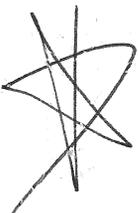


NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE PUBLIC UTILITIES ACT

- and -



IN THE MATTER OF the Audit of **NOVA SCOTIA POWER INCORPORATED'S** Affiliate Code of Conduct for the period from October 1, 2015 to December 31, 2016

BEFORE: Peter W. Gurnham, Q.C., Chair
Roberta J. Clarke, Q.C., Member
Richard J. Melanson, LL.B., Member

APPLICANT: **NOVA SCOTIA POWER INCORPORATED**
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Brian Curry, LL.B.

COUNSEL: **CONSUMER ADVOCATE**
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SMALL BUSINESS ADVOCATE
E.A. Nelson Blackburn, Q.C.
Melissa MacAdam, LL.B.

INDUSTRIAL GROUP
Nancy G. Rubin, Q.C.

NOVA SCOTIA DEPARTMENT OF ENERGY
Stephen T. McGrath, LL.B.

PORT HAWKESBURY PAPER LP
James MacDuff, LL.B.

BOARD COUNSEL: S. Bruce Outhouse, Q.C.

HEARING DATE(S): December 11, 12 and 13, 2017

FINAL SUBMISSIONS: January 22, 2018

DECISION DATE: **March 9, 2018**

DECISION: **See paragraphs [277] to [280]**

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1.0 INTRODUCTION and BACKGROUND

[1] Nova Scotia Power Incorporated (NSPI) is part of Emera Inc. (Emera), the holding company formed after privatization. NSPI was formed as a result of privatization of the Nova Scotia Power Corporation in 1992 under the *Nova Scotia Power Privatization Act*, S.N.S. 1992, c. 8. It is part of the Emera group of companies and is the primary supplier of electricity in the province of Nova Scotia.

[2] NSPI is regulated by the Nova Scotia Utility and Review Board (Board or UARB) under the *Public Utilities Act*, R.S.N.S. 1989, c. 380, as amended, (*PUA*). Its parent company, Emera, however, is not regulated by the Board.

[3] NSPI is a vertically integrated company, which means it generates, transmits and distributes electricity. NSPI does not, however, supply itself with all the goods, and services, or employ all the personnel, it needs to carry out its business. Consequently, from time to time, it shares services with, or obtains goods and services or uses personnel from, other companies which fall under the Emera umbrella. These companies are affiliates of NSPI because of their relationship to Emera. NSPI also provides goods, services, and personnel to Emera and its affiliates.

[4] The ability of NSPI to transact business with its affiliates necessitates rules governing its transactions. This was put succinctly in the opening statement of the Consumer Advocate (CA) at the hearing of this matter:

When Nova Scotia Power buys and sells goods or services with arm's length third parties, there is reasonable presumption that such transactions are free from undue influence. Third party procurement often provides objective evidence of market value. When NSP buys and sells goods or services with an entity affiliated with NSP, important risks are presented.

There is risk that inside information not available to third-party bidders will be conveyed resulting in the affiliate having a competitive advantage over third-party bidders. There is also risk that the price paid or offered by NSP may be influenced by a desire to maximise profit of the affiliated entity to the detriment of Nova Scotia Power ratepayers.

To address the risks inherent in affiliate transactions, this Board has imposed an Affiliate Code of Conduct on Nova Scotia Power. This Affiliate Code mandates that before entering into an affiliate transaction, NSP demonstrate that the transaction is the best available option for ratepayers.

Nova Scotia Power's burden to meet the high standards imposed by the Affiliate Code of Conduct is important in this hearing.

...

Ratepayers rightfully expect Nova Scotia Power to transparently demonstrate that each and every affiliate transaction is the best available option for ratepayers.

Ratepayers also reasonably expect Nova Scotia Power to use its very best efforts to abide by the spirit and intent of the Affiliate Code.

...

The ability to engage in affiliate transactions is a privilege that has been granted to Nova Scotia Power. It is a privilege that must only be exercised when Nova Scotia Power complies with the Affiliate Code, including demonstrating that each affiliate transaction is the best option for ratepayers.

[Transcript, pp. 9-11]

[5] Those rules were first codified in a Code of Conduct, jointly developed by NSPI and the Board, and given interim approval by the Board on March 16, 2001, effective on September 16, 2001. After concerns were raised in a later rate hearing, in 2002 the Board decided to engage PricewaterhouseCoopers to undertake a review of NSPI's compliance with the Interim Code and to recommend any changes. Ultimately, a revised Code was approved by the Board on November 9, 2004, effective January 1, 2005.

[6] One of the principal changes to the Code at that time was a change in the stated purpose of the Code. Instead of "no harm" to NSPI customers as the principle on which affiliate transactions could be justified, the new Code required that there be a "demonstrable benefit" to NSPI customers.

[7] As a result of the Board's decision [2006 NSUARB 23], the Board ordered that the Code of Conduct be revised, and retained Liberty Consulting Group (Liberty) to conduct an audit of affiliate transactions.

[8] The Board issued a decision on June 9, 2008 [2008 NSUARB 61] after a hearing on the Liberty audit, and ordered that the Affiliate Code of Conduct be revised.

The Board stated:

[55]...the Code must be revised and a clear and transparent review standard must be developed which would be used in audits when determining whether an affiliate transaction is of benefit to ratepayers. This test must provide an acceptable record as to the basis of NSPI's decision to engage in an affiliate transaction. In other words, a transaction can only occur if it is demonstrably the best available option for NSPI and that all other alternatives for the provision of goods and services, including third party and in-house options, are carefully and adequately evaluated.

[56] Accordingly, the Board directs that revisions be made to the Code to ensure that customers receive demonstrably the best available option when NSPI engages in affiliate or third party transactions and that a clear and strict standard by which this benefit will be measured be established.

[9] The Board directed that a process be engaged with Board staff, in consultation with NSPI, stakeholders and Liberty to review the Code and make recommendations. The Revised Code of Conduct resulting from this process was approved by the Board on February 24, 2009, effective June 1, 2009. This contained more detailed provisions about how Code compliance should be demonstrated.

[10] NSPI had created Guidelines associated with the Code. It intended they would provide internal guidance on how the protocols of the Code should be interpreted and satisfied. These Guidelines were also reviewed by Liberty.

[11] NSPI filed an annual report with the Board from 2009 forward to and including 2016, which addresses its compliance with the Code. The annual reports are made available to stakeholders such as the CA, the Small Business Advocate (SBA), the Industrial Group, and others who have provided comments to the Board.

[12] During this hearing, the CA noted, in cross-examination of the NSPI panel, concerns expressed by the Board in various matters, (for example, the decision of the

Board in the Digby Wind Farm matter [2011 NSUARB 37]) about affiliate transactions, and the Board's citing the necessity of a "strong Code".

[13] Ms. Hutt agreed with the CA that there is a "...legitimate sensitivity among ratepayers..." with respect to NSPI's dealings with its affiliates.

[14] From the comments of stakeholders on review of the annual reports filed by NSPI, it became clear that the Code required revisions to achieve greater certainty or clarity about affiliate transactions. Stakeholders were given the opportunity to comment on or question aspects of the Code. NSPI responded to those comments.

[15] As a result of the consultation, the Board approved a new revised Code, effective October 1, 2015. This Code is attached as Appendix A to this Decision. The Board advised NSPI that it would engage an external auditor to undertake an audit of NSPI's compliance. The audit would cover the period from October 1, 2015, the effective date of the revised Code, to the end of December 2016.

[16] NorthStar Consulting Group (NorthStar) was engaged by Board Counsel to undertake the audit, and a hearing was scheduled to begin on December 11, 2017.

[17] Over a period of several months, NorthStar met with NSPI personnel, conducted interviews, and issued document and data requests to NSPI. It prepared a draft report which was shared with NSPI. NorthStar then filed its final report with the Board on August 3, 2017, making 33 recommendations.

[18] The Board issued a Hearing Order on August 3, 2017, setting out the timeline for notices of intervention and the filing of evidence prior to the hearing.

[19] The public hearing took place at the Board's offices in Halifax on December 11-13, 2017. NSPI was represented by Daniel W. Ingersoll, Q.C., and Brian Curry, LL.B.,

NSPI Senior Regulatory Counsel. William L. Mahody, Q.C., appeared as the CA, and E. A. Nelson Blackburn, Q.C., and Melissa MacAdam, LL.B., appeared as the SBA. Nancy G. Rubin, Q.C., represented the Industrial Group. James MacDuff, LL.B., attended the hearing on behalf of Port Hawkesbury Paper LLP, but did not actively participate. The Nova Scotia Department of Energy filed a Notice of Intervention, but did not appear.

