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)

Delta Hotel, Saint John, N.B.
October 22nd, 2007

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15 CHAIRMAN: Raymond Gorman, Q.C.
16 VICE-CHAIRMAN Cyril Johnston
17
18 MEMBERS: Donald Barnett
19 Yvon Normandeau
20 Roger McKenzie
21 Constance Morrison
22
23 BOARD COUNSEL: Ellen Desmond
24
25 BOARD STAFF: Doug Goss
26 John Lawton
27 Dave Young
28
29 BOARD SECRETARY: Lorraine Légère
30 ASSISTANT SECRETARY: Juliette Savoie
31
32 ....
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34 CHAIRMAN: Well good morning, everyone. Today's hearing is
35 a Motions Day, which was established on the filing
36 schedule to deal with issues arising out of responses to
37 IRs. The Panel for today's hearing is composed of Don
38 Barnett, Cyril Johnston, the Vice-Chair, Connie Morrison,
39 Roger McKenzie, Yvon Normandeau and myself as Chair.
40 Could I have the appearances, please, starting with the
41

2 Applicant?

3 MR. MORRISON: Good morning, Mr. Chairman, Members of the

4 Board. Terrence Morrison and Ed Keyes on behalf of the

5 Applicant. And with me at counsel table today is Lori

6 Clark.

7 CHAIRMAN: Thank you, Mr. Morrison. The formal

8 intervenors, starting with Canadian Manufacturers &

9 Exporters N.B. Division?

10 MR. LAWSON: Good morning, Gary Lawson appearing for them.

11 CHAIRMAN: Thank you, Mr. Lawson. Conservation Council of

12 New Brunswick? Enbridge Gas New Brunswick? FPS Canada

13 Inc.? Irving Oil Limited?

14 MR. NETTLETON: Good morning, Mr. Chairman. Gordon

15 Nettleton on behalf of Irving Oil Limited.

16 CHAIRMAN: Mr. Nettleton, where are you?

17 MR. NETTLETON: I am here, sir.

18 CHAIRMAN: Thank you.

19 MR. NETTLETON: Thank you.

20 CHAIRMAN: J.D. Irving Pulp & Paper Group?

21 MR. WOLFE: Good morning, Mr. Chairman. Wayne Wolfe.

22 CHAIRMAN: Thank you. N.B. Forest Products Association?

23 Dr. Sollows?

24 DR. SOLLOWS: Good morning, Chairman.

25 CHAIRMAN: Utilities Municipal?

2 MR. ZED: Peter Zed. And I am joined by Dana Young, Darrell
3 Shonoman and Marta Kelly.
4 CHAIRMAN: Thank you, Mr. Zed. Vibrant Communities Saint
5 John?
6 MR. PEACOCK: Good morning, Mr. Chair. Kurt Peacock here.
7 CHAIRMAN: Thank you. Public Intervenor?
8 MR. THERIAULT: Good morning, Mr. Chair. Daniel Theriault.
9 And I am joined this morning by Jayme O'Donnell.
10 CHAIRMAN: Thank you. And the NB Energy and Utilities
11 Board?
12 MS. DESMOND: Ellen Desmond. And with me is Douglas Goss,
13 John Lawton and Dave Young.
14 CHAIRMAN: Thank you, Ms. Desmond. So I guess this morning
15 we have had three motions that were filed. Two which
16 related to answers to IRs and a third one relating to the
17 process dealing with confidentiality documents et cetera.
18 The parties took the opportunity there prior to this
19 morning's hearing to meet. Mr. Morrison, did anything
20 come from that or is there any conclusions that we can
21 draw as a result of that?
22 MR. MORRISON: I can say that we met. I can't say that we
23 came to any satisfactory agreement, Mr. Chairman. With
24 the exception of what I will call part two of Mr.
25 Theriault's motion dealing with the confidentiality issue.

2 CHAIRMAN: Yes.

3 MR. MORRISON: And perhaps Mr. Theriault can speak to it.

4 But I believe we agreed that perhaps the most appropriate

5 process is to have a meeting with Board Staff and the

6 intervenors to try to work through the confidentiality

7 process. And I would say that there are probably some

8 other procedural issues, timing of expert witnesses and so

9 on that should be dealt with before we get into the

10 hearing room. So I think it's just a question of when we

11 are going to schedule that meeting.

12 CHAIRMAN: Thank you. Mr. Theriault, perhaps you could

13 address that issue?

14 MR. THERIAULT: Yes. With respect to the confidentiality

15 issue, Mr. Morrison sent out a letter I believe on Friday.

16 And I agree with the procedure that he has set out in

17 there. So I am willing to drop that part of my motion.

18 And have Board Staff either schedule a conference call or

19 a meeting with the intervenors in order to deal with the

20 issues that I raised.

21 CHAIRMAN: So that part of the motion then is being

22 withdrawn this morning?

23 MR. THERIAULT: That's correct.

24 CHAIRMAN: Thank you. Before we proceed to hear the

25 motions, there have been a number of documents that have

2 been filed. Some of which, of course, will be the subject
3 matter of today's proceeding. So I am going to mark them
4 as exhibits.
5 I understand that the Board Secretary did circulate a copy
6 of the list of new documents with intended exhibit numbers
7 to all of the parties. And I will read those into the
8 record. But at this point in time, I would ask does
9 anybody has any objection to any of those becoming
10 exhibits to the list that was circulated last week?
11 MR. MORRISON: No objection, Mr. Chairman.
12 CHAIRMAN: I am not going to go through the list. If
13 anybody has a problem just put your mike on and tell me.
14 Otherwise, I am just going to mark them as exhibits at
15 this time.
16 All right. The new exhibits begin at <u>A-23(2)C</u>. That's a
17 letter dated September 28th 2007 attaching Response to
18 DISCO(CME) IR-19 with a claim for confidentiality.
19 Exhibit <u>A-26</u> is a letter dated September 28th 2007
20 attaching Responses that were deferred from September
21 10th, 14th and 18th 2007. These responses were part of
22 previously marked Exhibits A-19, A-20, A-20(1) and A-23
23 and were inserted accordingly.
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18 confidential Response on pink paper and in CD format of an
19 additional portion of Response to (PI) IR-48-(4) & (5).
20 Exhibit A-28 letter dated October 10th 2007 attaching
21 Responses to 1st Interrogatories on Revised Rate Design
22 Evidence and 2nd Interrogatories on all other Evidence
23 filed (volume 1 of 1).
24 Exhibit A-28(1)C letter dated October 10th 2007
25

2 attaching Responses to DISCO (UM) IR-5 (2 pages).

