

INDEX

A-3 - Notice of Motion - page 31

A-4 - Original affidavit of David Reid - page 32

A-5 - Affidavit dated 30th day of November - page 34

PUB-1 - Interrogatories with responses - page 47

New Brunswick Board of Commissioners of Public Utilities

PUB Boardroom, Saint John, N.B.

December 5th 2001

2:00 p.m.

IN THE MATTER OF an application dated July 12th 2001 by New Brunswick Power Corporation in connection with a proposal to refurbish its generating facility at Coleson Cove

New Brunswick Board of Commissioners of Public Utilities

PUB Boardroom, Saint John, N.B.

December 5th 2001

2:00 p.m.

IN THE MATTER OF an application dated July 12th 2001 by New Brunswick Power Corporation in connection with a proposal to refurbish its generating facility at Coleson Cove

CHAIRMAN: David C. Nicholson, Q.C.

COMMISSIONERS: Robert Richardson  
R. J. Lutes

BOARD COUNSEL Peter MacNutt, Q.C.

BOARD SECRETARY: Lorraine Légère

.....

CHAIRMAN: Good afternoon, ladies and gentlemen. This is Motions Day in reference to the Coleson Cove Refurbishment Hearing. And it was called pursuant to E-mail notice which was sent out on November 27, 2001.

And in that we indicated we would go ahead with this Motions Day unless affected parties object and the Board upholds the objection. And there have been no objections.

Therefore could I have appearances please. For the applicant?

MR. HASHEY: Yes. Ken Little and David Hashey appearing for the applicant.

MR. HYSLOP: Peter Hyslop and Donald Barnett for the  
Province of New Brunswick.

CHAIRMAN: Any other parties? I'm not going to read the 18  
odd that are here as parties in the full proceeding. But  
let the record show that there are -- there is -- the  
applicant the Province of New Brunswick is represented by  
DNRE and Board staff and Board counsel, Mr. MacNutt,  
present.

Mr. Hashey, do you have any documents you want the  
Board to mark? I have new stamps on exhibits here.

MR. HASHEY: Oh, you better use those. Yes. I thought it  
would be appropriate that I delivered to you the notice of  
motion that was filed in this matter.

This document was circulated on the 27th day of  
November by E-mail as ordered I believe. That is the  
first document.

CHAIRMAN: Just a minute. I will try and -- so that will  
be

A-3. That is the notice of motion.

MR. HASHEY: Actually I can probably more appropriately do  
this and then just deliver them up. That's all right.

CHAIRMAN: We will get this system down. Just give me a  
minute, Mr. Hashey.

MR. HASHEY: Mr. Chairman, I have copies of all of these  
documents. Would you wish me to deliver copies to the

other Commissioners as I deliver you the original?

CHAIRMAN: Well, we should have that document A-3.

MR. HASHEY: Okay.

CHAIRMAN: I don't know if any of the other parties do or don't.

MR. HASHEY: Everybody has it, I believe.

CHAIRMAN: Okay. You can keep those documents, Mr. Hashey.

MR. HASHEY: Okay. The next document that I have is the original affidavit of David Reid. And that is sworn on the 26th day of November, 2001. It was circulated on the 27th day of November.

CHAIRMAN: Thank you. That is A-4.

MR. MACNUTT: Mr. Chairman, what are A-1 and A-2, just for clarification?

CHAIRMAN: A-1 and A-2, Mr. MacNutt, are A-1, affidavit of publishing, A-2 schedule for Coleson Cove Refurbishment dated September 12, 2001 including September 14/01 changes.

So that was the schedule that we then in the prehearing conference went through and approved the dates and that sort of thing.

MR. MACNUTT: And you called them A-1 and A-2. Aren't we using the system of NB Power 1, NB Power 2?

CHAIRMAN: I think I changed that, Mr. MacNutt.

MR. MACNUTT: Oh, I'm sorry. I missed that.

CHAIRMAN: I just found applicant A is a lot easier than

putting down NBP. And when you got DNR, PNB and et cetera. But having the applicant as A made it easier.

MR. HYSLOP: Mr. Chairman, just by way of confirmation, any evidence filed with the Board so far doesn't -- isn't part of the record at this hearing at this time, is that correct?

CHAIRMAN: No, that is not correct. It is part of it.

MR. HYSLOP: Thank you, Mr. Chairman. It hasn't been marked as an exhibit though.

CHAIRMAN: Oh, I beg your pardon. I see what you mean.

MR. HYSLOP: Yes.

CHAIRMAN: Sorry. No. The only things that have been marked, Mr. Hyslop, that form part of the record --

MR. HYSLOP: Yes.

CHAIRMAN: -- are A-1 through 4 as far as I recollect. There is nothing else.

MR. HYSLOP: Yes.

CHAIRMAN: In other words the prefiled evidence of NB Power has not been marked. That would be done at the time of the hearing, the actual hearing itself. Sorry.

MR. HASHEY: The next document, Mr. Chairman, that I would request be entered as an exhibit is the affidavit of Eduardo Hernandez Carstens.

Now a copy of the affidavit of Mr. Hernandez Carstens -- this is the gentleman who is the

Vice-President of Marketing of BITOR.

I talked to my learned friend and it was suggested, and I think also from the Board, that we should have direct evidence from the supplier as to their concerns on confidentiality.

There was an affidavit circulated on the 28th day of November. But that affidavit was undated by the Notary Public. So I requested that that be resworn and sent in original form to us.

So this affidavit is dated the 30th day of November, 2001. It is identical in contents to the affidavit that was circulated to everyone in accordance with the orders of the Board.

So I would offer this as the next exhibit.

CHAIRMAN: Good. Thank you, Mr. Hashey. Any problem with that at all, Mr. Hyslop?

MR. HYSLOP: No, none, Mr. Chairman.

CHAIRMAN: Okay. That is A-6.

MR. MACNUTT: A-5, Mr. Chairman.

CHAIRMAN: A-5. Any other document that you wanted to have the Board receive at this time, Mr. Hashey?

MR. HASHEY: I don't believe so, Mr. Chairman. I do have a brief on the points that I would make that I would circulate at the time that you deem it appropriate. I can speak to the issues probably initially.