[20] S. Bruce Outhouse, Q.C., acted as Board Counsel. His only witness was Douglas Bennett, a principal of NorthStar.

[21] NSPI's evidence was given by a panel consisting of Karen Hutt, President and Chief Executive Officer; Christopher Smith, CPA, CA, Vice-President of Finance; Paul Casey, P. Eng., Vice-President, Transmission, Distribution and Delivery; Jennifer Ross, LL.B., Manager of Regulatory Strategy; and Patrick Baryenbruch, CPA, who was qualified as an expert. Mr. Baryenbruch's report was filed as Appendix C to the Reply Evidence of NSPI.

[22] David Vondle testified on behalf of the CA, and Melissa Whitten testified on behalf of the SBA. Each testified by telephone conference, and was qualified as an expert, able to give opinion evidence.

2.0 GOVERNANCE / UTILITY MANAGEMENT

[23] NSPI's governance structure was a focus of concern at the hearing.

[24] Code provisions relevant to this issue are:

- 1.1 The purpose of this Code of Conduct is to ensure that: (i) NS Power does not cross subsidize and NS Power's customers do not bear any risks or losses because of its affiliates, (ii) NS Power's organization and management is focused on utility operations, (iii) customer information maintained by NS Power is protected in transactions with affiliates, (iv) NS Power's financial records and other financial information are separate from those of its affiliates, and (v) NS Power complies with the Code of Conduct with a sufficient level of transparency.

...

3.1 Emera, the parent company of NS Power, will create and maintain a corporate organizational structure which ensures that regulated electric and other utility services are provided solely by NS Power and by no other affiliate.

...

4.1 NS Power will maintain within the utility a management team capable of delivering a superior level of performance.

[Exhibit N-32]

[25] NorthStar found that NSPI's management team is not maintained entirely within the NSPI organization and is not separate from affiliates, noting that numerous NSPI executives and managers report directly to Emera managers and Emera personnel report to NSPI managers. Officers hold key positions in both NSPI and Emera and in particular:

- the Emera COO is also the NSPI Board of Directors' Chair;
- for a time during the audit NSPI's Vice President Finance was shared with Emera.

[26] Other shared executives include the Corporate Secretary, Chief Legal Officer and Chief Human Resources Officer.

2.1 Chair of Board of Directors

[27] Until June of 2016, the NSPI Charter required that the Chair of the Board of Directors be an independent Director and that a majority of Directors be independent Directors. The requirement for an independent Chair was removed in 2016, apparently to enable the appointment of the Chief Operating Officer of Emera as Chair of the NSPI Board. At the time of the hearing, the Chief Operating Officer of Emera was also Chair of the Board of Emera Utility Services, a company frequently transacting with NSPI, and the Chair of the Board of Emera Brunswick Pipeline, a company undertaking commercial

activities that could, if successful, be detrimental to NSPI and its customers. He also serves as Chair of a number of other Emera/NSPI affiliates.

[28] The rationale for making the change and appointing an insider as Chair of the NSPI Board was not explained in the hearing.

[29] Relying in particular on the evidence of its expert witness, Mr. Baryenbruch, NSPI argued that the degree of overlap between NSPI and its affiliates was appropriate and common to the utility industry. NSPI argued that the reason for the existence of the Code is to manage “an inherent conflict that is created between affiliates themselves each time NS Power transacts with its affiliates” [Exhibit N-50, p. 4].

[30] NSPI argued vigorously that the UARB is, as a matter of law, precluded from interfering with the corporate structure of NSPI.

...Accordingly, the UARB’s supervisory function does not amount to an unfettered right to interfere with the structure and management of a utility.

...

To this end, as the sole shareholder and owner of NS Power, Emera has a substantive and legitimate interest in protecting its investment.

[Exhibit N-47, p. 47]

...

Any infringement on these rights is a substantial interference with the rights of NS Power’s shareholder and its own management functions that should not be interfered without legislative justification.

[Exhibit N-47, p. 48]

...

Therefore, as with general rules of corporate law, the substantive concern for NS Power, the UARB and its customers, should not be whether a conflict may arise, but rather whether the conflict is handled in a manner that protects NS Power and its customers. To this end, the fiduciary obligation to which NS Power’s directors and officers are held is to act honestly and fairly to ensure protection of NS Power and its customers’ interests, whether in conflict situations or otherwise.

[Exhibit N-50, p. 5]

[31] NSPI expressed confidence that its existing controls provide a framework to ensure protection of confidential information and require a Director to recuse himself or herself if engaged in a conflict related to an affiliate or otherwise.

[32] On the other hand, the Industrial Group argued that having an independent Chair of NSPI is of critical importance in maintaining the focus of NSPI on the best interests of utility ratepayers.

[33] The CA expressed a concern that this significant governance change and cross appointment occurred without any new process in place to formally assess and document conflict related matters. Indeed, there has not been a single documented recusal by an NSPI official, including its Chair of the Board of Directors, since these changes.

2.1.1 Emera Brunswick Pipeline

[34] Another focus of concern at the hearing was the potential conflict of the Chair of the NSPI Board related to circumstances concerning the Emera Brunswick Pipeline owned by NSPI's parent, Emera Inc. Briefly stated, Emera Brunswick Pipeline has attempted to attract Irving, currently a customer of the Maritimes & Northeast Pipeline, to be a customer of Emera Brunswick Pipeline. As a defensive maneuver, Maritimes & Northeast Pipeline applied to the National Energy Board to institute a load retention rate for Irving so that it would not leave the system. Loss of Irving from the system, or the creation of a load retention rate, would put upward pressure on rates for remaining customers of Maritimes & Northeast Pipeline, including NSPI. The following exchange between Board Counsel and Ms. Hutt highlighted the concern:

Q. Did he have any input in that decision?

A. (Hutt) Of whether or not it went to the Board? Mr. Balfour and I had a conversation about it, and he understood and agreed that the position that Nova Scotia Power was required to take on this was to act in the best interest of our customers. It's also acknowledged that other affiliates would need to act in the interests of their customers. We understood that.

Mr. Balfour displayed nothing but support for the position that I had indicated him that management was prepared to undertake. And I think in this particular circumstance it has played out in a very public way, the opposing interests of the affiliates, and I would hope that this is actually a rather unique example, and it gives comfort that there was absolutely no indication of us acting in any way that would be inappropriate or that wouldn't represent the best interests of our customers.

Q. I understand what you're saying, Ms. Hutt, and I'm certainly not questioning what Nova Scotia Power did in the circumstance.

The question is whether the organization structure that you go with Mr. Balfour being Chair of Nova Scotia Power's Board, the Emera Board, the Emera New Brunswick Board, EUS, I think EES, those companies, that is EUS, EES, Emera Brunswick Pipeline and Nova Scotia Power are bound to have ongoing conflicting interests. What's in the best interest of those others is not in the best interest of Nova Scotia Power. And you have the same person chairing all those Boards of Directors.

There will be constant conflicts of interest. one could say ongoing conflicts of interest. I guess what you're telling me a) most don't rise to the level of the Board; is that correct?

A. (Hutt) To my experience so far, that has not been the case. That's correct.

Q. And if they did, Mr. Balfour would act correctly, or the company would act correctly, despite what he said?

A. (Hutt) Well, I think it's important to just emphasize that Mr. Balfour and the rest of the organization would be particularly sensitive to the concern around the affiliate engagement that he has.

And so while there's no question our Articles of Incorporation contemplate a conflict, it applies to either an independent director or otherwise. But it would be, I think, expected that we would treat affiliate matters with particular sensitivity and that Mr. Balfour would never want to be a in a position where anyone believed that he was compromising his ability to act in the fiduciary best interests of Nova Scotia Power or any other Board that he participates in.

Q. I understand that about Mr. Balfour, but we're talking about an organizational setup where you have the same person chairing Boards of companies, Board of Directors of companies, who are in continual conflict of interest situations. And that's the situation you have set up. And I understand you're saying nothing improper has happened, and with the personalities involved, I'm not suggesting there would be, but you have set up an organizational structure, I suggest, which is rife with conflict.

A. (Hutt) But we've contemplated how to manage those potential concerns with a variety of different protections. And so I would just suggest that we haven't overlooked what might be a concern, broadly, around the structure. And we have made sure that we have protections in place from the Emera Code of Conduct down that deals with all of the various concerns that could arise as it relates to confidential information, the transferring of that confidential information, the event of a conflict and how that's managed. Those are all

contemplated in the rules. And it's well expected that anybody in those positions has to abide by them.

