Morrison, I don't have the confidentiality agreement in front of me. But my recollection of it is that it talks about designated recipients.

And is it your reading of the policy that those designated recipients in the draft policy are limited to solicitors? Mr. Keyes can certainly answer.

MR. MORRISON: I believe, Mr. Johnston, it is not referred to specifically in the confidentiality agreement. But it is referred to, I believe if you look at the definition of designated recipient, in the draft confidentiality policy.

I know we are in kind of a bit of a limbo because the policy hasn't officially been adopted by the Board.

MR. KEYES: It doesn't just mention the solicitors in here, if that was your question, Mr. Johnston.

MR. JOHNSTON: Well, that is right. I'm just wondering where this is coming from. And you may well be correct, Mr. Morrison, that there is a Board policy or practice or proposed policy restricting it to solicitors.

My recollection of the intent of the policy was that there would be designated recipients that would be agreed upon precisely to deal with this issue of solicitors being

able to get instruction either from clients or from experts, and that the whole notion of who would be a designated recipient in a given situation would be subject perhaps to a certain give and take depending upon the nature of the documents.

MR. MORRISON: I believe you might be correct, Mr. Johnston. And I believe my confusion might be arising from my involvement in the Nova Scotia process wherein the designated recipients were only solicitors. And I apologize for that.

MR. JOHNSTON: Just so I can be clear in my understanding, and again this is subject to review, is that if there was a determination that the documents would be circulated under a confidentiality policy, I think that the practice would be that there would be some proposal by the various parties as to who the designated recipients would be. And then that would be subject to some sort of agreement. And not to go out of turn, but perhaps Board Counsel could comment on this point now, just so that we are clear.

MS. DESMOND: Mr. Johnston, I believe that the policy is just that as it currently exists. It is a draft. And I know that a number of intervenors made comments about the draft policy.

And to address some of those concerns, the confidentiality, propriety and nondisclosure agreement as circulated attempted to set out such that anybody who signed as a third party, whether they are counsel, whether they are not represented by counsel, if they are an expert, they would be a third party and a designated representative, and as such able to have access to that information.

And I did from Mr. Morrison's comments, and maybe he hasn't looked at this agreement from that lens, but I understood that this agreement perhaps would be acceptable if a designated representative, regardless of their role, signed this agreement.

MR. JOHNSTON: My understanding is that there would be essentially a list compiled of who the designated recipients would be of any given document. And it could not be circulated outside of that list in any way, shape or form. Is that --

MS. DESMOND: This agreement was crafted with that intent, that anybody who was part of that designated list of recipients would sign this agreement.

MR. MORRISON: And that is acceptable to us.

MR. JOHNSTON: Mr. Morrison, I just want to make one comment now that I have opened my mouth to begin with.

One of the challenges I think that faces the Board in this instance was made very clear in your correspondence last night. And that is the approval of the deferral account is a final decision which cannot be revisited, well, except under very limited circumstances of course. But the challenge I guess is to make sure that this Board has enough information to be able to make that determination as to the appropriateness of the deferral account which is proposed to go on for some 23 years. And I guess I would just raise this issue so that you might comment and other intervenors might comment as to whether or not your proposal sufficiently informs this Board that we can -- so that we can make that decision on the deferral account.

MR. MORRISON: I have for very deliberate reasons not looked, have not reviewed the settlement agreement or the fuel supply agreement. However, I am advised by those who have reviewed it that the pertinent information that deals with the deferral account is essentially a calculation. It is a number. It is very limited information. So that my understanding is that, if you look at what has been redacted, there are essentially two very discrete elements. One is a price figure. The other is a term

figure. So the price and the term of the fuel supply agreement are essentially the only pieces of information that have been redacted from exhibit A.

And as I understand it, they are probably the only pieces of information contained in the "settlement agreement" that would have any bearing on the matters in issue here. As I understand it the rest of the agreement deals with fairly routine matters, like notices of discontinuance and releases and the usual things that you would find in a settlement agreement. But I have not read them myself, so.

MR. JOHNSTON: Thank you.

MR. MORRISON: Anything further from the Panel? Thank you, Mr. Morrison.

I guess our practice has been to go in alphabetical fashion. So Mr. Coles, I think the CBC would come next.

MS. DESMOND: Mr. Chair, sorry, if I could just raise one additional matter that perhaps all of the intervenors could speak to. And it might save an additional round of comments.

CHAIRMAN: Thank you, Ms. Desmond.

MS. DESMOND: Mr. Morrison did speak to source documents. And I just wanted to clarify whether he meant by source

documents the two agreements, or if that was to include additional information that would describe the amount and the timing of the benefits that are flowing to the NB Power group of companies in the forecasts that are used by DISCO to calculate the actual amounts of benefits to DISCO.

So another way to look at this is that DISCO should be able to demonstrate, from the Board Staff perspective at least, that DISCO can demonstrates its rights to the benefits of the settlement, to show where those rights are documented, to show how DISCO has verified that the benefits it receives are the correct amounts and to show how DISCO has calculated the impacts to DISCO that will flow as a result of those benefits.

So from a Board Staff perspective, in addition to the two contracts or agreements, there are additional source documents that are at issue. And perhaps DISCO could comment on those additional documents and then additional or other intervenors could also comment on that.

CHAIRMAN: Thank you, Ms. Desmond. Mr. Morrison?

MR. MORRISON: The source documents would -- I'm referring to them as the settlement agreement and fuel supply agreement. The fuel supply agreement is actually an appendix to the settlement agreement. So it is part of

the settlement agreement. But the confidentiality provisions apply specifically to the fuel supply agreement.

So one source document is the settlement agreement which includes the fuel supply agreement. The other source document would be the calculation of -- and I'm going to choose my words very carefully here -- the calculation of the benefit that arises as a result of the fuel supply agreement, which in part is based on fuel price forecasts and the analysis of those fuel price forecasts.

That would be, as far as I'm aware, the only other piece of information that would be necessary, for example, for your expert to confirm in order to verify that the numbers in the proposed deferral account proposal are correct.

CHAIRMAN: And my understanding is that Mr. Logan would be given an opportunity to review both of these documents. But you don't propose to file them in a confidential or any other basis with the Board?

MR. MORRISON: That is correct.

CHAIRMAN: Thank you. Mr. Coles?

MR. COLES: Thank you, Mr. Chairman. Prior to commencing today I provided Ms. Légère with copies of the July 27,

2005 decision of the Board of Commissioners of Public Utilities.

My understanding I think is that she provided members of the Board with a copy of that decision. If not I have copies.

I also have -- I have talked to my friend Mr. Morrison. They are familiar with the decision and have a copy. I have some additional copies here if anybody would like one.

CHAIRMAN: Just for everybody's information, the translation system is now working.

MR. COLES: Mr. Chairman, Section 90 of the Energy and Utilities Board Act states "Every decision, order, licence, permit, rule, regulation and direction made or issued by the Board of Commissioners of Public Utilities that was in force immediately before the commencement of this section continues in force as if it were a decision, order, licence, permit, rule, regulation or direction made or issued by the New Brunswick Energy and Utilities Board."

So our position begins by saying that we view this decision as having the same force and effect as if you and your colleagues made this decision.