CHAIRMAN: I think I would like to make a few preliminary remarks if I could, Mr. Hashey --

MR. HASHEY: Thank you.

CHAIRMAN: -- before we get into, as it were, the meat of the matter.

First of all, because Board staff submitted an interrogatory which has been -- response to which has been denied in reference to this particular motion, why I want to assure the participants that we have not discussed the reason that staff put that interrogatory in with staff at all. We have spoken in general terms about a number of things but not that particular issue.

And some of you who ate at the same place that the Commissioners and I ate at lunch, you will know that they actually ate at a separate table.

Now it is a small jurisdiction. However we have to be very careful that if in fact Mr. MacNutt speaks to Mr. Hashey's motion that the participants will be assured that the panel that sits here in front of you hasn't been breached by our staff in reference to that matter at all.

So that is the first thing that I wanted to say.

The second thing is just the question has -- the applicant and the Department of Natural Resources and Energy had an opportunity since the motion was proposed to actually talk about the difficulties and see if there were

any practical way to come to a mutual agreement.

And I harken back to what happened in the generic when NB Power sat down with Conservation Council and were able to come up with some compromises rather than the Board having to rule on motions. I guess I always try and seek that.

Gentlemen, have you anything to say?

MR. HASHEY: I can say that myself and Mr. Hyslop have spoken on a number of occasions I think about the matter.

And Mr. Hyslop has indicated to me that his position really is to object to this.

Now I have no problem with a further discussion. What we are really asking for is that somebody be appointed who can have full and complete access and can report to everyone that this information has been supplied and that they have had -- you know, that it has been appropriately used. To me it would be the solution to the protection rather than just put a confidential contract on the table which we can't do. I mean, in some ways of confidentiality -- could I go on just a little bit further?

CHAIRMAN: Sure.

MR. HASHEY: Mr. Hyslop and I have talked as late as this morning. One thing he requested from me yesterday was an indication of what had happened in other jurisdictions.

Now we checked that. We couldn't obviously in the time get an affidavit. But I can report that the deponent to the affidavit has reported that they made an application in the State of Florida. As well, that is I believe the only appearance that they have made before a regulatory authority in North America at this point in time.

And in Florida, it is our information that the contractual documentation or information that would be harmful to the parties who were negotiating, the parties to the contract, were in fact treated as confidential in that they were blacked out, so that the contract could be seen but the actual terms were not available such as the pricing, et cetera.

CHAIRMAN: It was expunged?

MR. HASHEY: It was expunged.

CHAIRMAN: Redacted.

MR. HASHEY: Now we are not asking to go to that step. We think that there is a better way of approaching it which should be able to satisfy everyone.

We are also informed with limited information that there was an application made in Wales in the U.K. And the information was a little bit sketchy.

But we were informed that, without question, that the confidentiality was raised there and it was respected by

the Boards that were dealing with the matter there as well.

Exactly how I'm not quite as certain. Because Mr. Hernandez Carstens was not firsthand involved with that. He is familiar with it. But to be specific on that he couldn't be in the same way he was in Florida. He is from Florida. He was much involved.

CHAIRMAN: I just shared with both you and Mr. Hyslop just prior to our coming into the room that the rules that have been promulgated pursuant to the federal legislation governing the CRTC and that in Ontario the Ontario Energy Board, I forget which set of rules that it has, very specific, perhaps both, very specific provisions dealing with redacting or expunging documents.

And when you do address the Board I have got a couple of comments that I would like all counsel to address. But one of them -- and I think I may have mentioned this to both Mr. Hyslop and you, Mr. Hashey, that one of the most difficult things when facing a motion of this nature is that when the entire document is confidential then the auditor goes in.

And we may attempt to be as specific as we can about what has to be confidential in that from his reading of that document. But there may be other things that come out of the document itself that may impact upon these

proceedings.

And I guess my philosophical point that I come from simply is that if there isn't a compelling reason to keep something confidential that we put in the open public forum, be it redacted or however it is dealt with, as much of the documentation as we possibly can so that all parties to the proceeding and the general public at large will appreciate exactly what has been kept in confidence.

It also makes it easier if we were to agree with your motion, Mr. Hashey, for our auditor because -- Mr. Easson would be the individual that we would direct to do that -- what he has to keep confidential is very explicit. And so I would like both counsel to talk about that.

I mean, there is a number of implications of things that can flow from that one document. And frankly if you look forward to Motions Day on the 19th there is probably a pile more coming down the line there.

So I guess Mr. MacNutt, do you have at this point anything that you think the Board should address further at this stage? Or should --

MR. MACNUTT: Well, at this stage, yes, Mr. Chairman, there is one point I would like to make.

CHAIRMAN: Okay. And can you pass the mike back to Mr. MacNutt there, Mr. Hashey? Oh, he has got one.

MR. MACNUTT: I'm covered. I don't have to bellow too

loudly.

We have identified exhibits A-1 through A-5. What we do not have in evidence before the Board upon which the Board can rule are the NB Power responses to the information request.

And I think for -- I think it is appropriate for the Board to have at least the information request and responses that are related in schedule A to the motion be in evidence at this hearing.

CHAIRMAN: Mr. MacNutt, would you come forward and take that down and show it Mr. Hashey. These are xerox copies I believe of -- or if Mr. Hashey has a copy of them there that's fine.

MR. HASHEY: I have made my own copy of those.

CHAIRMAN: Okay.

MR. HASHEY: I hope they are the same.

CHAIRMAN: Compare those with Mr. Hashey's. And we will see if we need more copies made or not.

MR. MACNUTT: We will use Mr. Hashey's list, Mr. Chairman --

CHAIRMAN: Yes.

MR. MACNUTT: -- his copies. We have done the same thing.

He has one addition to schedule A --

CHAIRMAN: Yes.

MR. MACNUTT: -- namely JDI-14 which was not in that -- not on schedule A and not in the set of copies that --

CHAIRMAN: I will ask the Secretary to take that out and make some copies. There is one additional one there.

While the Secretary is having that done, Board staff had compared -- I call it a compendium. I don't know what you would call it. But it is of the other affidavit -- excuse me, the other interrogatories which have been objected to.