And, you know, the other point that I think is important to consider here is Emera, as the shareholder of all of those businesses, is not motivated to act in a way that would create conflict in a way that would cause any of those businesses to not be able to comply with their own rules. That interest just simply doesn't exist.

Q. Well, that's not necessarily complying with their own rules. I mean, just take the situation with Emera Brunswick. That's the situation we're dealing with. You've got Emera Brunswick who's in business, and it's going to be the alternate provider. It's the one who could provide the alternate service to the Irving company, if M&NP doesn't match, in effect, that proposal.

So Emera Brunswick stands to profit. It stands to profit from this. And on the other hand, that profit, if it's earned, that goes to Emera. Emera owns Emera Brunswick. So you can make, let's say, another \$20 million a year in Emera Brunswick.

And what that does is drive fuel costs up by, say, \$30 million in Nova Scotia. Well, here it's not going to affect Nova Scotia Power's profitability, because Nova Scotia Power has a FAM. And so it's going to get the fuel costs passed through. So customers bear that extra cost that's being earned in profit by Emera Brunswick.

So from Emera parent point of view, it's getting an extra \$20 million. So why wouldn't it be in its interests to see Emera Brunswick prevail? Because fuel costs -- additional fuel costs in Nova Scotia is going to be recovered anyway.

From a pure commercial point of view, I'm not saying from other points of view, but from a pure commercial point of view, Emera parent would favour Emera Brunswick in that situation. It increases its profits, plain and simple.

A. (Hutt) I'm not sure that I could draw the same conclusion. What I can say is that Emera Brunswick Pipe is subject to its own set of rules and obligations. It's regulated by the National Energy Board. It has to act in a certain way and it has to be responsive to those rules. I presume that's what they're doing.

We have our own set of rules that we need to act if the outcome is the result, as you described, that's one consideration. But, importantly, the question at hand here is, was information used inappropriately to create that result? And, what I'm suggesting is that we have protections in place to prevent that from happening.

Q. Let me take one step further. If that were to happen, regardless of whether information was shared improperly, if the parent company allows one of its affiliates to take actions which harm Nova Scotia Power, harm Nova Scotia Power's customers, should those customers bear that cost or should the shareholder of Nova Scotia Power?

A. (Hutt) If Emera acted inappropriately ---

Q. I'm not suggesting inappropriate action.

A. (Hutt) But I think that's the question, that the rules are set in place and everybody needs to agree to follow the rules. And to the extent that the rules are followed, from my perspective, that's how we should be measured.

Q. But how much comfort can the Board have and the public have that the rules are being followed when the person in charge of Emera is making -- is the head of the Board of Directors of Nova Scotia Power and is the head of the Board of Directors of Emera? Actually, not Board of Directors of Emera -- he's the CEO of Emera and he is also head of the Board of Directors -- he's the Chair of the Board of Directors of Emera Brunswick Pipeline.

What comfort can the Board and the public take from that organizational arrangement? And you're saying that they should rely on the protections in the Emera Code of Conduct and in the conflict of interest rules in the company's bylaws.

A. (Hutt) But the rules that we follow from a Nova Scotia perspective are the law, in terms of how we act as a corporation. And so it's not simply an internal guideline; it's the law that prescribes how we need to act. And it very clearly describes how a conflict needs to be handled in the case of Board matters.

And so it's above and beyond the internal standards that exist. And I'm not saying that to diminish the importance of the internal standards; they're important, but in this circumstance, it's the law that dictates this.

And so there's no interest from Nova Scotia Power's perspective, or Emera's perspective, to try to override the law.

[Transcript, pp. 453-461]

[35] Each of the SBA, CA and Industrial Group expressed concern about these circumstances. The Industrial Group stated:

The concern about conflict is more sharply focused when looking at the NSPI Chair who has fiduciary obligations not only to the regulated utility, but also to the parent profit-motivated holding company as well as other competing affiliates. This structure adopted in June 2016, purportedly is addressed through the NSPI Board conflict provisions, adherence to the Emera Code of Conduct and NSPI's Affiliate Code. The National Energy Board hearing regarding Brunswick Pipeline provided an ideal opportunity to test this. We learned in the hearing however that at no time did the Chair recuse herself [sic] due to conflict of interest -- reportedly because it was never discussed.

It seems incredible that NSPI would take a public position contrary to an affiliate without this being discussed at a Board level, (even if the implementation of the intervention would have been handled at an operations level). Ms. Hutt did admit, however, that she had a discussion with Mr. Balfour, Chair of the Board (and CEO of Emera Inc., Chair of Emera Utility Services, Emera and Chair of Brunswick Pipeline) and he had "no concerns".

...

The fact that an off-the-record conversation occurred between Ms. Hutt and Mr. Balfour and there was an understanding and an agreement reached with respect to the position being taken by NSPI and support offered does nothing to demonstrate the recognition of the conflict of interest requirements. No discussions should have taken place. The conflict was patently obvious. [Emphasis added in original]

[Exhibit N-48, pp. 7-8]

[36] The CA, in argument, referenced Exhibit N-41, *The Corporate Governance Review*, Seventh Edition, which states: an independent Chair is an accepted industry goal.

[37] NSPI's position appeared to be that the provision only relates to public companies and that since NSPI is now only a reporting issuer for purposes of debt, it did not apply to NSPI. NSPI went on to say:

...Therefore, while NP 58-201 does still suggest an independent board chair or "lead" director, it also remains explicit that the policy is only a consideration and may not be practical or necessary in every context, particularly for companies like NS Power, which not only has a controlling shareholder, but a sole shareholder.

[Exhibit N-50, p. 9]

2.2 Analysis

[38] In the UARB's view, NSPI has gone from a governance structure that could be described as good practice prior to June of 2016, of having an independent Chair of the Board and a majority of independent Directors, to a much less desirable circumstance of appointing an insider as, not only Chair of the Board of NSPI, but as Chair of the Board of affiliates, Emera Brunswick Pipeline and Emera Utility Services, whose conduct can have a direct impact on NSPI. NSPI filed an updated Affiliate Code of Conduct Affiliate Listing following the conclusion of the hearing, dated February 5, 2018. In that filing, the UARB notes that Mr. Balfour resigned as Chair of Emera Utility Services on January 19, 2018, and resigned as Chair of Emera Brunswick Pipeline on January 30, 2018. Other Emera insiders were appointed to chair those two Boards.

[39] The UARB agrees with NSPI that, as sole shareholder of NSPI, Emera has a substantive and legitimate interest in the operations of NSPI. As noted by Mr. Bennett of NorthStar, Emera is entitled to know any information in its capacity as shareholder

providing that there is no information conduit to its affiliates. The UARB has no interest in interfering with Emera's ability to exercise its legitimate rights as shareholder of NSPI.

[40] Additionally, the UARB, while concerned about the conversation noted by the Industrial Group, makes no conclusion with respect to Mr. Balfour's conduct.

[41] What the UARB is concerned about is a governance circumstance that has been created which, to quote Board Counsel, "is rife with conflict".

[42] On the discussion which took place between Mr. Balfour and Ms. Hutt, NSPI stated:

Second, there was nothing inappropriate in Ms. Hutt's disclosure of NS Power's position on the M&NP situation to Mr. Balfour. It is only reasonable that Mr. Balfour, as Chair of NS Power's Board of Directors, be apprised of strategy decisions. Further, Mr. Balfour is, among other roles, the Chief Operating Officer of Emera and, as with any other senior manager of Emera, is entitled in that role to be informed of NS Power's operations and strategy decisions. As the auditor confirmed at the hearing, there is no information of NS Power that Emera, as the parent company, should not be able to review.

[Exhibit N-50, p. 7]

[43] With respect, NSPI misses the point. If Mr. Balfour's only role was the Chief Operating Officer at Emera there would be less of a concern. The problem is, he was Chair of the Board of Emera Brunswick Pipeline and Chair of the Board of other affiliates, some of which regularly transact with NSPI. That creates potential conflicts.

[44] One of NSPI's principal arguments is that the UARB is without legal authority to amend the Code of Conduct to do anything about this situation. It also argued that under its Articles of Incorporation and the Emera Code of Conduct, Directors would be required to exercise their fiduciary obligation to NSPI. The logical extension of NSPI's argument is that the NSPI Board could be populated entirely by Emera insiders and the UARB is without any ability to address this in the context of the Code.