And I would like to refer the Board in that decision

to page 5. The Public Utilities Board was confronted with two -- sorry, with four assertions by the media. Those are set out in the introduction of the decision on the first page.

One of the things the Board had to grapple with in making a decision as to how to respond to the Canadian Broadcasting Corporation and Telegraph Journal was effectively, what is the nature of the Board? What law is it bound by? How should it govern itself?

And at page 5 of that decision it states "The Board examined the cases to determine if the open court and freedom of expression principles referred to in the Toronto Sun case should have application to a Board or Tribunal such as ours. That is the Board which exercises a quasijudicial function in the administration of justice as authorized by statute and exercising discretionary powers in respect of its practice and procedure."

Obviously, Mr. Chairman, that description applies with equal forced effect to this Board as now constituted. You do the same thing.

Upon review of cases, including Travelers versus Canada, Chief of Defence Staff, Federal Court Trial Division, affirmed on appeal to the Federal Court of Appeal, Canadian Broadcasting Corporation versus

Summerside City and Pacific Press versus Canada, again Federal Court of Appeal. And the test and principle cited therein, "The Board is satisfied that this Board is bound by those principles. The Board exercised -- it considers it appropriate in the present case to apply the Dagenais Mentuck test in a flexible and contextual manner to the legislative legal and regulatory framework in which the Board finds itself."

So our position begins with saying yes, you are a Board which is bound by Charter considerations. You are a Board that must respond to Section 2(b) of the Canadian Charter of Rights of Freedoms. And you must conduct yourself according to law.

That is essentially a fundamental underpinning of the open court, freedom of expression principles, which I suggest to you bind this Board. What does that mean in the context of what we are doing today?

My friend Mr. Morrison is quite right that the legislation which creates you authorizes you to receive information in confidence and indeed authorizes you to proceed in-camera should you determine that to be appropriate. And that is essentially what Section 34 authorizes.

However, our submission to you is if you are going to

do that you must recognize that you are departing from the fundamental nature of the operation of this Board. This Board hears matters in public.

You are charged with a significant duty on behalf of the citizens of New Brunswick and the Government of New Brunswick which is deferred to you, in that you have to adjudicate whether or not people are going to pay what for among other things power.

The application that you are considering here has a significant financial impact upon the citizens of New Brunswick and will do so for years. This is an unusual application, as I understand it, based upon the happening of an unusual situation which calls for you to make a decision which will, as I say, carry an impact for certainly 23 years.

So my friend agreed in his presentation or stated that normally this is an open process. And that is right. And it is open. Why is it open?

Well, if I can quote again from the Supreme Court of Canada, where it quoted the philosopher, if I can -- in the McIntyre case -- Justice Lathaway in re Canadian Broadcasting Corporation versus Attorney General of New Brunswick, stated, the concepts of open courts is deeply embedded in the common law tradition. The principle was

described in the earlier case of Scott versus Scott, 1913, House of Lords in England.

A passage from the reasons given by Lord Shaw is worthy of reproduction for its precise articulation of what underlines the principle. He stated at page 477, "In the darkness of secrecy, sinister intent and evil in every shape have full swing only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very sole of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."

Philosopher Benson stated that principle hundreds of years ago, and our submission to you is of course what keeps the public faith in the institutions of government, the institutions of court, and of boards such as this, is the ability to say their actions are transparent. They have no fear of the public being able to sit back and say, look, here are the facts that were represented to the Board, here is what they did and here is what they decided.

In a democracy you can have a robust debate. You will no doubt have your advocates on whatever decision you make

that say, look, these gentlemen did a fine job. You will have your detractors too, who say, gee, based upon these facts I would have done something else. Well that's what it is like to live in a democracy.

So fundamentally the freedom of expression principles about open courts and open tribunals is to reinforce the faith the public has in the representatives who sit on that Board that they are doing a good job, that they are the appropriate watchdog, that they are considering the information. And that's why it is so important and so fundamental and it's constitutionally protected under the freedom of expression provisions of section 2(B).

So we begin with the principle that of course this should be open. All right.

We recognize that the legislation specifically contemplates situations where an applicant can come before you and say, look, for these good reasons this should be treated differently. This should be kept confidential or closely held and then in fact go to the extraordinary remedy of -- and we will talk about it in-camera. There is no question the legislation provides that and I can see that it's a necessary tool in certain situations when you are satisfied that it's appropriate.

My friend, Mr. Morrison, in his position to you this

morning suggested that disclosure of the information would seriously have a negative impact on the business interests of the Venezuelan company. he went on to say that that could have ramifications for DISCO.

We all heard him say that. Well that's a pretty significant fact. But where is it in the evidence before you. Our submission is if an applicant wants to come before you and request of you the extraordinary exercise of your powers to keep the information confidential, and then to go further and say, look, if we are going to talk about it we are going to do it in-camera, then as a fundamental principle they have got to bring forward the evidentiary basis for that assertion.

I have reviewed the affidavit that is on file in support of this application. It doesn't say any of that. It doesn't say there is any ramifications for anybody. It doesn't talk about any harm at all. All it says is that the parties signed an agreement, commercial agreement between the two of them which speaks of keep it confidential.

However, now that we have had the benefit of that document it goes on to say that we recognize that we are applicable to a body like yourselves and if you order it released, fine, the parties understand that, they

contemplate that. So the fundamental difficulty I have this morning, Mr. Chairman, is what are we here talking about?

With all the greatest of respect to my friend, Mr. Morrison, we are not here talking about what he talked about. We are here talking about the motion as supported by the affidavit on file, and the affidavit on file provides no evidence, no argument, nothing whatsoever to suggest that there will be any compromise of anybody's interest, any damages anywhere, to anyone.

All it says is the parties have this provision in the contract, but if you look at the provision, that provision goes on to contemplate that you can overturn it.

So what is the balancing act that you are called upon to do? Do you shut down and keep from my clients and from the citizens of New Brunswick the very information that is critical to understanding the righteousness of the application and depart from your fundamental practice, your fundamental common law obligations, I suggest, and the decision which binds you, previously made, that you will be an open hearing, that you will proceed in a transparent manner. Do you depart from that simply based upon the only evidence being put before you is the provision that the parties said it would be kept

confidential, recognizing right in the contract that you have the right to set that aside.

I suggest to you that it is entirely improper for this Panel to be seen to divest to the parties the decision as to whether in the context of this application the information should be kept confidential. That's your responsibility for purposes of this hearing. It's not for the parties that negotiated that contract. This is serious public business. This room is filled with dozens of people that are here and we knew that today was the day this issue is to be decided. And what is the evidence from the applicant that there is any harm? None.

And I suggest to you that it is utterly improper based upon the principles that govern this Board that I just read, that the legislature has made clear still binds you, to simply defer to a lawyer making a bunch of factual assertions that are unsworn, that are not in the affidavit, there is no cross-examination. He talks about an article that was in the paper where somebody from Venezuela said, gee, this clause -- this deal is very good for New Brunswick.

How do we deal with that? That's double hearsay not even supported by an affidavit. There is nothing under oath before you.

I confess, Mr. Chairman, I am a little confused in terms of the confidentiality policy which applies or does not apply. I have a copy of the policy of the New Brunswick Board of Commissioners of Public Utilities that was revised June 14, 2005.