And I wonder if Mrs. Drescher might make some copies for the participants here. Because I think we would be remiss, Mr. Hashey, if we didn't at least generally talk about those now, get the questions out and whatnot. So that is helpful, the compendium that was done by staff. Might as well get it done now.

MR. MACNUTT: I'm sorry, Mr. Chairman. I was --

CHAIRMAN: I was just suggesting to Mr. Hashey that I had Mrs. Drescher go make some copies of that compendium of the other interrogatories that will be questioned so that --

MR. MACNUTT: I'm sorry. I was preoccupied --

CHAIRMAN: -- when we deal with this matter we can sort of focus a little bit on that.

While the Secretary is out, Mr. Hashey, has NB Power approached any of the parties or the parties approached NB Power in reference to any of those interrogatories that aren't subject of this motion but we will be probably dealing with later?

MR. HASHEY: I think the answer is yes with respect to the Province to some extent but limited. And most all of them are the Province of New Brunswick's. In my list that I have, I have got them classified under categories.

CHAIRMAN: Well, Conservation Council has at least one in there I think.

MR. HASHEY: Just one.

CHAIRMAN: Well, there is WPI, I guess they do have. NB Power's response to Neptune Open Season, whatever that is, the question has been answered, I presume by another response to another interrogatory.

And then the request by WPI of the EIA document which responded there.

MR. HASHEY: Mr. Chairman, I think really, if we want to talk about those, I would say let me just mention maybe the categories I see. I think there are three effectively only that comes out of that for the future that we could discuss.

And I could also say that maybe we could have a little adjournment, after I just --

CHAIRMAN: Yes.

MR. HASHEY: -- speak generally, to meet with my friends to see if there is some way that we can work through this issue today, at least today's issue, and then maybe come back on the others as well.



CHAIRMAN: Oh, no. I don't wish to interrupt what we are here about today. But I do think --

MR. HASHEY: No.

CHAIRMAN: -- that since we are in the same room we can do some exploratory discussion on those which prove very helpful in the long run.

MR. HASHEY: I see it really, in really three categories, although you might say four. There is the question of confidentiality again with respect to negotiations that are ongoing with respect to potential suppliers of product or contractors if you like in relation to building.

This is the same old story, that if we discuss negotiations it is going to inhibit, would be our proposal there. It is not that significant or probably not that lengthy.

The other is the negotiations in relation to the fuel delivery and what is going on there vis-à-vis the Irving and the pipeline. And you know, yes, general discussion is not being restricted but details of what is being discussed might be damaging, is our suggestion.

And then it seems like the big one that we are going to be facing is I guess the licencing agreement and the intellectual property agreements both with PROMOD -- and again I think your point is well taken maybe to discuss this today.

Because if we get to the point that we have an independent auditor go in, I would think this might be something that he would want to do at the -- or he or she would want to do at the same time, that it -- to look at the -- and there is no restriction on the confidential basis from giving a full explanation of the licencing agreements, how they work.

But there is a proprietary interest in a lot of this, in the software if you like and the way things are done, as well as there is a very specific agreement that deals with the PROMOD modeling -- I have a copy of that here -- which is quite specific.

And there would be certainly a breach of the agreement if we disclosed that so that competitors could have access to it and be able to use it. Because there is a fee that has been paid and I believe is being paid with respect to the use of that software.

Those are the only issues that I see.

CHAIRMAN: Yes. With reference to PROMOD and that sort of thing, NB Power is a regulated utility. If it is not regulated by this Board then it is regulated by the Provincial Cabinet. And that is the case of Crowns across the country.

When NB Power signs contracts and enters into confidentiality, is there any mention of that fact, that

in fact they are a regulated entity?

And you know, there is a lot of law in reference to that and the jurisdiction and authority over the regulated entity by the regulator, whether it be Cabinet or this Board.

And one would almost think that it might be a good thing to have that disclosed in your contract, that with whatever private firm, that for the purposes of utility regulation or something of that nature that there be understood on the part of whomever NB Power is entering in agreement with that it may have to be shared with the regulator, not for commercial purposes but because it is a regulated entity.

MR. HASHEY: Oh, there is no question that that is discussed with the contracting parties. Now I can speak on the BITOR matter because I have directly asked that question.

I'm not sure that I can with respect to all of the contractual parties. That would be Mr. Reid or somebody -- or maybe Mr. Little could answer that.

But it is my understanding very definitely BITOR was told that look, the regulation -- the regulatory body in some fashion or form may have to have this information.

And they don't have great objection to that. But their problem is that if this gets out and is able to be used or accessed by competitors or by other potential

customers that it could be very, very damaging.

CHAIRMAN: No. I think I appreciate that --

MR. HASHEY: Yes.

CHAIRMAN: -- argument, Mr. Hashey. It is just that I'm looking at -- now again with PROMOD -- and I'm not for one minute saying that we make a copy of PROMOD and run our own programs down here.

But one would think again that if the regulator requires access to that program and it not be for commercial purposes but just simply in its role of regulator that again that be acknowledged in any contract between NB Power and the owner of PROMOD or whomever else those things are signed in the future.

Now I guess we have got --

MR. HYSLOP: Mr. Chairman --

CHAIRMAN: Yes.

MR. HYSLOP: -- on that point we -- part of our supplemental interrogatories, we have asked the Power Commission to provide the licencing agreements in order to find out what the limitations and restrictions may well be and to what extent maybe there is even an implication that it would extend to the public regulators and/or the Intervenors in this type of a proceeding.

CHAIRMAN: Again I guess we have got a copy of Mr. Hashey's, copies of the interrogatories that are the subject of the

motion today.

And I will mark that as an exhibit. It will give Mr. Hyslop and Mr. MacNutt an opportunity to make sure they are all there.

You gentlemen had an opportunity to look through. And those are -- as far as you are concerned --

MR. HYSLOP: As far as I'm concerned they would be --

CHAIRMAN: All right. I have 17 pages of this exhibit which are agreed by counsel to have been the interrogatories with responses which are referred to in schedule A to the applicant's motion for today.