[45] In the UARB's view, as a matter of law, it has two clear alternatives with respect to governance. It could:

1. prohibit affiliate transactions;
2. find, if an affiliate sets out to harm NSPI, any cost occasioned by that harm may be determined to be a shareholder cost.

[46] The question is whether the UARB can go further and amend the Code to require an independent Chair or, alternatively, an independent Lead Director.

[47] The UARB is a creature of statute and can only obtain jurisdiction from two sources: one, express grant of jurisdiction under the *PUA* and under other statutes (express powers); and two, from common law by application of the doctrine of jurisdiction by necessary implication (implicit powers).

[48] In *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] SCC 4, the majority decision stated, at paragraph 51, that:

...the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature.

[49] The majority also held, at paragraph 74 of the *ATCO Gas* decision, that:

...the doctrine of jurisdiction by necessary implication will be of less help in the case of broadly drawn powers than for narrowly drawn ones. Broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework.

[50] There is nothing in the *PUA* or any other relevant legislation which expressly confers authority on the UARB to require NSPI to have an independent Chair of its Board of Directors or an independent Lead Director.

[51] The UARB is not aware of any reported case where a regulator has ordered a public utility to have an independent Chair or independent Lead Director. The UARB is

aware of only two cases where regulators have imposed requirements on the composition and functioning of a public utility Board of Directors.

[52] In *Centra Gas Manitoba Inc. v. Manitoba (Public Utilities Board)*, [1997] M.J. No. 165, a judge of the Manitoba Court of Appeal denied an application for leave to appeal from a decision of the Manitoba Public Utilities Board which required that Centra not share facilities, executives, staff and employees with its affiliates and that Centra's Board of Directors should be separate from its affiliates with not more than 25% of shared Directors.

[53] In *Toronto Hydro-Electric System Limited v. Ontario Energy Board*, [2010] 99 O.R. (3d) 481, the Court of Appeal overturned a decision of the Divisional Court and reinstated the decision of the OEB to place a condition on the utility requiring approval by a majority of the utility's independent Directors before issuing any future dividends.

[54] In *Centra Gas*, the Manitoba board held a generic hearing to review the utility's role in the supply of natural gas to consumers within a new deregulated environment. The governing legislation included a general supervision clause which applied to "all public utilities and the owners thereof". It also included a provision which required all contracts between the utility and its affiliates be approved by the regulator. Further, the regulator was given express authority to disapprove, amend or terminate any such contracts. The general supervision clause in the Nova Scotia *PUA* does not expressly apply to the owners of utilities and the *PUA* does not require Board approval of affiliate contracts.

[55] Following the generic hearing, the Manitoba board found that Centra should not be allowed to share facilities, executives and employees with its affiliates. It also

established criteria for the continuation or establishment of future shared services. The board's decision included a directive that Centra's Board of Directors should be separate from its affiliates' boards, subject to the proviso that it could have up to 25% of shared Directors. From the chambers judge's brief decision, it does not appear that this directive was appealed. Rather, Centra's application for leave asserted errors by the Manitoba PUB in relation to the forced transfer of contracts, restrictions on advertisement of certain services by Centra's affiliates and the prohibition against shared facilities arrangements. The main thrust of Centra's argument was that the board had no jurisdiction to restrict it or its affiliates from competing in businesses which did not form part of the public utility or regulate the transfer of non-utility assets (contracts) to a related company.

[56] In *Toronto Hydro-Electric*, the distribution utility was wholly owned by the City of Toronto. During a rate proceeding, the OEB heard evidence that the utility had recently started paying much larger dividends at the request of the city. The OEB also heard evidence that the utility had under-invested in physical plant over the past several years and increased capital spending was required to address issues of aging plant and to maintain system reliability. As a result of the board's concerns arising from the evidence, it included a provision in its rate order requiring the utility to obtain the approval of a majority of its independent Directors before declaring any future dividends. The utility appealed arguing that the board had no jurisdiction to impose the condition and that it represented an unwarranted and unlawful restriction on the authority of the Board of Directors to declare a dividend. The Ontario Divisional Court upheld the appeal. In doing so, it applied the "correctness" standard of review. However, the Ontario Court of Appeal

overturned the decision applying the “reasonableness” standard, restoring the OEB decision.

[57] Section 70.1 of the *Ontario Energy Board Act* expressly confers authority on the OEB to “issue codes that...may be incorporated by reference as conditions of a [utility’s] license”. Pursuant to this authority, the OEB had established an Affiliate Relationships Code for Electricity Distributors and Transmitters which included a provision requiring that at least one-third of a licensed electricity distributor’s Board of Directors must be independent of any affiliate. The OEB’s decision to require approval of future dividends by the utility’s independent Directors was made in a context where at least one-third of the members of the Board were required to be independent.

[58] Having considered the matter carefully, the UARB is not satisfied it has the implied authority to require NSPI to have an independent Chair or an independent Lead Director. The *Centra Gas* and *Toronto Hydro-Electric* cases are both based on substantially different fact patterns and statutory regimes.

[59] So, while the UARB believes an independent Chair would be best practice, without more certain statutory authority under the *PUA*, it has concluded it should not make such an Order.

[60] The UARB clearly had the authority to order the audit and to hold the public hearing concerning alleged breaches. That jurisdiction flows from the UARB’s express authority to set just and reasonable rates and determine allowable costs. Affiliate transactions pose risks in terms of excess costs and cross-subsidization because of their non-arms-length nature. So, as noted earlier, if the UARB were to conclude that ratepayers would incur excess costs in an affiliate transaction under NSPI’s current

governance structure, it could prohibit affiliate transactions to prevent that from happening. The UARB could also disallow costs, in appropriate circumstances, if ratepayers suffer harm as a result of conduct between NSPI and its affiliate.

[61] There is no evidence in this hearing which would cause the UARB to disallow affiliate transaction costs. The UARB has determined that it would not be appropriate at this time to prohibit affiliate transactions so long as they comply with the Code. The UARB requests NSPI reconsider the structure of its Board and reconsider returning to the good governance practice of having an independent Chair; however, that is as far as it appears the UARB can go.

[62] In its closing submission, NSPI proposed to revise its guidelines to provide that in every calendar year if any person acts as both a Director or Officer of NSPI and a Director or Officer of Emera, or an affiliate, that person must:

- (a) complete the Emera Code of Conduct training;
- (b) complete the NS Power Affiliate Code of Conduct training; and
- (c) execute a Confidentiality Undertaking with respect to NSPI's confidential information.

Confirmation of that would be given by the President of NSPI as part of the Annual Report filing. The UARB agrees those would be desirable steps.

2.3 Shared Executives

[63] NSPI maintained that it complies with Section 3.1 of the Code by virtue of the fact that all members of the Executive Leadership Team are full time employees of NSPI and that the Executive Leadership Team contains all of the positions needed to comply with Section 3.1 of the Code. This Section requires maintenance of a corporate

organizational structure which ensures that regulated and other utility services are provided solely by NSPI.

[64] Insofar as the Executive Leadership Team is concerned, as it is currently constituted by Ms. Hutt, the Board is generally satisfied that those positions allow NSPI to comply with Section 3.1. The current Executive Leadership Team constitutes the senior positions needed to independently manage the utility. The UARB accepts that the Code was not intended to preclude NSPI employees from doing work for affiliates and vice versa, so long as the Code protocols are complied with. Likewise, the Code does not prohibit cross appointment of certain officials, for example the Corporate Secretary, again so long as the Code protocols are complied with.

[65] However, the UARB has two issues. The Executive Leadership Team is determined at the sole discretion of the President of NSPI and could change tomorrow without the UARB or stakeholders knowing.

[66] To alleviate that concern, the next revision of the Code will require that any changes to the composition of the Executive Leadership Team be filed with the UARB. If changes are made that are of concern to the UARB or stakeholders those could be raised with NSPI.

[67] Secondly, as pointed out during the hearing, there are certain sensitive positions, such as the Director of Procurement, who are not on the Executive Leadership Team, and need not be, but should not be shared with any affiliate transacting for goods or services with NSPI. The next revision of the Code will identify these key positions.

2.4 Confidentiality

[68] This issue concerns the protection of confidential information in circumstances where there are cross appointments, transfer of employees to and from affiliates, and temporary assignments to or from an affiliate.