Now again, as I understand the section of the legislation that creates this Board that I read to you, that would still seem to be in effect until you promulgate your revised policy. So again my submission to you is that is the status of that policy. And if you don't have it handy, I can certainly leave a copy for your deliberations with the Board.

What is significant is that both that policy and your proposed policy provide -- and I will read the clause first from your draft policy -- section 1(2) found on page 2, says -- deals with the participant filing a document that he wants you to recognize as confidential, and it says that specifically a participant shall, when filing a document pursuant to section 1(1)(iii) provide reasons for the request of confidentiality, including the details of the nature and extent of the specific harm that would result if the document were publicly disclosed. And he has got to serve a copy of that on all participants. That evidentiary requirement continues throughout this

policy on the applicant. He starts with the burden of saying, we want to keep this confidential, and he is required to file that in the affidavit. But that's not the rule, that's simply a restatement of what I say is the existing policy in force which is 1(2) of the June 14, 2005, policy which says, "A participant shall -- and it's exactly the same wording -- provide reasons for the request for confidentiality, including the details of the nature and extent of the specific harm that would result if the document were publicly disclosed."

It's not before you. I suggest to you that the applicant has put you in a most difficult situation.

And the difficult situation you are faced with is do you abandon the principles of evidence, do you abandon procedural fairness to all of the respondents and everything else who have seen nothing in the affidavit of this argument advanced by Mr. Morrison, and simply skip over all of the rules that should govern the exercise of the profound request to go in-camera and to keep confidential this information, simply on the basis that the lawyer says it's going to be terrible.

My submission to you is that that is not something you should do, that that is a terrible precedent if people can simply on the day show up and themselves give any fact

they wish, without any opportunity for review, no prior notice. It fundamentally aborts the process and quite frankly, it robs you of your ability to do your job. And if that's the rule here, that's the game, that a lawyer can simply come in and say what he wants without any substantiation, then I think quite frankly it represents an abdication of your responsibilities and your roles.

On the other hand, if you are saying, oh but good gracious, if what he is saying is true, then we can't do this, this is a terrible harm. With the greatest of respect, you are a Board and you are required to decide on the basis of evidence. And I suggest to you that the fundamental principle of openness applies unless my friend disturbs that and he has not done that.

How can he say to you that knowledge of the release will cost $100,000,000? What the heck is that? It doesn't exist.

Mr. Chairman, not only does the confidentiality clause that they point to as the sole basis for departing from the norm specifically say in section 23.1, except such disclosure as may be requested by governmental authorities or required by law or in connection with arbitration or a legal proceeding.

So the very section that begins to set out the

confidential requirement makes all these exceptions. But then it goes further. There is a specific reference in section 23.2 that it must be understood, however, that the buyer subject to the legislation of Canada and/or the Province of New Brunswick respecting disclosure of information to the public. There is a specific recognition in the deal between these two people that the law here applies. Charter of Rights applies. The tests in law that govern your exercise of discretion applies. It applied when they signed this, it applied when they brought their application.

Everybody knows the law in Canada is if you are going to rely on an evidentiary basis put the evidence before the court, put the evidence before the tribunal. They have not done so. Are you left to speculate as to, gee, they haven't done so because in fact it is such a good deal for New Brunswick? Maybe it's a bad deal for New Brunswick. Maybe despite the hearsay assertions of somebody from Venezuela in the paper, it's a terrible deal for New Brunswick. How do I know? How do you know? How do the citizens know?

If that was going to be the issue today, if the issue today was, gee, we have got to protect a good deal, then put that in the affidavit. Simple. Could have done that.

There is no impediment to that if that's a fact. But it's not there.

Mr. Chairman, I have case law that I'm happy to talk about to substantiate the legitimate public interest in what you are doing. I have case law, including the Edmonton Journal, that speaks of the surrogate role of the media in tribunals where housewives, people working, cannot attend tribunals like this and are dependant upon the press to report what is going on in the deliberations so that the public can be informed, the Supreme Court of Canada has recognized that. I'm sure you are familiar with the decision, Mr. Chairman.

My point is the pubic isn't going to be in your in-cameral ruling. They are not going to understand the basis upon which you make, whatever decision you make. And that's your job. But in a democracy they are entitled to know, except in extraordinary circumstances, what the evidence is. Courtrooms are not closed. We don't do things by star chambers. And a decision like this, I suggest to you, there is a very stiff burden on my friend, which is not meant to close things down.

Mr. Chairman, I can talk in detail about the paucity of information and why people need more information about the veracity of this settlement to understand the

righteousness of approving some 23-year-into-the future deal that people can understand.

But I don't want to be repetitive, and I understand my friend, the Public Intervenor, will speak to why the information is important. Should you have any questions in that regard I'm happy to address them, but I don't want to be repetitive and I know he is going to speak to that. So unless you have any questions or concerns or issues, I mean that's our concern.

CHAIRMAN: Thank you, Mr. Coles. You indicated that you had a number of cases. Do you have copies of those with you for the Board? If so, we want them distributed to the other intervenors and the Applicant as well.

MR. COLES: Well, my lord, the significant cases of course are referred to in the decision of the Board.

CHAIRMAN: Are there cases that aren't referred to, I guess that really is the only requirement.

MR. COLES: I think the only one that I referred to that is not referred to in there is Edmonton Journal. I believe the rest of them are. I'm not sure whether I have a copy of Edmonton Journal with me or not, but I will check on the break and if it is I will certainly make it available.

CHAIRMAN: Fine. And if you don't have it perhaps if you could just get the citation for the benefit of all the

parties and for the Board.

MR. COLES: Certainly.

CHAIRMAN: Thank you, Mr. Coles. Any questions from the Panel? No questions. Thank you very much. Mr. Lawson?

MR. LAWSON: Thank you, Mr. Chairman. I will be very brief.

I guess our first comment is while we are sympathetic to the concerns that have been addressed by DISCO with respect to the release of the information, we really believe that the balance of interest really falls on the release to the public of this information.

I do share the concern that Mr. Coles raised with respect to the absence of evidence to support the allegations of what could happen from a business point of view, the negative impact it could have on the Venezuelan company, having particularly seen the Board rule on the absence of information or evidence in interim the rate increase, which I guess from my point of view surprised me as to sort of the technical interpretation of the need of evidence in that decision. I think that similar standard should obviously apply in this case.

I guess that we do believe that it should be released and I guess my only last comment would be that if an ex-minister of the government of Venezuela is aware of the terms so as to be able to make some comment to the press

in New Brunswick about it there is no reason why the people in New Brunswick shouldn't be aware of it. Thank you.

CHAIRMAN: Thank you, Mr. Lawson. Any questions from the Panel? Mr. Hoyt?

MR. HOYT: Enbridge has nothing at this time, Mr. Chairman.

CHAIRMAN: Thank you. Mr. Baird?

MR. BAIRD: Thank you, Mr. Chairman. We have a concern as expressed by Mr. Lawson that this information should be available. We also have a concern that the integrity and the appropriateness of the Board to publicly have these hearings conducted is paramount to success. And from my point we would agree with Mr. Cole and the CBC that anything that is done in secrecy is going to be suspect and the consequence we would not want that to be. Thank you.

CHAIRMAN: Okay. Any questions from the Panel. Mr. Wolfe?