And since Mr. MacNutt proposed it, why we will call it the PUB exhibit this time. It would be PUB-1.

Okay. Subject to Mr. Hashey, whatever you --

MR. HASHEY: Yes. Just to answer your question that you raised, Mr. Chairman, on the PROMOD agreement, I don't think there is any reason in the world not to disclose the agreement itself, when you get down to that type of thing.

And we can make some arguments about intellectual property in respect to some of the programs being used if they became publicly available could be damaging, in that somebody might take advantage.

But there definitely is a confidentiality provision in the copy that I have. This is something I requested to see. I'm not certain that I have got the full agreement,

but I -- you know, to get a better sense of this PROMOD thing, which I thought really is coming up in the future.

CHAIRMAN: And it is, Mr. Hashey.

MR. HASHEY: But as far as providing, you know, letting people see what that says and trying to find solutions to that, no problem there, you know.

Because the agreement itself I don't think gives any information away that is confidential. It is the program itself and how it is used that is the problem, not the agreement, not like BITOR that has the specific terms.

CHAIRMAN: Yes.

MR. HASHEY: I apologize. I don't have the --

CHAIRMAN: No, Mr. Hashey --

MR. HASHEY: -- BITOR agreement.

CHAIRMAN: -- you don't need to apologize. Because that is the subject of another day.

MR. HASHEY: No, no. But I mean I don't have the BITOR agreement here today to --

CHAIRMAN: Yes.

MR. HASHEY: But I have got no problem with the Board seeing it.

MR. HYSLOP: I'm wondering, Mr. Chairman, if the -- there is the agreement relating to the supply of orimulsion which confidentiality is being claimed for.

But in the affidavit there is an indication that there

is a confidentiality agreement between BITOR and New Brunswick Electric Power Commission.

And I'm wondering if that agreement -- it is not part of the record -- but I can't see the confidentiality agreement itself being something confidentiality would be claimed.

And we have also asked for that confidentiality agreement in our supplemental interrogatories.

MR. HASHEY: I haven't seen the supplemental interrogatories.

MR. HYSLOP: I appreciate that.

MR. HASHEY: But the confidentiality agreement insofar as that it is relevant to that very contract, I have got no problem. I got a copy of it here too, you know. That I have seen.

Now whether that is -- that is a general confidentiality agreement. And then there is a confidentiality clause in the specific thing.

But I agree with my learned friend. I don't have a problem with confidentiality agreements to show that there is an agreement and to put forward whatever evidence may be required to test that.

CHAIRMAN: Where do you want to leave that, Mr. Hyslop? Do you want to wait for the response to the interrog' or do you want --

MR. HYSLOP: I would like to get a copy right now.

CHAIRMAN: -- to get a copy today?

MR. HYSLOP: I wouldn't mind seeing a copy of it today and ask if my friend is prepared to make it part of the record, to know exactly what the terms of the confidentiality are, Mr. Chairman.

CHAIRMAN: All right. Why don't we on that then wait for the break. And it will give Mr. Hashey an opportunity to talk to his client about it.

MR. HYSLOP: Yes.

MR. HASHEY: This is something that I asked specifically, obviously, you know, it seemed to me to be -- when I was dealing with Mr. Reid, who unfortunately is out of province today. But the - it's an agreement, it's there, you know, there is no reason for that.

Now I'm just wondering, Mr. Chairman, if it would be worth us taking a break to have a meeting with the -- we are now down to just the two of us to discuss this and the Board, and the Board counsel of course to see if there isn't a way to get around this BITOR one that's satisfactory to everyone?

CHAIRMAN: I think you know enough about me, Mr. Hashey, to know that I will accept a break under any pretense.

So you let us know when you have had sufficient time to do what you want.



Okay. Thank you.

(Recess)

CHAIRMAN: Mr. Hashey?

MR. HASHEY: Yes, Mr. Chairman. After considerable work -- and thank you very much for your indulgence and that of the Board members. We realize that it is a time consumer. And hopefully what we have come down with will be satisfactory.

But we would like to make a proposal to you that has been agreed by the two parties here that would be a resolution of this matter. And obviously you would want time to consider it.

And shall I read that into the record?

CHAIRMAN: Well, either that or is it all on a slip of paper that we can -- well, how long is it, Mr. Hashey?

MR. HASHEY: One page.

CHAIRMAN: Why don't you read it into the record.

MR. HASHEY: For starters the understanding is that we would probably need a ruling from the Board that the solution to our objections, the NB Power objections would be the following, something to that effect.

Because there are others that are here. But technically they are affected by the result of this motion.

CHAIRMAN: Yes. I understand.

MR. HASHEY: Yes.

CHAIRMAN: The Board would have to make --

MR. HASHEY: Yes. So I don't think it is just between the two of us. That is all I'm trying to say. If it was we would just enter into an understanding.

CHAIRMAN: Well, Mr. MacNutt and Mr. Goss have had an opportunity to sit in the room while you --

MR. HASHEY: They have been party to all the discussions.

CHAIRMAN: Yes.

MR. HASHEY: Yes. Everything has been with them as well.

CHAIRMAN: Yes.

MR. HASHEY: So it would be as follows.

"NB Power shall provide all documents governing the arrangements for Coleson Cove between itself and BITOR in a redacted form to the Board and registered Intervenors. Redacted items are to be identified by way of a description of the subject matter. Any party may submit further motions with respect to redacted items other than cost, price and price indexation."

MR. LUTES: That isn't what this says.

MR. GOSS: There is one there that doesn't have the word "redacted" in it and one copy does.

CHAIRMAN: Okay. "Redacted" goes in here. It is all right.

MR. LUTES: Sorry. Didn't mean to interrupt.

MR. HASHEY: No. I think in the haste -- Mr. Hyslop has

made a suggestion that after the word "indexation" we would like to add the word "of orimulsion".

CHAIRMAN: Where is that?

MR. HASHEY: Right at the end of the last sentence, "than cost, price and price indexation of orimulsion."

CHAIRMAN: We will have to put the R in the circle after that.