[69] NorthStar, in its audit, described the following circumstance:

- As a regulated public utility, NS Power must be above reproach regarding personnel transfers and the protection of sensitive and competitive information. Two personnel transfers provide examples of the potential appearance of a “revolving door” and senior management’s knowledge of confidential and commercially sensitive information traveling between NS Power and its unregulated affiliate. These management positions were related to the evaluation and decision-making process that resulted in the five-year PLT contract and other contracts with EUS:
 - The first transfer involved the NS Power VP Finance to EUS President and CEO, back to Emera Inc. Finance and NS Power Finance.
 - The NS Power VP Finance during 2012/2013 became the President and CEO of EUS March 19, 2013.
 - Within months after the transfer from NS Power Finance to EUS, EUS was sent NS Power’s Request for Proposal (RFP) to obtain PLT services. While the RFP was not dated, the schedule contained in the RFP noted that it was issued October 24, 2013. Submissions were due November 20, 2013.
 - The EUS proposal to provide PLT services was dated December 2, 2013.
 - The EUS President and COO signed the EUS proposal.
 - NS Power’s procurement recommendation for the selection of EUS was made in May, 2014.
 - One month prior to signing the contract with EUS, securing its baseload of work for five years at greater than \$[Redacted] million annually, and spending 17 months at EUS, the EUS President was then promoted to Emera Inc. VP Finance – September 1, 2014.
 - NS Power’s contract for PLT services was dated October 1, 2014.
 - On August 10, 2015 the Emera Inc. VP Finance took on the additional role of VP Finance at NS Power and remained in this dual role during the audit period, reporting to the NS Power CEO and the Emera, Inc. CFO.
 - The Director of Procurement at NS Power transferred to EUS as President and COO on May 11, 2015 seven months after the PLT contract dated October 1, 2014 and remains in that role today.
 - The NS Power Director of Procurement transferred to EUS with the NS Power laptop and information contained therein.

- NS Power's procurement recommendation for the selection of EUS was made in May, 2014.
- The NS Power Director of Procurement was promoted to the EUS President and COO seven months after execution of the PLT service agreement.
- Less than one month from this promotion to EUS President and COO, this same manager signed a proposal to NS Power for EUS services – the only proposal received by NS Power. EUS secured four contracts within the audit period from NS Power, representing over \$[Redacted] million in services in addition to the EUS PLT contract. None of these awards had appreciable procurement competition.

[Exhibit N-1, pp. IV-3 and IV-4]

[70] In the UARB's view, NorthStar was justified in bringing these confidentiality concerns to the Board.

[71] From the evidence of Ms. Ross, it appears that NSPI has recently undertaken a number of initiatives to address these concerns. Some of those were noted in Undertaking U-4.

[72] NSPI prepared an Employee Transfer Checklist to be filled out and completed for every employee transferring to or from NSPI. The Checklist deals with arrangements concerning laptops, cellphones, tablets and other IT assets, possession of confidential information, whether the transferring position is sensitive in light of the employee's current position, and other relevant issues.

[73] NSPI also filed, in Undertaking U-4, a new standard Confidentiality Form for short term assignments, and an Employee Transfer Agreement for employees transferring from NSPI to an affiliate, and other associated documentation.

[74] In addition, NSPI advised it will soon be establishing a formalized training module which will ensure that NSPI employees receive training on the Code each year. Training, with respect to the Code, would also be provided to affiliate employees who are assigned to work for NSPI.

[75] The UARB believes that these measures, as described by Ms. Ross and undertaken by NSPI, albeit belatedly, go a long way to satisfying the concerns that were raised with respect to the transfer of confidential information.

[76] The proof of the success of these initiatives will, of course, be subject to review in the next audit.

[77] During the process to amend the Code, the UARB will be inviting NSPI and parties to comment on the appropriateness of establishing a holding period for employees who transfer to or from a particularly sensitive position. During the holding period the employee would be precluded from being involved in any NSPI affiliate transaction with the affiliate the employee transfers to or from. That suggestion was not raised by the UARB during the hearing, but the UARB believes it is worthy of consideration in connection with the Code amendment process.

3.0 UTILITY FINANCING

[78] NorthStar recommended that NSPI should clarify the extent of its financial separation from Emera, including language that includes bankruptcy resistant covenants. NorthStar also said the Board should direct NSPI to implement ring-fencing provisions.

[79] NorthStar further recommended that NSPI should investigate if the transfer of Part VI.1 Tax, under the *Income Tax Act (Canada)* from Emera to NSPI, could substantiate a claim by creditors that the assets of NS Power could be accessed in a bankruptcy claim against Emera.

3.1 Bankruptcy Resistant Covenants and Ring-Fencing

[80] Protocol 5.2(i) of the Code requires NSPI to “enact bankruptcy resistant covenants that protect the utility in the event of a parent company bankruptcy.”

[81] The Code does not define the term “bankruptcy resistant covenants.” Mr. Bennett indicated that ring-fencing and bankruptcy resistant covenants are synonymous terms. In response to a question from Mr. Blackburn, he provided his opinion on the meaning of the term:

MR. BLACKBURN: Maybe I missed it; I didn't quite see in your report what it was that you are asking Nova Scotia Power to do with respect to ring fencing, specifically.

MR. BENNETT: In our experience, a ring fence is a term used for the separation of assets between two entities, such as NS Power and its parent, Emera. Ring fencing refers to the activities of separating, and therefore protecting, those assets between those -- between two entities. The ring fencing and covenants that protect the utility are synonymous.

[Transcript, p. 122]

[82] Mr. Vondle said NSPI's ring-fencing measures should be re-evaluated “to assume that comprehensive measures are in place to shield NS Power legally and financially from affiliate risk.” [Exhibit N-14, p. 25]

[83] Ms. Whitten agreed with NorthStar's recommendations with respect to ring-fencing.

[84] None of the experts suggested any particular wording or provisions which should be incorporated in NSPI's financing documents.

[85] NSPI explained its ring-fencing measures as follows:

NS Power maintains short and long-term debt programs with related independent credit agreements which are separate and distinct from its parent and affiliates for borrowings under its revolving credit facility and trust indenture for the issuance of long-term notes. NS Power provided NorthStar with copies of the default provisions from its credit agreement trust indenture which showed there were no provisions in either document that would permit cross default relating to any of NS Power's affiliates in the event of a bankruptcy event (i.e., a default by an affiliate under its own agreement(s) does not cause an “event of default” by NS Power under the agreements). As such, the agreements ensure there is no recourse to NS Power's assets in the event of a bankruptcy of Emera and such assets are thereby effectively “ring fenced”.

[Exhibit N-5, p. 63]

[86] NSPI maintained that NorthStar did not require access to the records of Emera, and its affiliates, in order to verify ring-fencing, since only NSPI could encumber its own assets, or otherwise guarantee debt of its parent or affiliates.

[87] During the course of the hearing, NSPI agreed to provide an opinion from a reputable law firm, on a confidential basis, confirming NSPI has bankruptcy resistant covenants sufficient to protect it in the event of an Emera bankruptcy.

3.1.1 Analysis

[88] As a matter of general law, neither NSPI, nor Emera, can contract out of the provisions of the *Bankruptcy and Insolvency Act (Canada)*, which sets out the rights and responsibilities of creditors and debtors, in the event of a bankruptcy or insolvency.

[89] Absent the availability of extraordinary remedies, such as substantive consolidation discussed below, in order to incur liability in relation to the debts and obligations of its parent, NSPI would have to enter into contractual arrangements assuming responsibility for such liabilities. As a matter of basic contract law, Emera cannot impose liability on NSPI, without NSPI being a signatory to such agreements.

[90] There is no evidence NSPI has guaranteed, or co-signed, any of the obligations of Emera, or its affiliates. There is no evidence NSPI executed security agreements with cross-default clauses, stipulating that the default of Emera, or its affiliates, constitutes a default by NSPI. NorthStar found NSPI was in compliance with Protocol 5.2(iii) prohibiting cross-default clauses.

[91] In Undertaking U-3, NSPI has provided the Board, on a confidential basis, with an opinion from Osler, Hoskin & Harcourt LLP confirming NSPI's credit agreements

have a covenant pattern that would not expose NSPI's assets to Emera's creditors if Emera were to go bankrupt.

[92] In these circumstances, the Board considers the issue of bankruptcy resistant covenants has been addressed. No further action is required at this time.

3.2 Part VI.1 Tax Transfer

[93] In response to the recommendation by NorthStar, NSPI stated:

NS Power has considered whether the transfer by Emera of Part VI.1 tax liabilities under the *Income Tax Act (Canada)* and the associated deduction from taxable income under Part I of the ITA (Transfers) to NS Power could substantiate a claim by a creditor of Emera that the assets of NS Power could be accessed by Emera's creditors in the event of any voluntary or involuntary proceedings in respect of Emera under the *Bankruptcy and Insolvency Act (Canada)* or the *Companies' Creditors Arrangement Act (Canada)*.