MR. WOLFE: Mr. Chairman, I suspect if I made any comments I would dig myself a very deep hole very quickly. So I am ready to defer to Mr. Lawson and to the Public Intervenor.

CHAIRMAN: Thank you. Mr. Sollows?

DR. SOLLOWS: Mr. Chairman, I lack the good judgment of Mr. Wolfe, so I will make a comment.

Looking at this I just want to clarify that article

23, the confidentiality agreement, does not apply according to as I read it any information that DISCO or NB Power had at the time the agreement was entered into.

So whether or not it -- the details of the fuel supply agreement were made available, this means that any of the matters, any of the facts in evidence that relate to the cost overruns in the completion of the Coleson Cove plant would therefore I assume be on the public record. I wonder if Mr. Morrison could clarify that?

MR. MORRISON: I'm not certain what Mr. Sollows is alluding to, if he is looking at what I believe is in one of the IRs about looking at the prudence of the investment in Coleson Cove, that is for another day --

DR. SOLLOWS: Certainly. I just wanted to make sure that the information would not be covered by this. We ended up with the settlement report by Mr. Todd indicating that the actual capital cost of the refurbishment ended up being $497,000,000 higher than the original cost estimate which was the one presented to the Board, and I just wanted to make sure that the details associated with that would not be -- should this Board decide to allow this to be confidential, those details associated with that capital cost would not be covered, because they were in the records of NB Power at the time that it entered into the

agreement.

MR. MORRISON: I wonder I could clarify that, Mr. Chairman. First, Mr. Sollows is not quoting Mr. Todd's report correctly, so -- but that's another issue.

The confidentiality provisions apply to the specific provisions of the fuel supply agreement. It doesn't pertain to what happened when Coleson Cove was refurbished. It doesn't extend or cloak any information surrounding that particular project. So if anybody is fearful the clause will somehow will extend upon the specific terms of this new fuel supply agreement, I can assure that it does not.

CHAIRMAN: Mr. Morrison, it is my understanding that this hearing is dealing only with two documents, Schedule A and the Todd report.

MR. MORRISON: That's correct.

MS. DESMOND: Mr. Chair, can I add to that the source documents?

CHAIRMAN: That's correct.

MR. MORRISON: The source documents in so far as our position is with respect to the Board's --

CHAIRMAN: That's right. The source documents have not been filed with the Board in any form, but they have been discussed as part of an offer I believe, I think that's

the best way to characterize it, that you had made to have them reviewed by the Board's expert.

MR. MORRISON: That's correct.

DR. SOLLOWS: If I may then continue, then I guess my question is has DISCO and has by extension this Board -- is it able to satisfy itself that the exclusions A and B in article 23 do not apply in this case?

Do we have evidence that -- or do we have an affidavit that says the information was not known to DISCO or to NB Power prior to execution of the agreement? Because it would seem that if it was known to them there should be no objection to file the information on the public record.

MR. MORRISON: I can't speak directly I don't think to Dr. Sollows' comments other than my own general knowledge of confidentiality clauses in various agreements. And normally something that may be covered by a confidentiality provision, but if it's generally known in the public domain or if it's information that the parties has gathered from other sources that was known to them, generally then that's an exclusion to a confidentiality provision. But I can't directly answer Dr. Sollows' concern.

DR. SOLLOWS: Just so that I am clear, we don't know that NB Power did not have this information prior to execution of

the agreement?

MR. MORRISON: I don't know. I can't address it other than to say my understanding is that the confidentiality provisions apply to the specific terms of the fuel supply agreement, particularly with respect to price and with respect to duration of the contract.

DR. SOLLOWS: Thank you. I guess I will just come to the conclusion that I don't again see any reason why any of this information should not be made public, unless of course there was some obligation on NB Power to give notice to PDVSA with regard to this proceeding and that notice has not been given. But if there is no requirement for PDVSA to be represented here, then why would we make this confidential at all? That's the extent of my comment.

CHAIRMAN: Thank you, Dr. Sollows. Mr. Zed?

MR. ZED: Yes. Thank you, Mr. Chairman. Really we came here today with really an interest in -- as a participant in the proceedings, that the information be available to us to fully enable us to understand the position of the Applicant, and to help us prepare our case.

And I understand the Applicant's position is that we will have access to that information and for our limited purposes that is acceptable.

The broader public interest question I guess we would leave to be debated between the Applicant, Mr. Coles, and I would understand that Mr. Theriault will thoroughly canvass those issues, so we are content to leave that determination to the Board without further comment.

CHAIRMAN: Thank you, Mr. Zed. Any questions from the Panel. Thank you. Mr. Peacock?

MR. PEACOCK: Thank you, Mr. Chair. Is the redacted information confidential? Obviously the Applicant believes it is in part because some of the details of their agreement are commercially sensitive.

We certainly respect their judgment but we disagree with their opinion the legal burden towards arguing for disclosing those details rests with other intervenors. In our opinion, it is in the public interest to release these details, and we don't feel it is irresponsible to point this out.

Since our organization is without legal counsel we cannot possibly respond to the Applicant's concerns using legal precedents. But we can state given the sorts of calls we have been getting that among low income New Brunswickers there is an apparent lack of confidence in the ability of NB Power to effectively serve the households of this province.

And on this I need only to quote from Alex Arsenault who drove down from Crabbe Mountain on last year's public comment day. He said, as a New Brunswicker, along with my co-New Brunswickers, we own New Brunswick Power. We pay all the bills. What baffles me is if I am the owner and the only customer and I pay all the bills, why the hell is it so difficult, in fact impossible, to get any information on how my company is doing?

Now we really felt that one of the best ways to restore public confidence in this utility is to be open and transparent, and we feel that the continued practice of redacting details is definitely not in the public interest. It certainly does little to restore confidence in the public utility.

Given that representatives from the CBC are here, Mr. Chair, I might conclude with a reference to Bob Edmonds, the gregarious senior profiled last year by the Fifth Estate. As you may know, Bob Edmonds received a settlement from the Ontario Lottery & Gaming Commission after a lengthy legal battle surrounding a case of lottery fraud. Many details of that settlement were kept confidential for years, and Mr. Edmonds was constantly threatened with legal action because of his co-operation with the CBC.

After the original episode from the Fifth Estate concerning Bob Edmonds was aired, much of the confidentiality provisions surrounding his settlement were lifted, and a Canada-wide series of gaming reforms has since been initiated.

We feel that there is a lesson for government agencies here. Clearly in keeping details of its settlement with Bob Edmonds secret the Ontario Lottery Commission was not working in the public interest. When the details did come out the public interest was served and a public institution was forced to better serve the people of Ontario.

While it may be much to compare orimulsion to lotto tickets, I think that the same principle must be upheld. For New Brunswickers to maintain confidence in their public utility, details of any settlement this size must be made public.

If Venezuelan officials have trouble with this, then I would encourage the Applicant to invite one of them here to New Brunswick to make their case. If they cannot make their case, let's remove the redacted parts. The people of New Brunswick deserve to know the specifics of this 20 year settlement since it was signed by their own public utility.

Thank you, Mr. Chair.

CHAIRMAN: Thank you, Mr. Peacock. Any questions from the Panel? Mr. Theriault, I think we will take a break and then we will hear from you after the break. And I'm going to ask you to come forward for your submission. Thank you.