MR. HASHEY: Then continuing, "To assist PUB and the Intervenors, a qualified, independent auditor be appointed by PUB to review the agreement, the spread sheets and input and output information with respect to the analysis, the preparation of all models and statements of all conclusions contained in NB Power Evidence. The auditor shall sign a confid'" --

CHAIRMAN: Again -- just let me stop you there.

MR. HASHEY: Yes.

CHAIRMAN: Again that is in reference to the BITOR agreement, in other words the agreement to supply of orimulsion.

MR. HASHEY: Yes.

CHAIRMAN: Yes.

MR. HASHEY: Yes.

CHAIRMAN: Okay.

MR. HASHEY: Probably a good idea.

CHAIRMAN: Well, I'm thinking, Mr. Hashey, of the other

interrogatories and your denial on those. And I don't want any --

MR. HASHEY: No.

CHAIRMAN: -- question about it. I mean, we have talked about it here. And this will form the basis of any order that we will make. So I don't think we need to --

MR. HASHEY: In relation to BITOR.

CHAIRMAN: This is in relation to BITOR.

MR. HASHEY: It's a very good point. Thank you very much.

MR. MACNUTT: So you are going to insert "BITOR" after "the" in the second line of the first -- second paragraph?

MR. GOSS: Just say "NB Power Evidence in relation to BITOR"?

MR. HASHEY: Right at the end of that, the third line --

CHAIRMAN: At the end of that first long sentence in the second paragraph, Mr. MacNutt, just add "in relation to BITOR."

MR. MACNUTT: Yes.

MR. HASHEY: Next, "The auditor shall sign" --

MR. MACNUTT: Perhaps just for clarification for the record purposes that --

MR. LUTES: Can't hear you, Mr. MacNutt.

MR. MACNUTT: Perhaps for clarification purposes for the record, Mr. Hashey can start that paragraph over again.

MR. HASHEY: Fine. "To assist PUB and the Intervenors, a

qualified, independent auditor be appointed by PUB to review the agreement, the spread sheets and input and output information with respect to the analysis, the preparation of all models and statements of all conclusions contained in NB Power Evidence in relation to BITOR."

New sentence. "The auditor shall sign a confidentiality agreement with NB Power." New sentence. "The auditor shall be permitted access to any and all information and data (including electronic data) and personnel that he deems necessary or required to complete his report. The auditor shall certify to PUB and the Intervenors the accuracy of the inputs and outputs or identity" --

CHAIRMAN: "Or identify".

MR. HASHEY: -- I'm sorry -- "or identify and report on the extent of any inaccuracy in the analysis and conclusions."

Paragraph. "The PUB and the Intervenors will be permitted to file additional interrogatories with respect to the redacted copies and the report of the auditor. The auditor shall be subject to cross-examination on his report at the hearings of evidence on this application provided however the auditor cannot be cross-examined with respect to any redacted items."

CHAIRMAN: Okay. Is that a standard confidentiality

agreement that NB Power has, Mr. Hashey?

MR. HASHEY: Yes. It will be -- it would be even less than what you would put on a commercial confidentiality agreement.

CHAIRMAN: Okay.

MR. HASHEY: We are dealing with a professional. I think we would respect that.

CHAIRMAN: Yes. All right. And as Commissioner Lutes pointed out during our break to me, is that one of the things that we would be concerned about is that if in this process our auditor who has extensive background in regulatory matters in audit accounting and a number of other fields, if there is something that he comes up against that he does not understand, that he be allowed to seek expert help to come in and assist with that portion of what it is that he sees that is beyond his capabilities, provided that that same confidentiality agreement is entered into by that individual.

MR. HASHEY: In fact what -- I thank you for that. But what I have got in there, I anticipated that in the draft that we did. It says that he would cause these people to respect this confidentiality agreement if he uses anybody else.

MR. LUTES: Yes.

MR. HASHEY: And they have to return materials to him.

CHAIRMAN: We don't know what it is that he has got to look at really.

MR. HASHEY: No.

MR. LUTES: Mr. Hashey, this guy has been a C.A. with Peat Marwick for years. And he understands the confidentiality as it relates to client affairs. It has been his whole life.

MR. HASHEY: Exactly.

MR. LUTES: So anybody that he would retain would sign off on the same agreement. And he would ensure that he deal with all these matters in the same confidential manner. I'm sure of it.

MR. HASHEY: Exactly.

MR. LUTES: Yes.

MR. HASHEY: Yes.

MR. HYSLOP: I might just one moment consult --

CHAIRMAN: Go ahead. Yes.

MR. HYSLOP: -- with Mr. Hashey.

CHAIRMAN: By all means.

MR. HASHEY: I apologize.

CHAIRMAN: No problem. This is what it is all about.

MR. HASHEY: One little issue here.

MR. LUTES: Mr. Hashey, just one other comment if I might. The last sentence in the second paragraph, in the middle paragraph, "The auditor shall certify to PUB."

MR. HASHEY: Wrong word?

MR. LUTES: Yes. Express his opinion.

MR. HASHEY: Yes, exactly.

MR. LUTES: Express his opinion to the PUB and the  
Intervenors as to the accuracy, et cetera. Because it  
connotes -- well, a precision that isn't -- that can't be  
there unless he examines everything.

MR. HASHEY: Quite right.

MR. LUTES: Which we don't want.

MR. HASHEY: That is not proper audit language. That's  
right.

CHAIRMAN: And I want it to be understood that if Mr. Easson  
disagrees with any analysis that has been done, there is  
nothing here that restricts him from doing a reworking of  
the calculations, et cetera for the purposes of his  
report.

In other words if he feels the methodology used by NB  
Power is in error, it doesn't restrict what he can look at  
other than what has been done. In other words you don't  
want to tie his hands. Certainly on the confidentiality  
that is another question.

Okay. The other that I have some question about -- I  
just throw it out to counsel here is last sentence, "The  
auditor shall be subject to cross-examination on his  
report at the hearings of evidence on this application



provided however the auditor cannot be cross-examined with respect to any redacted items."

Would it not be better in keeping with the spirit of this to say "The auditor shall be subject to examination on his report at the hearings"?

MR. HASHEY: Sure.

CHAIRMAN: So that I will be able to stop you if you get really rough. Now that is a little bit of humor. But I'm -- you know.