3 Exhibit A-29 letter from DISCO dated October 17th 2007

4 attaching a binder of public information, volume 1 of 1

5 concerning information filed on October 9th 2007 per Board

6 Ruling of October 2nd 207, 2nd set of IRs on Revised Rate

7 Design Evidence and DISCO Responses filed September 28th

8 2008.

9 And finally exhibit 29(1)C letter from DISCO dated October

10 17th 2007 attached a binder volume 1 of 1 and 3 CD's

11 containing confidential responses to DISCO (PI) 48-49, 50-

12 55, 57-59. This relates to information filed October 9th

13 2007 per Board Ruling of October 2nd 2007, 2nd set of IRs

14 on Revised Rate Design Evidence and DISCO Responses filed

15 September 28th 2007.

16 So that's all of the documents that have been marked as

17 exhibits today. I guess we do have --

18 MR. LAWSON: Mr. Chairman --

19 CHAIRMAN: Yes.

20 MR. LAWSON: -- if I might, Gary Lawson, just to correct the

21 record I guess, on A-29, it was pointed out by Mr. Wolfe

22 that the last date should be '07 on that information,

23 September 28, '07, rather than '08.

24 CHAIRMAN: Okay. And it does say on the list '07. I just

25 read it incorrectly. So it should be '07.

2 MR. LAWSON: The one that's printed here is '08.
3 CHAIRMAN: September 28th, '07. That's what I have. Sorry.
4 On A-29?
5 MR. LAWSON: A-29, yes.
6 CHAIRMAN: Okay. Correct. We will amend that to read '07.
7 Thank you. As I indicated we started out with three
8 notices of motion for today and since one has been
9 withdrawn we are left with one from the Public Intervenor
10 and one from CME. So we will start with the motion from
11 the Public Intervenor. Mr. Theriault, I will ask you to
12 come forward. Proceed.
13 MR. THERIAULT: Thank you, Mr. Chairman. Mr. Chairman,
14 Board members, in the July 27th, 2005, decision of the
15 Public Utilities Board they state at page 3 that the Board
16 has a dual role when acting as an economic regulator.
17 It must set rates that are just and reasonable to the
18 ratepayers. It must also ensure that the rates will allow
19 the utility to earn a rate of return on its investment
20 that will ensure the utility has the financial ability to
21 continue to provide the regulated service. The Public
22 Intervenor submits that this is an accurate description of
23 the role of this Board.
24 I also submit that the Board's role with respect to
25 setting just and reasonable rates to the ratepayer

2 inherently includes an examination of the public interest.
3 The Electricity Act is explicit in Section 130 that any
4 order of the Board made under the Act is subject to such
5 terms as the Board considers necessary in the public
6 interest.
7 There can be no doubt the application for a rate increase
8 has been brought by DISCO and as such they have the onus
9 of providing adequate evidence to ensure that the rates
10 proposed are just and reasonable to the ratepayers. In
11 other words, that the rates are in accordance with what is
12 in the public interest. However, DISCO also has an
13 obligation to both the Board and the intervenors to submit
14 additional evidence required for the parties to test the
15 data to ensure that the rates will be just and reasonable.
16 The question of relevance is an issue that needs to be
17 canvassed as it has been skirted too long. As noted by
18 Mr. Johnston at last month's Motions day on September
19 27th, in civil litigation documents are generally relevant
20 if they shed light on the matters in issue. While this is
21 true, it is certainly a very broad principle.
22 If this were the principle without any restriction,
23 basically anything could be viewed as relevant. While I
24 as the Public Intervenor would enjoy this principle to
25 form the basis of the relevance approach, I submit that

2 it's simply unworkable. I submit that the Board accept a test
3 to the determination of relevancy.
4 DISCO has made a number of unilateral, unsubstantiated
5 claims for protection of documents due to the fact that
6 they are not relevant. I submit that the determination of
7 relevancy lies in the capable hands of the Board, not in
8 the hands of the Applicant, nor in the hands of the
9 intervenors.
10 The determination by the Applicant that the requested
11 information that they undoubtedly have in their possession
12 is not relevant to the ultimate determination of just and
13 reasonable rates is completely antithetical to the purpose
14 of interrogatories.
15 It certainly cannot be disputed one of the main purpose of
16 the IRS is for the intervenors to satisfy themselves that
17 the rates requested or recommended by DISCO are indeed
18 just and reasonable. Therefore, DISCO should not and
19 cannot be the judge as to what a particular intervenor
20 determines as relevant to their investigation of this
21 particular issue.
22 The Board has a great deal of discretion to use and order
23 what it believes to be relevant to this issue. This
24 principle was stated by the Judicial Committee of the
25 Privy Council in Canada National Railways versus Canadian

2 Steamship Lines, which was a 1945 decision of the Privy
3 Council.
4 Their Lordships state, and I will quote, "It would be
5 difficult to conceive a wider discretion than is conferred
6 on the Board as to the considerations to which it is to
7 have regard in disposing of an application for the
8 approval of an agreed charge. It is to have regard to all
9 considerations which appear to be relevant. Not only is
10 it not precluded negatively from having regard to any
11 considerations but it is enjoined positively to have
12 regard to every consideration which in its opinion is
13 relevant. So long as that discretion is exercised in good
14 faith the decision of the Board as to what considerations
15 are relevant would appear to be unchallengeable." End of
16 quote.
17 In Sumas Energy 2 Inc. versus Canada and the National
18 Energy Board, which was a 2006 decision of the Federal
19 Court of Appeal, the court affirms the principle that
20 regulatory boards are provided a great deal of discretion
21 in matters regarding relevancy. In addition to lack of
22 good faith, the court in Sumas goes further and adds the
23 discretion of the Board may be reviewed where there is a
24 failure to take into account a consideration that it has
25 identified as relevant.