In the unlikely event of bankruptcy or other insolvency proceeding involving Emera, Emera's creditors would be required to successfully assert a claim for substantive consolidation of NS Power and Emera in order to access NS Power's assets.

The transfers are unlikely to have a significant impact on a court's analysis of the substantive consolidation test. Further, the transfers themselves should not give rise to a claim for substantive consolidation by a Canadian court and therefore, in the event that Emera commenced insolvency proceedings, they should not substantiate a claim by a creditor of Emera for access to NS Power's assets. NS Power is unaware of any case where the sale and transfer of tax attributes between related companies has been considered by the court in its analysis of the appropriateness of ordering substantive consolidation.

[Exhibit N-5, pp. 64-65]

[94] During the course of the hearing, NSPI agreed to provide to the Board, on a confidential basis, an opinion from a reputable law firm addressing this issue.

3.2.1 Analysis

[95] As the Board understands it, substantive consolidation is an extraordinary judicial remedy whereby a court would consolidate legally separate entities to allow the pooling of assets to satisfy creditor claims. It has some similarity with the concept of "piercing the corporate veil" between a company and its shareholders, although it is more often used to consolidate the assets of affiliates.

[96] As part of Undertaking U-3, NSPI has provided a confidential opinion from Osler, Hoskin & Harcourt LLP confirming that the transfers by Emera of its 2015 and 2016 Part VI.1 tax liabilities under the *Income Tax Act (Canada)* to NSPI should not on their own substantiate a claim that a creditor of Emera could access NSPI's assets.

[97] As the recommendation from NorthStar was that the issue be investigated by NSPI, the Board considers that this issue has been addressed.

4.0 FAIR DEALING

[98] Code Section 6.0, titled Fair Dealings, contains 18 protocols. The objective of this provision is:

To avoid discrimination in the matter of pricing or in any other manner against non-affiliated buyers of regulated electric utility services.

To avoid subsidy by NS Power of the costs, revenues, or activities of affiliates.

[Exhibit N-1, p. VI-1]

[99] The Fair Dealings provisions, and indeed the Code itself, are informed by the Statement of Principles set out in Section 2.0 of the Code.

[100] NorthStar summarizes the key aspects of Section 2.0 of the Code:

Fundamental elements of the Code requiring compliance are:

- Analyses must precede any transaction with affiliates.
- Transactions must receive sound, objective, transparent and reasonable documentation of alternatives analysis.
- Other alternatives analysis and documentation shall identify and compare:
 - Other reasonably available commercial alternatives considered.
 - Self-provisioning by NS Power versus an affiliate considered.
 - Joint provisioning documentation, if considered.
 - Joint NS/affiliate provisioning documentation, if considered.
 - Other arrangements documented, if considered.

[Exhibit N-1, p. II-3]

[101] NorthStar says that NSPI did not comply, or only partially complied, with the following protocols:

- 2.1, 2.2, and 2.3 on the basis that NSPI did not perform the proper analysis prior to transacting with its affiliates;
- 6.2, indicating that the Company did not maintain a separate information system from its affiliates;
- 6.7, alleging that NSPI did not perform the required fair market value (FMV) or self-provisioning analysis for highlighted transactions;
- 6.8, saying certain services supplied by Emera, or to affiliates, were based on fully allocated costs, without supporting evidence establishing FMV. NorthStar also found that a transaction with Emera Utility Services (EUS), associated with the testing of transformer oil, was not competitively bid or market based;
- 6.9, indicating NSPI did not provide documentation to demonstrate its inability to determine FMV for certain transactions;
- 6.10, which relates to the transfer of capital assets between affiliates, saying that NSPI could not document or demonstrate computers and information did not transfer with personnel between affiliates;
- 6.11, indicating no FMV analysis was performed in relation to Management and Administrative (M&A) services to enable them to be provided between NSPI and its affiliates priced at fully allocated costs;
- 6.15, saying NSPI does not have a comprehensive cost accounting manual, or a complete set of detailed documents, which complies with the requirements of this protocol;

- 6.18, stating that rent charged to Emera Newfoundland and Labrador Holdings Inc. and Emera Energy Inc., the EUS contract previously raised, and the exchange of M&A services described above, do not comply with the protocol, in that Board approval was not obtained to deviate from the pricing protocols set out in this Section.

[102] NorthStar made a number of recommendations in relation to fair dealing, the most all-encompassing being the development of a Cost Allocation Manual (CAM). The development of a CAM was supported by all intervenors and NSPI.

[103] NSPI took exception to a number of NorthStar's findings and recommendations, offering additional explanations and context in relation to others. This will be discussed in more detail in the analysis which follows.

4.1 EUS

[104] A major source of NorthStar's criticism of NSPI's Code compliance related to certain transactions with EUS. NorthStar said four EUS projects were not properly supported by an alternatives analysis. They were the transformer oil sampling program; fiber installation work at a mill as part of the COMFIT program; wire removal and reinstallation at the Sissiboo Falls substation; and, the Canso Strait Crossing project, which involved building tower foundations, erecting towers, installing hardware, stringing the conductor and remediating the site.

[105] NSPI disagreed with most of NorthStar's findings and recommendations related to the EUS transactions. Aside from the corporate governance issue, these transactions appeared to be the most vigorously contested in the hearing process.

4.1.1 Transformer Transactions

[106] NorthStar had significant issues with the manner in which the EUS transformer oil sampling program contract was negotiated and carried out. NorthStar's findings can be summarized as follows:

In summary, this single NS Power contract with its affiliate EUS, exhibited the following:

- Broad, unrestricted communication between NS Power management and an affiliate exchanging commercially sensitive information.
- Tying and conditioning the contract with [REDACTED], an unaffiliated contractor to NS Power's affiliate EUS.
- Sole source purchasing to an affiliate.
- Failure to precede an affiliate transaction with a sound, objective analysis of alternatives and reasonable documentation of a prudent business decision.
- Subordinating internal T&D resources and prohibiting fill-in work that, as discussed, could improve internal productivity while assigning work to an affiliate to earn a profit.
- Failure to adhere to and manage the purchase order with EUS: approving and paying for activities that were not included, overpaying for agreed upon unit costs, and additional payment for EUS lost productivity.
- ...NS Power paying more than the purchase order agreed upon amount. The total amount paid to EUS exceeded NS Power's in-house cost estimate and the all-inclusive estimate from [REDACTED].

[Exhibit N-1, p. II-7]

[107] NorthStar made the following recommendations in relation to the EUS transformer oil sampling program:

3. Perform a proper self-provisioning analysis for the remainder of the transformer oil testing program using comparable productivity factors and real costs for in-house versus contractor rates.
4. Share the results of this analysis and recommended action with the UARB and obtain an approval prior to any procurement decision to continue transformer oil testing using EUS.
5. Perform self-provisioning and alternatives analyses preceding affiliate transactions. NS Power self-provisioning cost analyses should be performed consistent with and responsive to Procurement's Requests for Proposals in order to be comparable.
6. Perform a comprehensive assessment of NS Power procurement and accounting practices. Focus on levels of competitive procurement versus sole sourcing, materials and service areas lacking competitive alternatives, activities that NS Power is conducting to promote competition locally, controls over inspection and approval of work performed by contractors prior to payment, and policies/procedures/approvals for change orders and rework or work rejected due to poor quality.

7. Perform a detailed prudence review of NS Power transactions with EUS to ensure that the failure to sufficiently evaluate and document economic and operational alternatives as well as reasonable management of NS Power resources has not resulted in cross subsidization or additional costs to ratepayers.

[Exhibit N-1, p. E-7]

[108] In rejecting all the proposed recommendations, NSPI took the position NorthStar's characterization of the transaction was incorrect and incomplete.