MR. HASHEY: Yes. That's good.

CHAIRMAN: You know. And we could just -- at the hearing in this application.

MR. MACNUTT: What about the qualifier at the end, Mr. Chairman?

CHAIRMAN: Which one is that, sir?

MR. MACNUTT: "Provided however the auditor cannot be cross-examined with respect" --

MR. HASHEY: It should be "examined".

CHAIRMAN: It should be "examined". New sentence in accordance. After "application" in the second line, we will take out "provided however" and put in "the auditor cannot be examined with respect to any redacted items."

In the last sentence of the second paragraph the word "certify" has been taken out. And is it "express" that has been --

MR. HASHEY: "Express his opinion."

MR. LUTES: "Express his opinion", yes, "to the PUB and the  
Intervenors as to the accuracy of the inputs" --

MR. HYSLOP: "As to"?

MR. LUTES: "As to"? Yes.

MR. HASHEY: "As to'?"

MR. LUTES: "The accuracy of the inputs and outputs" --

MR. MACNUTT: Yes. The last line in that second paragraph  
which now reads "outputs or identify and report", perhaps  
that should be "outputs and identify and report."

So that the revised sentence, being the last sentence  
in that second paragraph would read now complete "The  
auditor shall express his opinion to PUB and the  
Intervenors as to the accuracy of the inputs and outputs  
and identify and report on the extent of any inaccuracy in  
the analysis and conclusions."

CHAIRMAN: Any comments on that?

MR. HYSLOP: That's fine, Mr. Chairman. Thank you.

CHAIRMAN: We will retire and consider that. Is there  
anything else, gentlemen?

MR. HASHEY: I don't believe so. I think we could say that  
there has been some discussion and some movement in  
relation to a resolution of some of the other issues that  
might come before the Board on the 19th, particularly with  
respect to --

CHAIRMAN: Okay.

MR. HASHEY: -- making available spread sheets and things  
that we are trying to resolve --

CHAIRMAN: We will rule on this, Mr. Hashey.

MR. HASHEY: We are not giving --

CHAIRMAN: And we will --

MR. HASHEY: That is just reporting to you.

CHAIRMAN: Yes.

MR. HASHEY: Because we did discuss that.

CHAIRMAN: Yes. We will rule on this. And then we will  
pass on to that sheet. Mr. MacNutt, you had --

MR. MACNUTT: Yes. Clarification, Mr. Chairman. The motion  
made by NB Power calls for two orders to be made by the  
Board, (1) with respect to a direction -- declaration that  
the information which has been refused to be produced be  
declared to be confidential; and (2) --

CHAIRMAN: Speak up, Mr. MacNutt, so I --

MR. MACNUTT: And (2) --

CHAIRMAN: What was the first one? I missed that, the end  
of it there.

MR. MACNUTT: My understanding that the NB Power motion  
calls for a declaration of confidentiality of the material  
which NB Power has refused to produce.

Number (2) was a request for an order which has just  
been addressed in the submission to you just completed.

The question outstanding is will we be addressing the first order requested this afternoon, the declaration of confidentiality of the refused material?

CHAIRMAN: Well, it seems to go hand in glove.

MR. MACNUTT: Just a clarification would be appropriate.

CHAIRMAN: I will ask counsel for advice on that. I want to do it properly. And certainly we can do that. But here we are.

We have said that there are -- there is certain information that is set forth in a particular contract. Or maybe there are contracts. I don't know.

But I presume that certain documentation may well be this contract that is going to be redacted and filed with the Board.

MR. HYSLOP: Mr. Chairman, as a party who came and was opposed to the motion in the form as presented, I think it is with some confidence that we can say that the first paragraph of the order sought I think has been properly resolved with the order that we are now suggesting that the Board make.

In other words the declaration that they be honored, that part of it at least I think is contained in the language that we have given to you. Mr. Hashey may have a comment.

CHAIRMAN: I think Mr. MacNutt is coming from a strictly

legal -- a declaration in order that it be -- certainly certain portions of the business arrangements and agreements with BITOR America Corporation could be ruled on as being confidential.

And if that will suffice, Mr. MacNutt, in your opinion, why --

MR. MACNUTT: Well, Mr. Hashey acting on behalf of NB Power is the party -- is the applicant in requesting that and outlined it in its motion as to what it wants.

I think perhaps they should speak to whether or not, in light of the current circumstances --

CHAIRMAN: Yes. I'm just calling on Board counsel to make certain that we do it in an appropriate legal fashion, that's all, sir.

Do you see any difficulty if we bring in a ruling, Mr. Hashey, that we agree that certain of the business arrangements and agreements between the applicant and BITOR America Corporation are in fact confidential and then we go on to rule?

MR. HASHEY: That's fine. I would like that.

CHAIRMAN: You know, in other words --

MR. HASHEY: Yes.

CHAIRMAN: -- we are not saying everything --

MR. HASHEY: No, no.

CHAIRMAN: -- that is involved with those agreements. But

there are portions of it that are confidential. And then go on to rule in this fashion.

MR. HASHEY: No. It speaks that there is still opportunity.

The only thing that has really been agreed to today is that we have agreed that cost, price and price escalation of orimulsion is confidential, I think in fairness.

CHAIRMAN: Yes.

MR. HASHEY: And that the remaining portion is still open for discussion if need be.

CHAIRMAN: Okay. So that is what I would rule or that the Board would rule, is that those three items in reference to orimulsion in your business arrangements and agreements with BITOR America Corporation are confidential.

MR. HASHEY: That is as far as my learned friends or my friends have gone today.

CHAIRMAN: Okay. We will take a brief recess.

(Recess)

CHAIRMAN: The Board has listened to counsel from both sides in this matter and in reference to the actual motion itself we do find that certain of the business arrangements and agreements between the applicant and New Brunswick Power Corporation and BITOR America Corporation concerning cost, price and price indexation of orimulsion are confidential.

The Board, pursuant to negotiation between counsel and

Board counsel direct that "NB Power shall provide all documents governing the arrangements for Coleson Cove between itself and BITOR in a redacted form to the Board and registered Intervenors. Redacted items are to be identified by way of a description of the subject matter.