(Recess)

CHAIRMAN: Mr. Theriault, are you ready to proceed?

MR. THERIAULT: Yes, I am, Mr. Chairman. Thank you.

Mr. Chairman, as I understand it the motion by DISCO is to have the deferral account deal with the proceeds of the settlement reached with PDVSA, and if this deferral account is approved by the Board, then DISCO will ask that the interim rate be reduced from 9.6 percent to 7.1 percent to match their new revenue requirement of 83.2 million dollars. Any further understanding is impossible as all relevant information has been redacted, thus making it difficult to prepare for tomorrow's hearing.

However, before this can be done, the Board must address the confidentiality question. That is, as part of their motion DISCO has redacted the substance of the settlement agreement with PDVSA. We only know that the settlement provides for a cash payment and a new fuel supply agreement. With the details of the settlement

being the cash amount and the fuel agreement, DISCO wishes to avoid public scrutiny.

I submit that the tradition of common law is that judicial proceedings be conducted in public so that justice will manifestly be seen to be done. This principle is supported by Jones and De Villarrs in the Principles of Administrative Law, 3rd edition. The exception to this rule occurs where for public policy reasons it is decided that a case should not be subject to the full glare of publicity. I submit this exception is an extraordinary circumstance and should only be used sparingly.

I further submit that these principles apply to administrative tribunals such as this Board, with the addition of the fact that an administrative tribunal is a creature of statute and thus the Board must look at the legislation. I suggest that it is clear that the Energy and Utilities Board call for open and public hearings when DISCO is seeking a rate increase of more than three percent. This is the only way that the public can be assured that the process is fair and transparent.

However, there are times that documents may have to be submitted in confidence. Section 34 of the Act provides for this. This section basically states that where the

information by its very nature is confidential, such information shall not be disclosed unless the Board determines that disclosure is necessary in the public interest.

When we examine the evidence to this motion we see that the settlement agreement is subject to a confidentiality provision. However, these provisions allow for this very process. It allows for disclosure of as may be requested by governmental authorities or required by law or in connection with arbitration or a legal proceeding. It is clear if the Board orders the disclosure of this information as part of the public hearing process, then such an order is in accordance with the confidentiality agreement and as such an order will be required by law. As such DISCO would not be in breach of its agreement. As stated earlier, these provisions I suggest anticipate this precise hearing and surely DISCO, an NB Power group of companies knows it would be subject to these public hearings when entering the settlement agreement. DISCO has not argued nor submitted evidence that there are commercial competitive dimensions that it will encounter if full disclosure is given. Such an argument in the right circumstances may support an in-camera hearing, but

this argument has not been made and cannot be considered.

Basically what the Board has is a consideration of two principles. First, this is a public process which must be open and transparent. We are dealing with what some call the biggest fiasco in our province's history. The ratepayers and the public have a right to know all details, especially as it directly affects power rates. On the other hand, the Board must balance this with DISCO's contention that it must respect commercial terms between the parties to avoid being in breach of these terms. However, DISCO's argument does not correspond to the agreement itself which clearly states that if ordered to disclose DISCO is not in breach of the agreement. As such, all information in this hearing should be public unless there is a legitimate reason to subject it to confidentiality. Based on the evidence presented here today for the Board's consideration, there is no reason for the public not to know the details, and these details are definitely in the public interest.

Now by way of an example, Mr. Chairman. When DISCO originally filed the redacted motion, or evidence to the motion, the Board came back and made an order. The Board ordered that certain things should be disclosed, for instance, the confidentiality agreement, and certain other

issues that the Board had set out in an order.

DISCO of course complied with the Board's order. I haven't heard anyone from DISCO saying, we have been called by PDVSA, we are in breach of our agreement because there has been disclosure of our confidential agreement. So I suggest that if the Board so orders it then there would be no breach and that is supported by the very document itself.

Now just a couple of comments on some of the argument presented by my friend, Mr. Morrison, this morning. First of all he referred to these are commercially sensitive documents.

Again there is no such evidence before this Board of any commercial sensitivity or why they would be commercially sensitive aside from the fact that they are commercial documents with a confidentiality clause. There is no evidence whatsoever outside of Mr. Morrison's statement that PDVSA will suffer harm. We don't know. So that's not a consideration I would suggest for the Board.

As to the former Minister of Energy for Venezuela, I agree with the comments made by Mr. Lawson. He says it's a good deal for New Brunswick and a bad deal for Venezuela. Well I read an article in the Telegraph yesterday by a columnist that said it's a terrible deal

for New Brunswick. We don't know.

Finally, I want to make a comment to a certain statement that was made by my friend, Mr. Morrison, this morning. Now I have been practicing law for 20 and I think I have known Mr. Morrison for that entire time. He is an excellent lawyer.

But we are in a process here today, a process that Mr. Morrison has a role to play and that I as Public Intervenor I have a role to play and the Board has a role to play. I am seeking as part of the public process full disclosure of all information. For Mr. Morrison to suggest by implication that I will responsible if $300,000,000 is lost is underhanded and is fear mongering, and I think it does not stand up to the Mr. Morrison that I know, and that's all I have to say.

CHAIRMAN: Thank you, Mr. Theriault. Any questions from the panel? Thank you very much.

MR. MORRISON: Thank you.

CHAIRMAN: Mr. Morrison, any rebuttal?

MR. MORRISON: Yes, Mr. Chairman, and I would like to start my remarks with an apology to Mr. Theriault. My comments this morning -- it was mentioned to me at the break, my comments this morning were I hope out of character for me. I did not -- sometimes in the heat of battle one says

things that one regrets later, and I do regret making that statement.

I understand that Mr. Theriault has a job to do. He is doing his job to the best of his ability . I respect that. And my comment this morning to the contrary, I sincerely hope that he will accept my apology and I withdraw them completely.

But to get on with some of the comments that were made. I am going to deal with Mr. Coles' argument first. There seems to be some criticism with respect to the affidavit that was filed in support of this, and the Board did not have appropriate notice of what it was that we were alleging in terms of the harm that was to be -- result as a result of the -- if this information was disclosed publicly.

First, I don't know whether Mr. Coles received my letters of August 10th and August 13th, but I believe his client did, and those letters set out specifically what harm would result. Basically -- and that was repeated again on August 13th.

What we have here and what I said was that if this information is made public, put in the public domain, it could precipitate a claim for breach of contract, and a loss of the benefits of that contract. I don't know what

more can be put in an affidavit other than to say that if a contract is breached and someone as a result of that breach repudiates that contract, the harm that will flow. Now obviously we can't talk about the specific dollar value until we get into the in-camera session if that is the will of the Board, but it is clear that that is the issue that is before the Board. I don't think there is much more that can be said. And as to whether or not that certainly that information could be made available to all the parties before we got here, there is no requirement for an affidavit, as you know, in the Board's process. I proceeded by way of affidavit when I filed the notice of motion just because it's a procedure that I am more comfortable with in the court setting.

I also want to refer you to the Sierra Club case which Mr. Coles talked about. That case -- I am just going to quote from -- dealt with a confidentiality order that was necessary in that case because the disclosure of confidential documents would impose serious risk of important commercial interests of the Crown corporation, and there was no reasonable alternative measures to granting the order. The court went on -- and it was also referred to in the Board's decision of July 27th.