2 However, they go on to state, and I quote, "It bears
3 repeating that the choice of relevant factors is for the
4 Board alone, and the question of choice of relevant
5 factors is a decision upon which the Court will give the
6 Board considerable deference." End of quote.
7 I submit the relevant considerations to to weight, not
8 admissibility.
9 Mr. Chairman, for greater certainty the Energy and Utility
10 Board Act explicitly states at Section 35 that the Board
11 may receive in evidence any statement, document, record,
12 information or thing that in the opinion of the Board is
13 relevant to the matter before it, whether or not that
14 statement, document, record, information or thing is given
15 or produced under oath or would be admissible as evidence
16 in a court of law.
17 Now, Mr. Chairman, I would agree with Mr. Morrison's
18 assertion at the September 27th hearing that although a
19 document may be relevant, there must be a probative value
20 associated with it. I submit that the probative value
21 should come from its utility in the overall determination
22 as to what is in the public interest.
23 The determination as to what is in the public interest has
24 a long history in public utility regulatory jurisprudence.
25 In the case of Canadian Nation Railway

2 versus Nakina Townships, which was a 1986 decision of the
3 Federal Court of Appeal, the Court states that by
4 definition the term public interest includes the interests
5 of all affected members of the public. The determination
6 of what is in the public interest involves the weighing
7 and balancing of competing considerations. Some may be
8 given little or no weight, others much. But surely a body
9 charged with deciding in the public interest is entitled
10 to consider the effects of what is proposed on all members
11 of the public. To exclude consideration of any class or
12 category of interests which form art of the totality of
13 the general public interest is an error.
14 The purpose of the discussion of public interest is
15 certainly not meant to be a thorough analysis of what is
16 meant by public interest. The discussion has been
17 provided to give some context to the question of
18 relevancy. The Public Intervenor submits that the
19 question of relevancy should be approached by the Board
20 with the idea of public interest as a whole. Further, the
21 Public Intervenor submits any determination of relevancy
22 and/or public interest should involve weighing and
23 balancing of the competing considerations.
24 Mr. Chairman, I submit that the relevancy claims of the
25 Applicant are wholly unsubstantiated. It is believed

2 the relevancy claims are a shield against disclosure of
3 certain information. If that information is confidential,
4 then the Applicant should claim confidentiality. The
5 Applicant must provide a more solid explanation than a
6 unilateral bare assertion that a document or documents are
7 not relevant. It is not the decision of DISCO what a
8 particular intervenor believes to be relevant. That
9 decision can only come from one source, Mr. Chairman, and
10 that is of this Board.
11 It is not only the Board's discretion, it is also their
12 responsibility to determine relevancy and public interest.
13 Procedural fairness and natural justice dictate this.
14 Not only is it a requirement of procedural fairness of the
15 right to disclosure by the administrative decision maker
16 of sufficient information to permit meaningful
17 participation in the hearing process, it is also whether
18 the Board provided the parties with disclosure sufficient
19 for their meaningful participation in the hearing, such
20 that they are treated fairly in all circumstances.
21 And, Mr. Chairman, there are a series of cases, Martineau
22 versus Matsqui Institution, which was a 1979 decision of
23 the Supreme Court of Canada, Cardinal versus Kent
24 Institution, which was a 1985 decision of the Supreme
25 Court of Canada, and Lakeside Colony of Hutteran Brethren

2 versus Hofer, which was a 1992 decision of the Supreme Court
3 of Canada, and I will provide the citations later, that
4 stand for that principle.
5 Mr. Chairman, I submit that the Applicant -- for the
6 Applicants to deny access to documents under the guise of
7 relevancy and subsequent affirmation by the Board of this
8 claim could carry the possibility of a denial of
9 procedural fairness.
10 From early on in this process, specifically July 20th,
11 2007, DISCO has continually requested to extend time to
12 file evidence that they maintained could not be completed
13 in the time allotted by the Board. As a result, the IR
14 process has been broken up to a point where I would submit
15 it is at best confusing.
16 Normally the process should have been simple. DISCO would
17 have filed their evidence, the intervenors would have IRs
18 to which DISCO would respond, then we as intervenors would
19 have a motions day and a second set of IRs and responses
20 would follow.
21 As a result of DISCO's numerous extensions to the
22 schedule, we have filings occurring at numerous times,
23 often days apart, with little chance for intervenors to
24 review all evidence.
25 I understand, Mr. Chairman, that this is a labour

2 intensive effort by DISCO and as such the Board gave the
3 extensions required. However, what I find unreasonable
4 and unfair is DISCO's responses to many of the IRs
5 submitted by myself, CME and Board Staff in this latest
6 round. They state that the IRs do not arise from
7 responses from September 28th and October 9th, and as such
8 they do not have to answer them.
9 Although, Mr. Chairman, I disagree and submit that the IRs
10 filed by the Public Intervenor do arise from the Board's
11 decision of October 2nd, 2007, ruling, which I will get
12 into and discuss later. I submit that DISCO's failure to
13 respond to these IRs on such grounds is unreasonable and
14 unfair, given their constant changes to the filing
15 schedule. The whole purpose of the IR process is to
16 obtain information prior to the start of the hearing so
17 that the hearing can be done as efficiently as possible.
18 To deny the information requested on these grounds will
19 simply prolong the hearing process and will prejudice the
20 intervenor's ability to present proper evidence or to
21 prepare for cross-examination.
22 Now, Mr. Chairman, in getting into the specifics of
23 today's motion with respect to the responses, there is a
24 series of IRs -- and I will refer to them rather than say
25 PI IR because I find that a tongue-twister -- I will just

2 refer them as IRs in referring to my IRs.