Any party may submit further motions with respect to redacted items other than cost, price and price indexation of orimulsion."

"To assist PUB and the Intervenors, a qualified, independent auditor will be appointed by the PUB to review the agreement, the spread sheets and input and output information with respect to the analysis, the preparation of all models and statements of all conclusions contained in the NB Power Evidence in relation to BITOR in reference to this particular application. The auditor shall sign a confidentiality agreement with NB Power. The auditor shall be permitted access to any and all information and data (including electronic data) and personnel that he deems necessary or required to complete his report. This auditor shall express his opinion to the PUB and the Intervenors as to the accuracy of the inputs and outputs and identify and report on the extent of any inaccuracy in the analysis and conclusions.

"The PUB and the Intervenors will be permitted to file additional interrogatories with respect to the redacted

copies and the report of the auditor. The auditor shall be subject to examination on his report at the hearing in this application. The auditor cannot be examined with respect to any redacted items."

And the Board so rules.

Have we thought about timing in the preliminary discussions that Mr. Hashey had with me initially and then through Mr. MacNutt if I recollect?

You were trying to get sufficient time for the auditor to have his report before the 19th of December.

MR. HASHEY: I don't think we will ever achieve the 19th. Hopefully we might be able to achieve the 21st, which means the auditor would have to go to work next week.

One little difficulty in relation to next week is that there have been a second set of interrogatories delivered.

And the people who would be assisting the auditor would be the same people that will have to be very attentive between now and next Tuesday say at least to supply or to get the answers so that they can be set out in time and delivered by Thursday.

In other words there is a typing time involved here. You can't leave it till the Thursday to get the answers to it.

So probably Wednesday on next week hopefully an auditor could be available, would be my guess. And



immediately -- and everything would be made available.

In the meantime things -- like this agreement has to be looked at. We will have to go over those agreements. We will send out a confidentiality agreement hopefully tomorrow.

Once the auditor is identified -- maybe you should order the specific auditor, Mr. Chairman, and we could --

CHAIRMAN: I think we put in auditor here which allows him that if he doesn't wish to do it or sign your agreement he doesn't have to.

MR. HASHEY: Okay.

CHAIRMAN: You know, it is as simple as that. I don't want to --

MR. HASHEY: We know who the identified party is.

CHAIRMAN: Well, that is certainly the gentleman that we will approach. And he has been doing the work for this Board for 20 odd years. Anyway if he were to say no, I -- this is out of my bailiwick.

I have on a tentative basis approached Mr. Easson and said if in fact the Board goes ahead with the motion or agrees with the motion the Power Corp. has filed with us, would you check with the appropriate people at NB Power just to find out what their timing is and scheduling and get a grasp of the kind of nature of the complexity of the information you will have to review, because we would like

to have this done before the 19th of December.

Now I don't know what he is talked about or anything else. But he has done it.

I just looked in the Board's ruling. It indicates in the last paragraph that both the PUB, which means Public Utilities Board staff, and the Intervenors were permitted to file additional interrogatories with respect to the redacted copies and the report of the auditor.

So I think it would be impractical to say that we are going to have the auditor's report before the 19th. And the redacted copies, the sooner they be made available to all the parties the better.

And I would suggest that the parties have two days, after receipt from NB Power, to put in those interrogatories in reference to the redacted copies.

MR. MACNUTT: Two days from the receipt of the auditor's report?

CHAIRMAN: No. I'm talking now just about the redacted copies.

MR. MACNUTT: Oh, I'm sorry.

CHAIRMAN: Okay. And quite frankly I don't think that -- you know, I don't think it's a practical matter to have interrogatories in reference to the auditor's report. I think we had better stop that process. Even though it is in our ruling, it is there, we will deal with it.

But my personal approach would be no, ask your questions at the time of the hearing. Otherwise this interrogatories stage could go on and on forever. And all interrogatories are is to try and define the issues better and get the information out in advance.

I think that the auditor's report probably should stand on its own until Mr. Easson is put on the stand. And you could ask questions about it at that time. But it is in the order. And we will leave it there.

MR. HASHEY: One comment on the order. Little things you miss in the haste. Presumably when the auditor delivers his opinion to the Public Utilities Board and the Intervenors, he can also deliver it to NB Power?

CHAIRMAN: We will have to take that under consideration. I think that is okay to leave that out. Because it will happen, yes.

MR. HASHEY: Yes.

CHAIRMAN: I suggest that what will happen is that it will be delivered by Mr. Easson to us. We will ask him at the same time to copy NB Power and all the Intervenors.

MR. HASHEY: And I would suggest that, just speaking with Mr. Little, that we would be prepared to have him there as early as Tuesday of next week and get right on with this, you know, for Tuesday to look at the agreements and things, and then move into the other stuff.

CHAIRMAN: Well, I will be talking to him very shortly. As I say, he has already spoken. I told him to call Marg Tracy and she would tell him exactly who it is that he should speak with, to know the task that is facing him. So he is -- I think he has done that already. If in fact we rule on it.

That is all the matters in reference to the motion which was returnable today. But I believe that Board staff has handed out that sort of two or three-page summary, blocked out of the various interrogatories that probably -- she is doing so now -- which will be the subject of discussion we hope, the Board sincerely hopes, between the parties now and over the next week or so, and that they don't have to come to a Motions Day.

MR. HASHEY: A lot of this deals with the data situation. There has been discussions today that hopefully is leading to something that would be workable.

You know, a sincere effort is being made to get that in a form again that would be satisfactory to my friends and not create any breaches of confidentiality or problems in relation to the programs and things that were raised.

We are not down to very many items. And it looks pretty promising.

CHAIRMAN: Okay. Good. Does PROMOD do, I presume, what today, yesterday or 10 years ago would have been done by

an army of accountants and mathematicians?

MR. HASHEY: Mr. Little might like to try to address that.

I have never seen PROMOD. I have seen the agreement with them. But that is --

MR. LITTLE: Actually PROMOD was in use by NB Power 10 years ago when --

CHAIRMAN: 15 then, Mr. Little, you know.