The court went on and discussed what is the definition

of an important commercial interest. That's at paragraph 55 of the decision. It said, however, if as in this case exposure of information would cause a breach of a confidentiality agreement then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information.

So the fact that there is the potential for breach -- the fact that there is a confidentiality agreement at all says that there is an important commercial interest to be protected. And although this isn't directly on point, I would note that at page 85 of that decision the Supreme Court went on to discuss -- sorry -- paragraph 85 -- the Supreme Court went on to discuss that there is a distinction between what is the public interest and what is the interest of the media. And I would recommend that to your reading.

I would like to talk a little bit about just one comment that Mr. Peacock raised. He was talking about general concerns about transparency. Let's put this in context. We are talking about a deferral account here, a very specific relief that we are seeking. This is not -- there will be plenty of opportunity both in this hearing and in other forums to discuss some of the issues that

were raised here this morning.

Certainly all the evidence is going to be tested. I'm sure people will have questions about the orimulsion situation. Public accounts already dealt with it once. I'm sure they will deal with this particular settlement in due course. I don't know that but it's a possibility. It's not about general transparency here.

I think the comment that -- I can't remember who said it, I don't believe it was Mr. Theriault actually, this is not a question or an issue of DISCO wishing to avoid public scrutiny. That is not the issue. And quite frankly I had to agree with most of what Mr. Theriault had to say with respect to what is the purpose of a public body such as yourselves. And it is in fact in most cases to deal with things on the public record.

However, the legislation contemplates and past practice contemplates, the courts even in the Charter of Rights contemplate that there are exceptions, and that a balance has to be struck when there is an issue of commercial interest, if you will, or a potential breach of a contract, as is the case in this particular matter, that a mechanism be available whereby certain information can be kept confidential.

Now is it going to be available for public scrutiny?

No. If you agree with the order, that's correct, it will not be available for public scrutiny. But there is a mechanism for all of the intervenors to look at it. Mr. Theriault is a Public Intervenor. He represents the interests of the public. Surely if he has the opportunity to look at these documents he can discharge as agent of the public, if you will, the public interest in this case.

I know that people talked about PDVSA. This is not about protecting the interests of PDVSA. This is about protecting the benefits of this particular settlement from potential loss as a result of a potential breach of the confidentiality provisions. That is essentially what our argument is.

I have full sympathy with all the parties. If I were on the other side I would be probably arguing the same. However, I believe this is an appropriate case for the Board to exercise the authority and the discretion that it has under Section 34, and I believe that it is in the public interest.

What DISCO is attempting to do here, and as I indicated in my letter yesterday, it has no obligation to do what it is doing in terms of asking for a reduction in the interim rate. It is trying to give the benefits of this settlement to the ratepayers as quickly as possible.

And I will say that in attempting to do that as quickly as possible -- documents -- we did do documents as quickly as possible.

I know that Mr. Theriault commented to the fact that we had redacted the entire exhibit A and then when the Board asked us to revisit it we redacted certain portions of it. Well quite frankly, I wanted that affidavit filed no later than last Wednesday because of the time constraints, and it was under my instruction that we just redact the whole thing. And then when we had an opportunity to revisit it we realized that there were portions of that exhibit that could in fact go on the public record.

So in short, Mr. Chairman, sometimes it's hard to do the right thing and DISCO is trying to do the right thing. That's all my comments.

CHAIRMAN: Thank you, Mr. Morrison. The Board will consider the arguments and submissions made by all of the parties this morning. We appreciate that it's very important that a decision be rendered as quickly as possible. So what we are going to do is set a bit of a time table for us, I don't know if we will meet it or not, but we are going to attempt to issue an oral decision on this this afternoon. And I am tentatively going to set 3:30, but I see Ms.

Desmond's light on, so perhaps I have forgotten something or --

MS. DESMOND: Mr. Chair, if I could just remind the Panel that I think after the break parties were going to be given the opportunity to comment on the draft non-disclosure agreement if they had any concerns with respect to that document.

CHAIRMAN: Thank you, Ms. Desmond. You are correct. Does anybody have any comments with respect to that agreement? Mr. Coles?

MR. COLES: Thank you, Mr. Chairman. I realize the document was not drafted really in consideration of my client. Obviously, you know, we would not execute such a document. The nature of my client's interest in the information is to of course provide it to their readers in the case of the Telegraph Journal and the broader audience of my other client, the Canadian Broadcasting Corporation. So I submit to you that we would not sign.

I raise two other questions for your consideration. Just generally in terms of the document, one of the difficulties that I suggest you have, and this was sort of touched upon in the discussion that the Vice-chairman had earlier -- is if you are asking a solicitor for any of these parties to sign it that he gets to see it and not

anybody else and his client, I suggest that is a fundamental misunderstanding of the role of a lawyer. It's of no never mind for the lawyer to see it.

The lawyer takes instruction from his client. If he can't dialogue with his client then what is the point of the lawyer seeing it, if your solution when you have parties that aren't represented by a lawyer you say, well we will let one person in that company sign it. I mean what does that mean? He can't share it with his boss or the people that he needs to consult.

In other words, I have a criticism of this notion of somehow restricting it and I would have thought that if you found yourself in a position where you are looking at the execution of a confidentiality agreement, the scope surely should simply bind the party, and it's up to the party as to who internally in itself, you know, it wishes to share the information with. The issue is we will let you look at this but it's not for broader disclosure than you, the party. I make that comment.

I also make a comment that it was disturbing when we are starting an application to decide whether there is confidentiality at all, to have this draft order circulated at the outset which begins with the preamble that the Board having decided this is confidential

information.

I would have thought that it would be far more appropriate that any notion of any kind of order or the scope thereof not arise until after your deliberations and you make a decision, because in fact it may be entirely appropriate, certainly as we have advocated and the Public Intervenor has advocated that there is no confidentiality here, and I can appreciate that it's a sort of a bit of a short-cut saying, look, if we go down this particular path, and only if we go down this particular path, here is the sort of order we are contemplating. And I can appreciate why that may be done, but I just do want to go on the record as saying it's -- it is disturbing before one starts the argument to see such a draft order.

CHAIRMAN: Mr. Coles, just to address that last issue, I can assure you that the Board has not pre-judged this issue, that the document was put together by Board staff in order to expedite matters in the event that the Board were to come to such a conclusion, so that we could forward in a timely fashion.

Again I would reiterate that had the Board pre-judged this issue then we could issue a decision obviously at this point in time. So you should not be concerned about that.

With respect to your comment as to what persons might or might not be able to view the documents in the context of the confidentiality agreement, I thought we canvassed that somewhat thoroughly this morning and I understood the position of the Applicant essentially to change as that discussion took place and at the end of the day he was not seeking it to be restricted simply to solicitors for the parties but to the parties themselves provided they sign the appropriate confidentiality agreement.

If I misunderstood the Applicant's position on that, I will ask Mr. Morrison to clarify that now.

MR. COLES: I do thank you, Mr. Chairman, for your response to my concern.

MR. MORRISON: It is my understanding that -- at least what we contemplated is that there would be a designated person of the party, or persons of the party, and they would not share that with anyone else. That's how I understood the agreement or at least the discussion this morning that we had.