3 With respect to IR-30(2) dealing with Shareholder's Equity
4 in Each of the NB Power Group of Companies. Now the
5 request that came was that the IR requested information on
6 whether NB Electric Finance Company maintained any
7 shareholder equity accounts and, if so, provide the titles
8 of these accounts and the balances in these accounts for
9 the fiscal years 2005/6 and 2006/7, and the forecast for
10 2007/2008. The response by DISCO was NB Electric Finance
11 Corporation was not a part of the NB Power group.

12 Now with respect to IR-40 dealing with the Lawsuit against
13 PDVSA, the IR requested a copy of the statement of claim
14 and statement of defence in these actions as filed with
15 the court and a copy of all offers and counteroffers that
16 were on the record. The utility in its October 9th filing
17 indicated there was no defence filed in the New Brunswick
18 action or in the New York action.

19 IR-42 dealing with the power purchase agreement costs.
20 The IR requested copies of all invoices for PPA costs
21 submitted to DISCO to cover the period from the first
22 invoice to the most recent. The response given by DISCO
23 was that the October 12th interrogatories were to cover,
24 one, the rate design issue, two, DISCO's responses of
25

2 September 28th, and, three, additional information filed on

3 October 9th. Additionally DISCO argued that the

4 information was to a level of detail which was not useful

5 to this process and has little or no probative value.

6 IR-43, again similar to IR-42. The IR requested copies of

7 all invoices for the SLA costs submitted to DISCO to cover

8 the period from the first invoice to the most recent.

9 Again the response, October 12th interrogators were to

10 cover, one, rate design issues, two DISCO responses of

11 September 28th, three, additional evidence filed on

12 October 9th. Additionally DISCO argued that the

13 information was to a level of detail which was not useful

14 to this process and has little or no probative value.

15 IR-45, which dealt with amendment number 1 to the Vesting

16 Agreement. The IR requested the date on which the

17 amendment was executed and an explanation for the details

18 of the reduction of the capacity payment under the Vesting

19 Agreement. The response was that the October 12th

20 interrogatories were to cover, one, rate design issues,

21 two, DISCO responses of September 28th, three, additional

22 filings of October 9th.

23 IR-46 dealing with the option to reduce nominated capacity

24 under Section 2.4 of the Vesting agreement.

25

2 Again this requested details on all activities related to the
3 analysis of alternative generation resources done under
4 section 2.4 of the Vesting Agreement. The response was
5 the same, October 12th interrogatories were to cover, one,
6 rate design issues, two, DISCO responses of September
7 28th, three, additional filings of October 9th.
8 PI-IR-47, the request asked for details on how a gain or
9 loss on liquidating fuel hedge is treated, and the
10 identification of which entity bears the credit and
11 transaction costs associated with both fuel and energy
12 hedges. Their response was similar or familiar. October
13 12th interrogatories were to cover, one, rate design
14 issues, two, DISCO responses of September 28th, three,
15 additional information filed on October 9th.
16 And finally PI-IR-56. This IR requested the rationale for
17 the choice of hedge products, an explanation of how the
18 Utility executes hedges and receives a reasonable
19 execution price for its financial hedges, a description of
20 how fuel needs forecasts are developed and information on
21 fuel needs forecasts that were used in PROMOD modelling.
22 Again the response. October 12th interrogatories were to
23 cover, one, rate design issues, two, DISCO responses of
24 September 28th, and three, the additional information of
25 October 9th.

2 Now, Mr. Chairman, going back, and I intend to deal with
3 each of the IRs and why I submit they should be answered
4 by DISCO.
5 First of all with respect to PI-IR-30(2). This is
6 entitled -- the IR is entitled "Shareholder Equity in Each
7 of the NB Power Group of Companies". This matter was
8 before the Board with respect to this IR and it is already
9 -- the Board has already ordered the utility to provide
10 this information in its ruling of October 7th. Mr.
11 Chairman, the title of the IR is irrelevant. It is the
12 substance of the IR that the utility was expected to
13 address. This information should have been provided and
14 the failure of the utility to do so, I submit, constitutes
15 a violation of the Board order.
16 PI-IR-40. This was dealing with the lawsuit against
17 PDVSA. And in the utility's confidential response to PI-
18 IR-41 of October 9th, as a result of the Board order of
19 October 2nd there is a copy of the Settlement Agreement.
20 Now in this Settlement Agreement there is reference to a
21 statement of claim that was filed by PDVSA, simply being
22 the Public Intervenor was asking to have a copy of that.
23 It is the statement of claim of a document that was filed
24 in the New York court and I think the wording of the IR
25 and the Order of the Board is broad enough to include all

2 claims that were brought, whether it was by PDVSA or whether
3 it was by NB Power or Holdco.
4 CHAIRMAN: Just on that particular IR, it's just as I read
5 the response, and maybe I have missed something here, but
6 I understand you probably have the statement of claim?
7 MR. THERIAULT: I have the statement of claim in New
8 Brunswick and I have the statement of claim in New York.
9 There is an official statement of claim.
10 CHAIRMAN: Sorry. Is it the statement of defence that you
11 are looking for?
12 MR. THERIAULT: No. There doesn't appear to have been a
13 statement of defence filed in either one, so --
14 CHAIRMAN: Okay. I'm not clear then what it is that --
15 MR. THERIAULT: I'm looking for the statement of claim that
16 would have -- there apparently was a statement of claim
17 filed by PDVSA against NB Power in New York, and I would
18 like a copy of that. As I say, it's broad enough to
19 include all pleadings in an action involving PDVSA and NB
20 Power.
21 CHAIRMAN: Okay. Thank you.
22 MR. THERIAULT: With respect to IR-42, the Power Purchase
23 Agreement Costs, Mr. Chairman, I submit that DISCO's
24 response to this IR raises issues of procedural fairness
25 and relevance. It is important for the Board to

2 understand that this IR arose out of the decision of October
3 2nd in which the Board ruled in dismissing the Public
4 Intervenor's requests for detailed generation cost data
5 that the only costs that would be considered in the
6 hearing would be costs under the control of DISCO. The
7 PPA costs are such costs, and the manifestation of these
8 costs is in the form of invoices. Procedural fairness
9 mandates that we be allowed to examine the details of the
10 PPA costs.
11 In so far as relevance is concerned, the Board should be
12 aware of one central issue here. At this point no one can
13 know if the PPA invoices exist or not, if the PPA invoices
14 are calculated according to the Power Purchase Agreements
15 or not, and if DISCO audits these invoices before payment
16 or not.
17 It is essential that the details on the invoices be
18 available for review and examination in order to determine
19 whether the costs that DISCO seeks to pass on to its
20 ratepayers are prudently incurred. The PPAs by themselves
21 do not constitute proof of prudency. Only an examination
22 and defence of the actual charges to DISCO constitutes a
23 review of prudency. It should be clear that the details
24 on these invoices is very relevant to an investigation
25 into the reasonableness of the PPA costs.