[109] NSPI's evidence can be summarized as follows:

- The Company did not have the internal capacity to do the work, which involved sampling 10,000 transformers;
- In 2014, an independent third party contractor, which had patented proprietary technology, allowing the work to be performed while the pole top transformers were still energized, was initially engaged to do the work;
- Due to safety violations, the work was stopped in April 2015. NSPI notified the third party it would not be extending the services agreement, but would permit it to participate in a new procurement process;
- The third party had made it clear it would not allow its proprietary technology to be used by competitors, but it would allow an Emera affiliate to do so, if the third party was engaged to provide training, so long as the work took place in Nova Scotia for NSPI customers;
- The contacts between NSPI and EUS did not divulge confidential information. The purpose of the contacts was to discuss the nature of the work, and gauge EUS interest in submitting a proposal;
- A suggestion by NSPI operations managers that the work could be used as "filler work" for NSPI employees was not supported by the Company's planning group;

- NSPI did do a form of self-provisioning analysis, which was filed as N-23(c);
- The EUS proposal was less costly than the proposal submitted by the third party contractor;
- EUS was paid in accordance with the terms of its contract, on a per unit basis;
- Any change orders were appropriately documented and approved prior to payment, as had been the case with the third party contractor;
- NSPI indicated a complete self-provisioning analysis during the course of the audit had been performed which showed the EUS contract was the lowest cost option.

4.1.1.1 Analysis and Findings

[110] The Board understands why the EUS transformer oil sampling program contract would have attracted NorthStar's particular attention.

[111] The self-provisioning analysis contained in Exhibit N-23(c) appears rudimentary, with no documentation to back up cost and allocation figures. Internal emails raised the possibility that NSPI had the capacity to do the work, despite the Company's assertion that it did not. An internal email also suggested that NSPI self-provisioning was the best available option for NSPI customers. As well, the pre-contract contacts between EUS and NSPI raised concerns which had to be investigated. The accounting for the payments to EUS was somewhat convoluted, and there were numerous change orders.

[112] The Board has reviewed the evidence surrounding the change orders. Much of the disagreement between NorthStar and NSPI appeared to relate to terminology and timing. NorthStar requested change orders. NSPI provided change order request forms from EUS, which were ultimately approved by NSPI, in most cases after the work was done.

[113] There must be a documented manner in which EUS requests additional payment for unforeseen circumstances, or a change in work scope. In this case, it is done through a change order request. Once accepted by NSPI, there can be no doubt that this constitutes a change order.

[114] With respect to change orders being finalized after the fact, in response to a question from the Board, Mr. Smith testified as follows:

MR. MELANSON: And I'm not going to get into the discussion, because we've had a discussion about change orders and change requests, but is it your experience that change orders are readily agreed upon between two unrelated commercial entities?

MR. SMITH: So the reference here is that when a contractor comes across something, they put in the change request, so the process that we would use would be a change order request. And then it has to be, then, agreed upon by Nova Scotia Power.

MR. MELANSON: Right.

MR. SMITH: So this is discussion. There has to be documented proof as to what it was for. And in our minds, this is a great process. Because it's done after the fact, the risk is on the contractor.

MR. MELANSON: Right.

MR. SMITH: So the contractor does the work and takes the risk.

[Transcript, p. 555]

[115] In a commercial setting, the risk falls on the party requesting the additional payment, if the work is done prior to receiving written authorization. While there may be a concern as to the robustness with which the need for the change order is reviewed by a related party, this is not the issue which was identified by NorthStar.

[116] The Board finds that the change order request process does not fall outside commercial norms, and the evidence does not disclose that NSPI paid for items not authorized by change orders.

[117] With respect to accounting for the payments to EUS pursuant to the contract terms, the disagreement between NorthStar and NSPI centers on whether there are 1667

units, for which EUS received payment from NSPI, which are not accounted for in NSPI's documentation.

[118] NSPI provided correspondence indicating these 1667 oil samples would be credited against an initial training and mobilization charge invoiced by EUS pursuant to the original purchase order.

[119] In cross-examination, Mr. Ingersoll traced the path of these 1667 samples, sorted by facility ID number and sample date; and, showing Maxxam Labs, which performed the oil sample testing during the course of the program, had tested the samples, correlated to the oil testing contract by the specific project number.

[120] The Board is satisfied that payment for the 1667 samples is supported by the documents provided by NSPI. It appears to the Board the path which Mr. Ingersoll drew in the hearing, which was not apparent to the Board from the pages of supporting documents filed, could just as easily have been drawn in the responses provided to NorthStar prior to the hearing.

[121] The NorthStar Report describes weeks "of electronic communication and collaboration", prior to the award of the contract, between NSPI service personnel involved in the transformer oil sampling program, and EUS management, which NorthStar says resulted in the exchange of commercially sensitive information.

[122] Given that NSPI did not want to de-energize the transformers to conduct the sampling program, and the restrictions placed by the third party on the use of its proprietary technology, the fact is that in reality, only three options were available to NSPI, namely: accepting one of the three options in the third party contractor's proposal; self-

provisioning; or, finding an affiliate which could do the work more economically, with the capacity to do the work.

[123] In these circumstances, it does not appear unreasonable for NSPI to have approached EUS to confirm its interest, particularly when the possibility of engaging an affiliate had already been discussed with the only other potential outside proponent.

[124] In its Reply Evidence, NSPI described the nature of the exchange with EUS. NSPI says it shared information which it would make available to any other proponent with respect to the scope of the work, including the location of the subject transformers, in order to allow EUS to properly understand what was required under the contract.

[125] While the extent of the pre-contact exchanges raised red flags, in the final analysis, the Board finds there is not sufficient evidence to conclude that it was inappropriate in the circumstances.

[126] With respect to NSPI's internal capacity, a May 29, 2015, email contains the following:

With respect to having EUS quote the work, I would prefer to confidentially discuss the option with them and have them provide a ball park for this specific work and then reevaluate before we create churn in the business by bringing it to Operations. I know the Ops Managers were hoping to use this as filler work for their crews which would present a logical [sic] challenge I'm not sure we want to undertake.

[Exhibit N-1, p. II-6]

[127] This appears to suggest that there was a possibility NSPI could perform the oil sampling work itself. This said, the email suggests this would be a challenge. An email with a procurement recommendation was presented to management. A cost comparison sheet assessing the third party contractor proposal, the EUS proposal, and NSPI self-provisioning was presented. The email noted:

I put a cost comparison sheet together for NSP, EUS and [REDACTED]. You should be able to see that NSP is the best option from a cost perspective, but we will not be able to [sic]

the self-provisioning because our resources are loaded with work. I believe EUS is the way to go since it's the second most cost effective option and resources can be available to complete the job.

[Exhibit N-1, p. II-7]

[128] This exchange appears to indicate that while the operations managers hoped to use the work with internal forces as filler, and at the hearing there was a concern expressed about the effect on employee morale related to outsourcing, the Company's planning group did not agree.

[129] While the Board can accept that in 2015, NSPI did not have sufficient resources on hand to take on the project, it notes another argument advanced by NSPI is not convincing. NSPI said the testing involves highly skilled workers, requiring specific training and skill sets related to patented technology. EUS employees had to undergo training under the third party contractor who owned the technology. There is no reason to assume NSPI PLTs could not undergo similar training.

[130] When distilled to its essence, the Board's main concern with the EUS transformer oil sampling program contract relates to the lack of a comprehensive, documented, self-provisioning analysis, pre-dating the award of the contract. This is especially concerning when there is an internal email indicating that NSPI's self-provisioning analysis resulted in its being the best option.

[131] NSPI indicates the analysis discussed in the email "was based solely on the hourly rate for PLT's and did not include any other factors (such as recruitment, training, vehicles and tooling for additional staff) necessary for a fully comparable analysis".

[132] NSPI's evidence in relation to whether or not the self-provisioning analysis in the EUS transaction was sufficient to meet the requirements of the Code was nuanced.

[133] In response to a question from Ms. MacAdam, Mr. Casey said:

So definitely agree. We -- the transaction you were talking about there, the EUS transaction, we had done a self-provisioning analysis. We went through a very detailed review of that yesterday.

We might say that it needed to be better documented; there might have been a better way to present that information. But the thinking was there, the right decision was made.

As Ms. Hutt just said, we provided more information just to be helpful to kind of show that if we had used this other model, we would have reached the same conclusion.

That was purely to be helpful. That was not meant to say that we forgot anything or that we did a poor analysis. It was simply to say if we use the same methodology, we would reach the same conclusion.

And I think in every case that we've looked at, in particular with the EUS transactions, we would say that all of the thinking was there, all of the self-provisioning thinking was there, but the documentation is what needed to be improved. And going forward, we're committed to improving our documentation.

[Transcript, p. 375-376]

[134] The following exchange between Mr. Casey and Board Counsel expands upon the answer provided to Ms. MacAdam:

MR. OUTHOUSE: The other three. The first one, they've already dealt with, but I'm just asking Mr. Casey if the situation with respect to the first contract, the one that I just mentioned, the Pole-top contract, whether or not that had only a partial self-provisioning analysis.

MR. CASEY: Our perspective -- certainly my perspective would be that it was a full self-provisioning analysis that was done.