CHAIRMAN: Well suffice it to say that -- and again ultimately it will be a decision for the Board to make, but the position of the Applicant was that it would not be restricted to solicitors, it would be to a designated individual for each party.

MR. MORRISON: I think we had that discussion this morning, Mr. Chairman. We agree with that.

CHAIRMAN: Thank you.

MR. BARNETT: Mr. Morrison, just one question. PDVSA has been mentioned many times this morning. Were they aware that this -- the result of this settlement agreement, there could be changes to your -- an application to the Board as far as the rates for the test year for '07 -- I mean '08, '09? They certainly aren't here, as obvious. But were they aware that this would be a process that your client would have to go through as a result of this settlement agreement?

MR. MORRISON: I doubt it, but I don't know that for sure.

MR. BARNETT: Does your client know?

MR. MORRISON: No, not at this table, no, Mr. Barnett. I don't know what they know about New Brunswick procedure quite frankly. And as far as I know they weren't given any direct notification of it, but I don't know that.

CHAIRMAN: Thank you. I think I will just continue canvassing parties with respect to that draft confidentiality agreement that was circulated this morning. Mr. Lawson?

MR. LAWSON: Thank you, Mr. Chairman. Just a continuation of this issue, the disclosure, as raised by Mr. Barnett

this morning. The concern I had is the question of showing it to myself and my client may be of little value to what is it, my depth of knowledge, is a very shallow pool, as the Board has heard before. I would like to give it to somebody who might have an understanding of what this means. And when I looked at the agreement, the draft agreement in paragraphs 5 and 8, it seems to imply the ability for disclosure to agents. And that gave me the comfort that I would be able to give it somebody who knows what they are talking about. But the discussion now seems to suggest otherwise. So that is a concern. I think it is essential to have the ability, recognizing the need that that agent would also be bound by confidentiality to be able to give it to somebody.

CHAIRMAN: My understanding of what has been proposed is that certainly nobody would look at it without having first signed the agreement. And that if in fact you didn't have -- if you didn't have the ability to analyze it that you would designate somebody -- designate an individual to analyze that for you.

MR. LAWSON: And as long as it's recognized that that could be somebody outside of the scope of in my case the CME itself, somebody who would be an adviser or as I would describe it as agent. And clearly I would have to also

have access to it to be able to ask any questions on it.

MR. MORRISON: Mr. Chairman, if I could just maybe circumvent some long discussion. At least it's my conceptual view of this, and how we proceeded in the past, was that, for example, if Mr. Lawson had retained an expert in cost allocation or rate design or financing, whatever, if you wish to share the confidential information with that expert, the expert would sign the document similar to this.

The whole purpose of this is to allow the parties to do their job without having it -- these documents in general circulation.

So I think we can find a result that satisfies everyone. But certainly my contemplation is that there is experts, consultants that the parties have retained. Obviously, they have to have the ability to look at the confidential information. As long as they sign the agreement and agree to be bound by the terms of it, there shouldn't be an issue.

CHAIRMAN: And that was my understanding of what your position was earlier this morning. Is that -- Mr. Lawson, is that satisfactory?

MR. LAWSON: Absolutely. Thank you.

CHAIRMAN: Mr. Hoyt?

MR. HOYT: Nothing substantive, Mr. Chairman. I would just point out the reference to a Crown corporation on the front page. My understanding is that DISCO is no longer a Crown corporation.

CHAIRMAN: Thank you. Mr. Baird?

MR. BAIRD: Thank you, Mr. Chairman. We have one comment. Recognizing that we sign a lot of confidentiality agreements, all of them that we have signed before have a clause in it that state should this information be found in the public realm it relieves all of the parties from any onus on this. I think that clause should be added. Thank you.

CHAIRMAN: I am not sure that that's an issue if in fact there is not going to be any need for it obviously if we find it isn't confidential so -- but thank you for your comments. Mr. Wolfe?

MR. WOLFE: No further comment.

CHAIRMAN: Mr. Sollows.?

DR. SOLLOWS: No comment, Mr. Chairman.

CHAIRMAN: Thank you. Mr. Zed?

MR. ZED: No, sir. I think the prior discussion has identified our concerns as well.

CHAIRMAN: Thank you. Mr. Peacock?

MR. PEACOCK: No comment.

CHAIRMAN: Mr. Theriault?

MR. THERIAULT: Just a few points, Mr. Chairman. If I understood my friend's comments early on, the terms of settlement was with HOLDCO. So I don't know why the agreement would be between the parties and DISCO. And perhaps you could explain that?

Secondly, getting to I think Mr. Baird's point, as I understood Mr. Baird's point was that if let's say some other -- one of the parties, PDVSA or HOLDCO made this information public, then that would relieve us of the obligations is I think what his comments were.

Outside of that and Mr. Hoyt's comments with respect to a Crown corporation, I have nothing.

CHAIRMAN: Thank you. Mr. Morrison, anything further?

MR. MORRISON: Just with the comment with respect to whether it should be HOLDCO or DISCO. I believe it should be DISCO, because nobody would really have any access to any of HOLDCO's information. Except that DISCO has it for purposes of dealing with this deferral account and the transfer of the benefits of the settlement. So it comes into DISCO's possession. So I think it's appropriate that DISCO is the correct party.

CHAIRMAN: Thank you. Ms. Desmond, are there any other issues?

MS. DESMOND: No. Thank you.

CHAIRMAN: Thank you. And the Board will adjourn to deliberate on this matter. And tentatively we are going to issue an oral decision at 3:30 this afternoon. We will attempt to update you. It won't be before 3:30. We will update you if it's going to after that. Thank you.

(Recess)

CHAIRMAN: Good afternoon. I now will deliver the oral decision of the Board with respect to this morning's motion.

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

DISCO also filed a Notice of Motion and an affidavit in support thereof requesting the Board to make an interim order pursuant to Section 40 of the Act approving a 9.6 percent increase to all electricity rate categories, except water heater rentals and connection fees where the increase would be 3 percent to be effective from the date of such interim order until further order of the Board.

A public hearing on DISCO's motion for the interim rate relief was held on May 31, 2007. The Board approved the full amount of interim rate relief as requested on June 1st 2007 and the new rates became effective on June 8th 2007.

In a Notice of Motion filed with the Board on August 8th 2007, DISCO stated that the settlement of a lawsuit involving New Brunswick Power Holding Corporation and Petroleos De Venezuela, S.A. ("the Settlement") will result in reduced fixed charges to New Brunswick Power Coleson Cove Corporation ("Coleson Cove Corp."). The benefits of such reduced charges will be passed through to DISCO by way of reduced charges flowing to DISCO through the Coleson Cove Tolling Agreement ("Tolling Agreement"). DISCO proposed the establishment of a deferral account to levelize, on an annual basis, the financial benefit that would accrue to DISCO. The Notice stated that DISCO would apply to the Board for the following:

(a) approval of the establishment of the Deferral Account;

(b) subject to and conditional upon approval of the Deferral Account, leave to amend DISCO's application for a change in its charges, rates and tolls dated April 19th 2007 to request recovery of a forecasted

revenue requirement shortfall of $83.1 million;

(c) if the Deferral Account is approved then an Order pursuant to section 43 of the Energy and Utilities Board Act varying the Board's Interim Rate Decision by reducing the interim rate increase to 7.1 percent to all electricity rate categories except water heater rentals and connection fees which will remain at the approved interim rate of 3 percent to be effective as of the date of the Board's decision with respect to this motion in accordance with the revised rate schedules attached to the affidavit of Sharon MacFarlane sworn to on August 8th 2007 filed in support hereof and marked as Exhibit "C";

(d) an Order that Exhibit "A" attached to the affidavit of Sharon MacFarlane sworn to on August 8th 2007 be held in confidence by the Board pursuant to section 34 of the Energy and Utilities Board Act and that any hearing or deliberation by the Board with respect to the establishment and approval of the Deferral Account be held in camera such as to preserve the confidentiality of the information set out in the said Exhibit "A".