2 With respect to IR-43, the Service Level Agreement Costs,
3 again I submit that this issue raises questions of
4 procedural fairness and relevance. As with the IR on the
5 Power Purchase Agreement costs, this IR on SLA costs arose
6 out of the decision of October 2nd in which the Board
7 ruled in dismissing the Public Intervenor's requests for
8 detailed generation cost data that the only costs that
9 would be considered in the hearing would be costs under
10 the control of DISCO. The SLA costs are such costs and
11 the manifestation of these costs is in the form of
12 invoices.
13 At this point again we do not know if these exists or not,
14 we do not know if the invoices are calculated in
15 accordance with the Service Level Agreement, and we do not
16 know if DISCO audits these invoices before payment or not.
17 It is again essential that the details of the invoices be
18 available for review and examination in order to determine
19 whether costs that DISCO seeks to pass on to the
20 ratepayers are prudently incurred.
21 With respect to IR-45, which is Amendment Number One to
22 the Vesting Agreement. Again this is another matter of
23 procedural fairness and relevance. This IR arose out of
24 the decision of the Board of October 2nd in which the
25 Board ruled in dismissing the Public Intervenor's requests

for detailed generation cost data, that the only costs that would be considered in the hearing would be the costs under the control of DISCO.

The PPA costs are such costs and the amendment referred to in the IR will have an impact on both the PPA costs and the invoices submitted to DISCO. It is essential that the details on the PPA costs and the invoices be available for review and examination in order to determine whether the costs that DISCO seeks to pass on to its ratepayers are prudently incurred. Only an examination and defence of the amendment will determine if the proposed reduction was appropriate and that no further reduction was merited.

With respect to IR-46 which deals with the Option to Reduce Nominated Capacity Under Section 2.4 of the Vesting Agreement. This IR is linked directly to the responses to IR-39(2) filed on October 9th. The Pubic Intervenor had requested information on capacity payment adjustments, including copies of recommendations to senior management from the PPA Operating Committees.

The response from the utility was as follows: Members of the PPA Operating Committees make recommendations to their respective vice-presidents verbally. As such there are no written recommendations to senior management.

2 Mr. Chairman, if DISCO is prepared to say that analysis of
3 alternative generation resources is not a subject for
4 consideration by the Operating Committee, or that the
5 Operating Committee did not see fit to meet their
6 obligations under Section 2.4 of the Vesting Agreement,
7 then the Applicant should say so. IR-46 goes to the
8 matter of how DISCO carries out its management
9 responsibilities to act prudently and in the best interest
10 of the ratepayers. As such the IR is procedurally
11 appropriate and relevant and I submit must be answered.
12 With respect to IR-47, the Fuel Hedging Strategy and
13 Costs, this question follows up on PI-IR-4 and PI-IR-5,
14 the responses to which were the subject of a
15 confidentiality filing dated October 9th. As such this IR
16 is procedurally appropriate and relevant to an
17 investigation into the fuel purchase strategy of the
18 Utility and again I submit should be answered.
19 With respect to IR-56, Fuel and FX Hedging, this question
20 follows up again on PI-IR-4 and 5, the response to which
21 were subject of the confidential filing dated October 9th.
22 As such this IR is procedurally appropriate and relevant
23 to an investigation into the fuel purchase strategies of
24 the Utility and should be answered.
25 Now, Mr. Chairman, I am going to try and anticipate so

2 I don't have to maybe do some sort of rebuttal. But the
3 interrogatory process, as I understand it, is to allow two
4 things. One the -- three things I guess, the efficient
5 operation or the efficient management of the actual
6 hearing. Two, to allow the intervenors information in
7 which to prepare evidence, which we have to submit. And
8 third, to allow intervenors to be able to cross examine.
9 The questions I submit are all that -- that we have asked
10 are all relevant. Are all in accordance with the decision
11 that this Board gave on I believe it was October 9th and
12 should be answered. It would be totally unfair to myself,
13 as Public Intervenor, and I can only speak for myself, to
14 be told that information is not forthcoming to me and will
15 be answered at the hearing. These are informations, these
16 are interrogatories and they go to the process. They go
17 specifically to what the Board has ruled. But as I said
18 earlier even if they didn't, the fact is that this
19 schedule has been changed so much that it is very
20 difficult to keep straight what is. But again I submit
21 that all my questions do go towards the proper filing
22 schedule.
23 And Mr. Chairman, I do have copies of my submission for
24 the Board and for the other parties here today that I
25 would like to introduce at this time.

2 CHAIRMAN: Perhaps you could have that distributed at this
3 time.
4 MR. THERIAULT: And it contains the citations of the cases
5 that I referred to.
6 MR. CHAIRMAN: Thank you. Any questions from Members of the
7 Board for Mr. Theriault? Thank you, Mr. Theriault. I had
8 indicated that we would hear the Public Intervenor's
9 motion first, but it strikes me the nature of Mr. Lawson's
10 motion is very similar. Perhaps, Mr. Lawson, you might
11 come forward and make your argument. It may save us a
12 little bit of time in the sense that I rather suspect that
13 we will hear some very similar arguments.
14 MR. LAWSON: Instead of similar argument, I will just say
15 ditto. Really aside from the relevance issue, which has
16 not been raised with respect to our particular IR, I think
17 the points that the Intervenor has made with respect to
18 the timeliness of it are exactly our point, which is quite
19 simply there is a certain perplexity about the process.
20 And we will profess that it does appear as though indeed
21 our questions are probably not timely.
22 So the Board -- what we are really asking the Board is
23 is that for the sake of an expedited process at the
24 hearing itself, which will in itself have some of its own
25 problems, we would encourage the Board to require the