MR. LITTLE: I would presume the answer to that question is yes. What it does is simulate the entire NB Power interconnected power system and all the plants in it on a -- I forget the exact frequency, whether it is daily, hourly, weekly or whatever, but on an intensive basis.

And it performs a least cost determination of how the system should be run to produce the lowest power costs overall.

So it is very complex calculations. It would take an army of accountants to calculate it.

MR. HASHEY: I understand this was designed by somebody in Ontario Hydro.

MR. LITTLE: This is widely used. This model is widely used in North America. It is very accepted in regulatory practices and well-known. But it would take an army of accountants to do the same calculations.

CHAIRMAN: So what Mr. Easson would see, if PROMOD is used in reference to, but I don't know that it is, the motion

today, is that part of what he would see would be PROMOD?

MR. LITTLE: Yes. What Mr. Easson would see would be PROSTORE, PROVIEW, PROMOD and the financial models that are used to actually translate some of the final fuel cost information into the evidence that you have got.

CHAIRMAN: So I have some difficulty in how Mr. Easson -- you know, it is not the input but it is the output.

MR. LITTLE: Mr. Easson will have a guided tour from people that will tell him who knows what. And he will have access to the people.

But they will have to in fact sit down with him, show him how the models work, show him where the inputs go in, show him where the outputs come out.

And he may want to have some demonstration runs done, change that number to this and show me what happens.

CHAIRMAN: Yes. Okay.

MR. LITTLE: That would be the process I would anticipate.

CHAIRMAN: Okay. Mr. Hashey, can you address tenders, prices received in tender for scrubber and wet electrostatic precipitator?

It is not concluded. When is that tendering process going to be concluded on that?

MR. HASHEY: When they are able to let the contract, I would suggest. Now this would be ongoing.

CHAIRMAN: Okay. Where I'm coming from, and this again is a

layman, is that I look down at this three pages of things here. And there seems to be an awful lot of data that is contingent on negotiation or tender process.

And you know, again as a layman -- and I haven't talked to staff about this at all. I don't know what their opinion might be.

But you know, I know that the scrubber and wet electrostatic precipitator -- I have a recollection of what it cost at Belledune. And that is one big expense of the whole operation, you know.

MR. HASHEY: That's right.

CHAIRMAN: It really is. And so -- you know, and then I look at this. And I will just conclude by saying this. I look at this and I know that staff and the Board has had sort of exploratory conversations as to how we could deal with certain things that are -- we know are not going to be concluded prior to the conclusion of the evidence being taken in this hearing, like the environmental assessment process, okay.

So -- and you look at parameters. And you know that if you come in, if NB Power files evidence and says -- if the Environmental Assessment Review comes in with this range of -- or within this range, then the evidence that we have is good.

And then the Board will be able to adjourn sine die

until that environmental process is concluded. And if in fact it leaves the cost within that range then that's fine. We can issue a decision immediately thereafter.

But I get into these. And I look at it. This means that for instance pipeline cost, that is going to be a range I presume. The price for the scrubber and the wet electrostatic precipitator, that will be in a range. The capital cost on each fuel delivery, that is again a range.

I see all those ranges out there.

And for me, the layman, I look at it and say, goodness gracious, have we got the cart before the horse here? Or how are we going to practically work through that, so that we can get out in a public forum the best evidence and the public have confidence that in fact everybody in this room has had an opportunity to review the evidence?

MR. LITTLE: Just to -- if I -- off the record -- the way these projects proceed is that it is a level of developing more and more detailed estimates and confidence as you go through.

To get to the fully confident stage you have to have done all of the engineering, all of the tendering. And in fact you are probably 50' to \$100 million into the project.

And I mean, the reality is we bump up against the \$75 million limit before you can get to -- what you would



really like to know is with 100 percent confidence what is this thing going to cost?

So in Coleson's case that is a type of challenge. And in the Lepreau case it is another type of challenge. And it is really a matter of -- I guess from the corporation's standpoint, we have to -- we progressively make these decisions. And our board is consulted all the way through.

And you get the first \$5 million, you do a level of engineering and estimating that gives you enough confidence you go to the next 25 million. You get to that level, you get enough confidence you go to the next 50 million.

And you know, the PUB process, we definitely have to be here before it gets to 75 million. And right now we are -- by March we will be at the \$10 million level with Coleson, starting to spend perhaps \$5 million a month from there forward.

And I mean, we have to convince everybody that we have a basis of estimate that is reasonable and sufficient contingencies that as things unfold we will be able to achieve the price.

But to wait for complete certainty in the tendering we are talking months and tens of millions of dollars. That is just -- that is how the process goes.

CHAIRMAN: Mr. Hyslop?

MR. HYSLOP: Well, Mr. Chairman, if I can, without wishing to argue the case here, this is off the record, you are at the point now where you have a 95 percent confidence level. And that results in about a 10 1/2 percent contingency into your capital cost of 747 million.

MR. LITTLE: Right.

MR. HYSLOP: That is the point you are at.

CHAIRMAN: I don't want to get into any argument. I just gave my layman's impression of things. And I understand - - I appreciate where you are coming from on it, Mr. Little.

I just say from, you know, an economic regulator's point of view. And that is where we are. The statute calls upon us to make a recommendation to your board of directors.

And we don't like to make those recommendations until we have a fairly certain or a certain range. And then we can -- and we know there is a finite date by which -- yes, estimates can always be wrong. There is no question about that.

But when you have got so many different things floating out there, that scares me. I just wonder how -- I'm sure the engineers can break it down into percentages and all sorts of things. But I look at it and say, you

know, until you get to a certain stage how do you know?

Anyway, that is my concern. And I hope that -- I will let anybody say anything they want to after here.

But that is the reason that I have asked Mrs. Dresher to hand these sheets out. Because it sort of puts out the various items that are still up in the air.

And hopefully we can come up with what is a way to cut through some of these questions without the Board having to rule.

Okay. Well, since I have no power to do anything anymore, we might as well go home.

Thank you very much.

MR. HASHEY: Thank you.

CHAIRMAN: And I couldn't say anything more than encouraging the parties to talk, trying to help this.

(Adjourned)

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

Reporter