Exhibit "A" was filed in redacted form with all parties. An un-redacted confidential copy of the exhibit

was filed with the Board pursuant to section 34 of the Act.

On August 9th 2007, the Public Intervenor filed a letter in which he stated that all document such as the exhibits contained in Ms. MacFArlane's affidavit should be subject to a full and open hearing. The Public Intervenor agreed with DISCO's request for a confidentiality hearing.

The Board reviewed DISCO's Notice of Motion and the supporting affidavit of Ms. Sharon MacFarlane. On August 9th 2007 the Board advised all the parties that it would hold an oral hearing to review DISCO's request for confidentiality on August 16th 2007. It also advised that an oral hearing on DISCO's request for a Deferral Account and a reduction to the interim rate increase would be held on August 17th 2007.

The Board requested DISCO to provide the following information by August 10th 2007, to assist in the conduct of the confidentiality hearing.

(a) a copy of the sections in the fuel supply agreement that specifically address the matter of confidentiality;

(b) Exhibit "A" wherein the only information that has been redacted is the specific information that is identified in the fuel supply agreement as being

confidential;

(c) a summary as to the nature of the redacted information;

(d) a rationale as to why the redacted information should be kept confidential including the nature and extent of the specific harm that would result if the redacted information were disclosed.

On August 10th 2007 DISCO filed the information as requested. DISCO also advised that a written expert opinion with respect to the appropriateness of the Deferral Account that was identified in Ms. MacFarlane's affidavit and was to have been filed on August 10th 2007 would not be filed until August 13th 2007. A report prepared by Mr. John Todd entitled "Treatment of the Petroleos De Venezuela, S.A. (PDVSA) Settlement in Setting RAtes for NB Power Distribution and Customer Service Corporation" was filed in redacted form with all parties on August 13th 2007. An un-redacted confidential copy of the report was filed with the Board on the same date and DISCO made a request that it be held in confidence pursuant to section 34 of the Act.

A public hearing was held on August 16th 2007 to consider DISCO's request that certain information be kept confidential.

Board's Authority

The following section of the Act provides the Board with its authority to hear DISCO's motion.

Confidentiality

34 Where information obtained by the Board concerning the costs of a person in relation to the operations of the person that are regulated under this or any other Act, or other information that is by its nature confidential, is obtained from such person in the course of performing the Board's duties under this or any other Act, or is made the subject of an inquiry by any party to any proceeding held under the provision of this or any other Act, such information shall not be published or revealed in such a manner as to be available for the use of any person unless in the opinion of the Board such publication or revelation is necessary in the public interest.

THE CANADIAN BROADCASTING CORPORATION and BRUNSWICK NEWS INC. (Telegraph Journal) ("Media")

By way of a letter dated August 13, 2007 the Media advised the Board that they intended to appear at the hearing on August 16th 2007 to make representations in opposition to DISCO's request for confidentiality.

A copy of this letter was forwarded to the parties by the Board.

At the opening of the hearing on August 16th 2007 the Board with the consent of DISCO and the formal intervenors granted the Media formal intervenor status for the purpose of making representation to the Board on DISCO's request that certain information be kept confidential pursuant to section 34 of the Act and that any hearing involving such information be held in camera.

Confidential Information

DISCO, on August 8th 2007, filed with all parties a redacted version of Exhibit "A" that was attached to the affidavit of Ms. MacFarlane. On August 10th 2007 DISCO filed an amended version of Exhibit "A" that provided additional information but still had certain information redacted.

ON August 13th 2007 DISCO filed with all parties a redacted version of a report by John Todd.

DISCO provided to the Board an un-redacted versions of both Exhibit "A" and the report of Mr. Todd. DISCO requested that the information that had been redacted be kept confidential pursuant to Section 34 of the Act.

At the hearing on August 16th 2007 it was noted that further information would be necessary in order for parties to verify the amount of benefits that would flow to DISCO as a result of the Settlement. This additional

- information is:the sections of the Settlement agreements that describe the amount and the time of the benefits that will flow to the NB Power group of companies; and

the forecasts that were used by DISCO to calculate the actual annual reductions in charges to it under the Tolling Agreement that will result from the Settlement.

DISCO stated that it was prepared to provide this information to the Board's expert for use in verifying the particular amounts but did not wish to provide any copies on the record, either redacted or un-redacted.

The Board considers the redacted portions of Exhibit "A" and the redacted information from Mr. Todd's report to be the subject matter of today's motion and will be referred to by the Board as the "Confidential Information" in this decision.

The Issue

Information filed with the Board is normally considered to be public and available to any interested party. However, Section 34 of the Act does allow information to be filed on a confidential basis and requires that such information shall not be published unless in the opinion of the Board such publication is necessary in the public interest. The Board must therefore weigh the possible benefits of public disclosure against the possible harm that might arise.

- DISCO has stated that the nature and extent of the harm that would result if the Confidential Information was publicly disclosed, in violation of the confidentiality provisions of the fuel supply agreement, is that this could precipitate a claim by Petroleos De Venezuela, S.A. that the terms of the agreement have been breached thereby putting the benefits of the fuel supply agrement in jeopardy. Although DISCO made this claim, it did not provide any evidence on the specific harm that may result.

A number of parties stressed the importance of a public review of all information and the benefits that result form such a transparent and open process.

The Board has carefully considered the submissions of all parties.

Ruling of the Board

The Board considers that it is in the public interest that whenever possible, a public review should occur.

The Board notes that the Settlement agreements clearly contemplate that a government authority, such as the Board, may see fit to order public disclosure of the Confidential information in question.

The Board has reviewed the information that has been redacted from both Exhibit "A" and the report of Mr. Todd.

The Board does not consider that any harm would arise from public disclosure of the information that has been redacted. In addition, it is important to remember that DISCO intends to use both Exhibit "A" and the Todd report as evidence to support their case for a general rate increase. The Board also notes that the proposal by DISCO would have impact over the remaining term of the Tolling Agreement.

The Board considers that the very nature of its responsibilities and the tradition of public agencies dictate that, in the absence of the identification of specific harm that might arise, it is necessary and in the public interest that the Confidential Information be made public.

The Board therefore orders DISCO to place un-redacted versions of Exhibit "A" and Mr. Todd's report on the public record forthwith.

The Board also orders DISCO to make the additional information, as described above, available to the Board's consultants subject to the consultants signing a confidentiality agreement.

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

Reporter