2 answers be given. We don't think the request for our
3 information is difficult to be provided by DISCO. No
4 indication that's the case.
5 So I don't think there is anything lost by asking that it
6 be answered. We are not asking that there be just a
7 continuation of further questions. We can just keep
8 asking until the hearing date. This is the one series of
9 questions that we asking be answered as additional to our
10 previous ones.
11 Those are all the comments I have, Mr. Chairman.
12 CHAIRMAN: Thank you, Mr. Lawson. Any questions of Mr.
13 Lawson from the Board? I am going to give the other
14 intervenors an opportunity to comment before I get back to
15 the applicant.
16 So, Mr. Nettleton?
17 MR. NETTLETON: Nothing arising, Mr. Chairman.
18 CHAIRMAN: Mr. Wolfe?
19 MR. WOLFE: No comment.
20 CHAIRMAN: Dr. Sollows?
21 DR. SOLLOWS: No comment.
22 CHAIRMAN: Mr. Zed?
23 MR. ZED: No comment.
24 CHAIRMAN: And Mr. Peacock?
25 MR. PEACOCK: No comment, Mr. Chair.

2 CHAIRMAN: Thank you. Mr. Morrison?

3 MR. MORRISON: Thank you, Mr. Chair. I will address the
4 issue of changes in the schedule that Mr. Theriault
5 alluded to.

6 Yes, there have been some changes. There is no question
7 about that. But there also has been some extraordinary
8 events. For example, the PDVSA settlement and the
9 requirement for a deferral account which changed the
10 revenue requirement. Yes, circumstances change and
11 sometimes the regulatory schedule has to accommodate those
12 changes. So I am not apologetic about that. But it's
13 just a simple reality.

14 Mr. Theriault gave a very articulate argument with
15 respect to relevance and the cases that he referred to and
16 the Board's role. And I do not disagree with a single
17 word that Mr. Theriault said in that matter. But our
18 issue today isn't relevance. We haven't raised relevance
19 as the reason for our objection. Basically the IRs, the
20 reasons for our objection fall into two categories. And I
21 am not going to use buckets this time. There are those
22 that we think we have already answered. And there are
23 those questions which we just say should have been
24 answered earlier. And the latter category, there are
25 really - oh, eight, I believe. There is CME IR-56. Mr.

2 Lawson just talked about. And PI IR-42, 43, 45, 46, 47 and
3 56.
4 In the filing schedule, the IRs that were to be submitted
5 on October 12th were initially only to address matters of
6 rate design. And it was a very short time frame for
7 responding. But DISCO didn't really have any objection to
8 the type of response time, because at that time it was
9 only rate design issues. And we believe that the number
10 of IRs that would be submitted on that would be few and
11 manageable. And indeed on this round of IRs, there was
12 only one rate design question submitted.
13 Now this round of IRs was expanded to include responses to
14 information that was filed on September 28th and to ask
15 questions on any information coming out of the Board's
16 ruling of October 2nd, which was filed on October 9th.
17 And, of course, that's fair. And we believe that's fair
18 and reasonable for parties to be able to deal with that.
19 However, what's not fair and reasonable is to expect DISCO
20 to answer additional questions that do not relate to
21 either the rate design, the September 28th filing or the
22 October 9th filing.
23 Mr. Theriault dealt with the interrogatories individually.
24 I don't intend to do that, because I
25

2 believe they can be addressed in two broad categories.
3 None of the IRs, it is my submission that I just referred
4 to can reasonably be interpreted to relate to the
5 September 28th and the October 9th filings. The questions
6 when you read them are very generic in nature. And they
7 do not relate specifically and do not fall out of any of
8 the interrogatory responses or the material that we filed
9 on September 28th or September 29th.
10 In fact as we said in our IR responses, we believe that
11 these questions should have been asked a long time ago.
12 And in some cases, we believe these questions really
13 relate to information that was filed on April 19th.
14 It's interesting to note -- and I know we had a discussion
15 about this early on about the form of the formatting the
16 IRs, but none of the IRs that have been submitted have a
17 reference, a specific reference to any of the material
18 that was filed on September 28th or October 9th.
19 And to just put this into perspective Board Members, Mr.
20 Chairman, to date there had been in excess of 1,300
21 individual questions submitted to DISCO for response.
22 That's 200 more than in the entire 2006 Rate Application.
23 And that included the CARD hearing.
24 I would suggest that the discovery process to date has
25

2 been exhaustive, not to mention exhausting. In my experience,
3 not every conceivable question is asked during discovery.
4 The parties still have four weeks of hearings to put
5 questions to DISCO.
6 Now, as is his right, the Public Intervenor has
7 consistently insisted on strict adherence to the process
8 set out by the Board. In this manner, DISCO is asking the
9 Board to apply the same standard. And there is a matter
10 of principle involved here, Mr. Chairman. And I am always
11 reluctant to raise matters of principle when you are
12 talking about litigation and legal matters. But there is
13 a matter of principle here. And that is if we answered
14 these questions in effect there is third round of IRS.
15 And I think that is a rather dangerous precedent to set as
16 we go forward into rate hearings in the future.
17 Now, I would like to make some additional comments with
18 respect to IR 42 and 43. And those relate to the PPA and
19 SLA invoices that Mr. Theriault referred to.
20 In addition to there being -- well I say they are out of
21 time, they are not appropriate for this round. I would
22 submit they are not appropriate for another reason. The
23 IRs, those two IRs ask for copies of all the invoices for
24 the PPA and SLA charges, together with detailed supporting
25 documentation.

2 Now to give you some idea of the magnitude of this task,
3 the documentation supporting just one month of SLA charges
4 consist of a one-inch binder. And the interrogatory
5 requests monthly backup going back to 2004. That would
6 mean that DISCO would have to prepare and copy up to
7 approximately 40 one-inch binders just to answer PI IR-43
8 alone.
9 Now those PPA and SLA charges are set out in the evidence.
10 And we have already answered several interrogatories on
11 them. We have provided annual figures for '05 and '06 and
12 11 months of actuals for '06 and '07.
13 I guess the question is -- and I think it is an important
14 question to what level of a detail with the Board require
15 DISCO to provide information? Because there is almost no
16 limit to how far down you can drill.
17 Now I acknowledge that this may be a difficult line to
18 draw. However, I believe, and it is my submission that
19 these two particular IRs cross that line. The information
20 requested, while technically relevant, I am not going to
21 argue that it is not technically relevant, in my view or
22 in my submission I should say, there is little or no
23 probative value. And I don't want to continue harkening
24 back to another process, but I remember a couple of
25

2 hearings back what was then NB Power was asked by a particular
3 intervenor to provide all documentation with respect to
4 tidal power. And it was boxes of material. It was
5 returned to us unopened. Nobody asked a question on it.
6 Nobody referred to in the course of the hearing. I doubt
7 it was even reviewed.
8 So I guess as a practical problem, there is really no end
9 to the volume of material that can be produced. Almost no
10 end to the volume of material that can be produced. But
11 you have to weigh the mountains of paper against the
12 probative value of that information.
13 And I am just going to refer the Board to its October 2nd
14 decision.
15 It is not simply a matter of whether DISCO has the
16 information, but rather would the information be useful
17 for the Board, and that's really our only issue with IRs
18 42 and 43, besides the fact that we believe those
19 questions should have been asked a long time ago.
20 I only have to deal with two other IRs, so I should be
21 fairly brief. And that's PI IR-30(2), that's the PDVSA
22 settlement, the pleadings -- I'm sorry -- that's the
23 equity accounts of the NB Power Group of Companies. The
24 IR did generally relate to the equity accounts of the NB
25 Power Group of Companies. That's how it is headed.

2 Granted the second part of that IR goes on to request
3 information concerning equity accounts for Electric
4 Finance Corporation. Now DISCOs responses at EFC it's not
5 part of the NB Power group. I would submit that our
6 answer is clearly responsive. EFC is not part of the NB
7 Power group and as such DISCO has no access to that
8 information. And would have no authority to respond on
9 behalf of EFC in any event.
10 I don't know what more we can say on the matter. We
11 obviously can't provide that which we do not have and we
12 do not have that information with respect to EFC.
13 The last IR is PI IR-40, which deals with the pleadings in
14 the PDVSA settlement. The IR has two parts. The first
15 requests a copy of the statement of claim and the
16 statement of defence filed in the PDVSA law suit, and the
17 pleadings that exist were provided. When Mr. Theriault
18 was speaking earlier he referred to a second -- we did
19 provide a statement of claim and I believe there was no
20 defence filed in New Brunswick. We made inquiries of Ms.
21 Harrison while Mr. Theriault was speaking. There are no
22 other pleadings. Mr. Theriault has been provided with
23 what we have.
24 CHAIRMAN: In response to my question, Mr. Theriault, I
25 understood that it might have been something almost in the

2 nature of a counterclaim, that it was a claim by PDVSA.
3 Perhaps Mr. Theriault can clarify. That was what I
4 understood his response was.
5 MR. THERIAULT: My understanding is that there was an action
6 filed in the State of New York by PDVSA, a statement of
7 claim filed by PDVSA, not an arbitration case but a
8 statement of claim. If I'm wrong on that that's fine,
9 they can tell me.
10 MR. MORRISON: I don't know, but I might be able to get the
11 answer in a moment or two, but the IR says with respect to
12 the lawsuit against PDVSA. So -- and I'm not going to
13 split hairs, but if you can just give me a moment we might
14 be able to resolve this.
15 CHAIRMAN: Certainly.
16 MR. MORRISON: I am advised there was no statement of claim.
17 Apparently there was an arbitration process that went
18 through as a result of that court case, so -- but there
19 was no statement of claim as I understand it. So I
20 believe we have provided what we have with respect to the
21 pleadings.
22 CHAIRMAN: Mr. Theriault, are you okay with that response?
23 MR. THERIAULT: That's fine. I will make inquiries of the
24 State of New York and get it that way, if it's there.
25 MR. MORRISON: That's fine. The other part of that, and I

2 don't know whether there is an issue with it or not, but Mr.
3 Theriault asked the question to provide offers and
4 counter-offers that were filed with the court if publicly
5 available. There are no offers or counter-offers filed
6 with the court. And, of course, that is not unusual.
7 Usually offers aren't filed with the court. So I guess on
8 that point we believe that we have been completely
9 responsive.
10 Those are all the comments I have, Mr. Chairman, Members
11 of the Board. Thank you.
12 CHAIRMAN: Thank you, Mr. Morrison. Any questions from
13 members of the Board? Mr. Johnston?
14 MR. JOHNSTON: Mr. Morrison, I took some notes here and I'm
15 just trying to summarize your position so that I'm sure I
16 understand it. With respect to PI IR's 45, 46, 47 and CME
17 IR-56, the only argument that is being advanced with
18 respect to those is the scheduling argument in the sense
19 that they should have been asked at an earlier date,
20 correct?
21 MR. MORRISON: That's correct. And I believe PI-56 is in
22 that group as well.
23 MR. JOHNSTON: Oh, there is two 56's. That must have been
24 what confused me. CME had a 56 and PI had a 56. Thank
25 you. I thought that was -- I have a duplicate page.

2 And then with respect to 42 and 43 there is that issue as
3 well and then the additional issue that you raised of it
4 simply being excessively voluminous and you don't think
5 particularly useful to the process.
6 MR. MORRISON: That's correct.
7 MR. JOHNSTON: But with respect to these others, 45, 46, 47
8 and 56 PI and 56 CME, do I understand that they would have
9 been answered had they been filed in a timely fashion?
10 MR. MORRISON: That's correct. But I guess, Vice-Chairman,
11 and I'm sure everybody appreciates this and Mr. Theriault
12 did allude to it, we do have a filing schedule which is
13 fairly aggressive shall we say, and the preparation of
14 these IR responses is a tremendous amount of work. And as
15 I mentioned earlier about the principle of a third round
16 of IRs, it really gets to the point where you have got to
17 cut it off at some point. There has to be an end to the
18 interrogatory process. And perhaps we have drawn a line
19 in the sand with respect to those particular IRs, but I
20 think it's a line in the sand that was important to be
21 drawn. Otherwise you will end up in a perpetual discovery
22 right up until the time of the hearing.
23 And they are a tremendous amount of work. I'm not saying
24 that that's an excuse that they shouldn't be answered, but
25 in fairness to the people, men and women

2 that work at DISCO to provide these responses, if it relates
3 to information that was filed earlier, then it should have
4 been in fairness asked earlier. And that's essentially
5 the point I'm trying to make.
6 MR. JOHNSTON: I have a very specific question to ask with
7 respect to 42 and 43, and that is at what time in your
8 submission could those questions have been asked?
9 MR. MORRISON: Well with respect to 43, April 19th, and
10 there was some additional information on August 20th. So
11 they could have been asked in the previous round of IRs
12 for sure. On 42 I believe that clearly relates to the
13 initial filing on April 19th.
14 MR. JOHNSTON: So your submission would be that with respect
15 to 42 it would be the initial filing evidence on April
16 19th, and with 43 April 19th and some additional evidence
17 having been filed on August 20th?
18 MR. MORRISON: I think there is an argument to be made that
19 it could relate to the information that was filed on
20 August 20th, yes.
21 MR. JOHNSTON: All right. Thank you.
22 CHAIRMAN: You have a question, Mr. Barnett?
23 MR. BARNETT: Yes, Mr. Morrison. I understand referring to
24 IRs 45, 46, 47, 56 and CME 56 -- it's a timing issue in
25 your answer. Does this mean then that if these questions

2 are asked orally during the course of cross-examination that
3 the likelihood of there having to be an undertaking
4 responding to those is remote?
5 MR. MORRISON: It is very remote.
6 MR. BARNETT: Thank you.
7 CHAIRMAN: Mr. Theriault, any response?
8 MR. THERIAULT: Yes. Just a few. My friend started out his
9 comments I believe saying that the issue was not
10 relevance, but I would submit with IR-42 and 43 that's
11 exactly what he is stating in his response. It is simply
12 a matter of whether -- it is not simply a matter of
13 whether DISCO has the information but rather would the
14 information be useful for the Board, and he quotes the
15 Board's previous decision of October 2nd, and that was
16 exactly as I recall the discussion between the Vice-Chair
17 of the Board and Mr. Morrison over the relevancy issue.
18 So that's why. As to how far -- I think he used the term
19 how far do we drill? Well if it's relevant to the
20 ratepayers then we drill to bedrock if that's necessary.
21 The point is, Mr. Chairman, Board Members, is to review
22 all documents. Now my friend pointed to a situation where
23 in the previous hearing a box of documents came back
24 unopened. Well the point being it's to review the
25 documents. If it leads to a ground of inquiry at the

2 hearing, then obviously that will be followed up. But as you
3 know Mr. Chairman, it's part of the discovery process.
4 Just because you ask a question doesn't necessarily mean
5 you are going to use it. It doesn't make it any less
6 probative because it may lead to a ground of inquiry. And
7 the fact that, you know, out of a thousand and some
8 questions that have been answered if at the hearing I
9 choose to only ask questions with respect to 50 questions
10 that have been answered, it's because the rest have been
11 answered in accordance to my satisfaction.
12 So the point being is that is what this whole purpose of
13 interrogatories is for. It's not for them to say, well,
14 you know, that is just something that can be dealt with
15 later or dealt with at the hearing. The point of
16 interrogatories, and I think, Mr. Barnett, this hopefully
17 goes to your question with respect to the undertaking that
18 can be answered, but I think it is important for the
19 Intervenors to have the evidence not only to be able to
20 ask cross-examination and receive answers, but by that
21 point in time the Intervenor's evidence will have been
22 filed, so we will not be able to present any additional
23 evidence to that.
24 Now with respect to the timing, again I ask the Board -- I
25 ask the Board to go back and review its October

2 2nd decision. It was at that point that it clarified its
3 earlier decision as to what could be asked. The questions
4 that I have asked in the last round of IRs all relate to
5 what the Board said in its October 2nd decision. There is
6 more than just a listing in that decision. The Board set
7 out some very specific parameters of the type of costs,
8 the PPA costs and what could be looked at. And as you
9 will note in specifically IR-42, 43 go directly to that.
10 So do all the other IRs.
11 That's all I have to say. Thank you.
12 CHAIRMAN: Thank you. Mr. Lawson?
13 MR. LAWSON: I'm just -- I guess the fact that Mr. Barnett's
14 answer -- the answer Mr. Barnett's question indicates,
15 presumably the answers to the IRs are relatively simple
16 and can be provided fairly easily if no undertaking be
17 required, would suggest that sort of the price if you will
18 to be paid for getting these answers seems pretty small in
19 asking for the answers today instead of waiting for the
20 hearing itself.
21 So we would again just encourage the Board to say, look,
22 let's not get caught up on a technicality here. This
23 isn't going to open a floodgate as a result of deciding
24 these answers should be provided. I'm sure the Board's
25 decision will be specific to these particular ones

2 and won't open up a floodgate. So we would again encourage

3 you. Thank you.

4 CHAIRMAN: Thank you, Mr. Lawson. I guess that concludes

5 the matters that are before us. Ms. Desmond, there is the

6 outstanding issue of procedures applying to the parties

7 with respect to confidentiality and you will look after

8 convening a meeting with the parties to deal with that?

9 MS. DESMOND: Yes, Mr. Chair, we will be in touch with all

10 of the Intervenors with respect to a suitable date and

11 time.

12 CHAIRMAN: Is there anything further this morning then?

13 Okay. The Board will stand adjourned.

14 (Adjourned)

15

16 Certified to be a true transcript

17 of the proceedings of this

18 hearing, as recorded by me,

19 to the best of my ability.

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23 Reporter

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