MR. OUTHOUSE: Well, I will find a reference, but in your evidence it's described as only a partial self-provisioning analysis. You don't recall that?

MR. CASEY: No. If we could find that? Yeah, I think -- so as was discussed yesterday, we spent quite a bit of time talking yesterday about the self-provisioning analysis we did.

MR. OUTHOUSE: Yeah.

MR. CASEY: And we would certainly -- I think we did a good job of showing the labour component. We costed that out. We showed the labour component. And then we had a sentence and a paragraph about availability of resources.

MR. OUTHOUSE: Yeah.

MR. CASEY: And we certainly would say that that documentation is not where it needs to be. We've learned from this audit for sure that we need to do a better job of documenting that.

MR. OUTHOUSE: Yeah.

MR. CASEY: The thinking was all right. The self-provisioning is correct in that it's a labour component and availability. What we didn't do was quantify the availability component. The two sentences together made a self-provisioning analysis.

MR. OUTHOUSE: And you've described it in your evidence as a partial self-provision?

MR. CASEY: Well, I think, again, though, there was a commercial analysis which was the dollars of the labour, and then followed with -- together I would say that is a self-provisioning analysis. I would say it's a complete self-provisioning analysis, but it has shortcomings for sure, and that the documentation was not clear.

[Transcript, pp. 494-496]

[135] In its Closing Submission, NSPI states:

NorthStar has suggested improper conduct by NS Power in its decision to award the transformer oil testing contract to EUS. While NS Power has acknowledged that the self-provisioning documentation associated with entering into this contract should have been more robust and has committed to ensuring improvement in the future, NS Power has nonetheless demonstrated that awarding the contract to EUS was appropriate and compliant with both the letter and the spirit and intent of the Affiliate Code.

[Exhibit N-47, p. 32]

[136] NSPI goes on to say:

As NS Power explained in its Evidence, during the Audit process the Company re-conducted a full self-provisioning analysis for this transaction using the "Mulleese approved" model to confirm that EUS was the most economic option when accounting for all relevant factors. As Mr. Casey testified:

That was purely to be helpful. That was not meant to say that we forgot anything or that we did a poor analysis. It was simply to say if we use the same methodology, we would reach the same conclusion.

In terms of the analysis that was conducted by NS Power at the time of entering into the transaction, NS Power has agreed that more detailed documentation ought to have been maintained and will ensure it does so in the future. However, the self-provisioning documentation that NorthStar admits was provided to it in the Audit process, as contained within the transaction recommendation filed as Exhibit N-23C, confirms and is consistent with Mr. Casey's testimony that all applicable factors were considered in actually carrying out a full self-provisioning analysis prior to awarding the contract to EUS.

[Exhibit N-47, p. 33-34]

[137] The Board notes that NorthStar did not agree that the form of self-provisioning analysis contained in Exhibit N-23C was sufficient to comply with the Code. The Board finds it is not. The spreadsheet contains cost and allocation figures, without

any analysis or documentation showing how these figures were derived. They do not approach the level of detail which, in the Board's view, is required by the Code.

[138] While the Code does not specifically state what components comprise a reasonable self-provisioning analysis, it is clear that such an analysis must be sufficient to demonstrate that NSPI does not cross-subsidize its affiliates (Protocol 1.1) and, it must be transparent, sound and documented (Protocol 2.2).

[139] In a situation where NSPI had terminated the third party engagement, yet was reliant on the third party's technology, severely limiting who could actually do the contemplated work, a robust and detailed self-provisioning analysis was required. Absent such a well-documented, detailed analysis, it is not surprising that an external audit would question all aspects of the circumstances surrounding the transaction.

[140] As the lack of a self-provisioning analysis, or lack of supporting documentation, are recurring themes in this matter, the Board will address the issue in more detail in the following section.

4.1.2 Self-provisioning

[141] A robust alternatives analysis is a key element of the Code. Alternatives analysis concepts are referenced in Protocols 2.1, 2.2, 6.8, 7.6, 7.8, 7.9 and 7.10.

[142] A major element of most alternatives analysis is whether self-provisioning is the best option for NSPI and its ratepayers. Pursuant to Protocol 2.1, a self-provisioning analysis must be "sound, objective and transparent." It must be documented. It must precede any transaction with affiliates.

[143] In addition to the previously discussed issues surrounding the self-provisioning analysis in the transformer oil sampling program, concerns were raised by

NorthStar in relation to the quality, or absence, of such an analysis with respect to three other EUS contracts: the fiber optics installation project; the Sissiboo Falls project; and, the Canso Crossing project.

[144] NSPI justified the lack of a self-provisioning analysis for the fiber optics installation project on the basis NSPI did not have the internal capacity to do the work. As well, EUS was the lowest bid of two responses to an RFP for this contract.

[145] With respect to Sissiboo Falls, NSPI said it was a competitive and transparent RFP process, which was circulated to four potential bidders, and a response was received from EUS only. NSPI indicated it did not have the internal resources within its work plan to complete the project.

[146] The Canso Crossing project was by far the most significant of the three contracts in monetary terms. An RFP was sent to seven companies. Only two responses were received. EUS, in partnership with another company, was the low bid. NSPI did not have the personnel or equipment to do the job.

[147] In response to questions from Board Counsel, NSPI confirmed circumstances in which NSPI had not been doing a self-provisioning analysis:

MR. OUTHOUSE: Since the Code came into effect on October 1st, 2015, in what circumstances does NSPI not do a self-provisioning analysis prior to entering in a new affiliate transaction in which it acquires from or provides to an affiliate any goods, services, leases, assets or other exchanges of value?

MS. HUTT: I will ask Ms. Ross to answer that question.

MS. ROSS: We provided a DR response which answered questions about in what circumstances do we feel that self-provisioning is not required. And so in any circumstance in which Nova Scotia Power is the provider of the goods or the services, we don't do self-provisioning because self-provisioning is the test to determine what the cost would be to Nova Scotia Power if it were to provide those goods or services. And so when we are providing them, we don't do self-provisioning in that particular instance.

And we have in circumstances as I think was discussed yesterday, if Nova Scotia Power does not have the labour or the skills or the equipment or the technology or the ability to

carry out the scope of work, then we have not been doing self-provisioning because it's not possible for us to determine what the costs would be internally to carry out that work.

So those are circumstances in which we don't carry out self-provisioning.

MS. HUTT: But I might add, in the last reference made by Ms. Ross that is an area where we recognize we can do better at and that, to the extent that we reached that conclusion, the proper documentation for the rationale is helpful. And that's something that we're committed to doing going forward.

MR. OUTHOUSE: It's not just helpful; it's required under the Code. Correct?

MS. HUTT: Certainly. Certainly.

[Transcript, pp. 482-484]

[148] Factors which should be considered in a self-provisioning analysis, where NSPI does not have the capacity to carry out the scope of work, were discussed by Mr. Bennett:

MR. MELANSON: My question is what are the usual components of a self-provisioning analysis in that scenario?

MR. BENNETT: The important components of a self-provisioning analysis in that respect would be to determine or at least document whether or not the company expected to do more of this in the future, and therefore, that still incapability ought to be incorporated in the workforce versus whether or not that was a unique situation, such as infrared thermographic testing of circuitry showing hotspots. That is an exercise that's done very seasonally and only once, say per year, to identify areas in the system which exhibit problems and they can be detected by infrared heat signatures.

It's not likely that a utility company would want to have the technology, the tools, the equipment, and the training to be able to do that on such an infrequent basis so it's quite often contracted out. It may be a very large company might have that, but not anything other than a very large company.

In terms of optical fibre, that is becoming more and more common in anybody -- in any large utility's communication system, and so I cannot tell you whether or not it might have been appropriate for Nova Scotia Power to begin to have those kinds of skills and capabilities.

MR. MELANSON: Okay. And you mention about the potential to do the work in the future, and I'm just wondering, because we deal in a number of situations of assessments of present value for future work and those kind of things, what kind of timeframe are we looking at when you're doing a self-provisioning analysis as to the future, whether you're going to be doing that work in the future?

MR. BENNETT: I think fundamentally an assessment of whether or not that work is going to appear in the future, to what degree, and how much is going to be therefore contracted out versus done at cost by utility forces and what the present value of that might be if one were to get very sophisticated in the analysis. But nevertheless, to simply ignore it with

the assertion that we don't do that kind of work could be used across the board. Maybe we don't do any work.

[Transcript, pp. 257-259]

[149] NSPI, through Mr. Smith, also discussed what a self-provisioning analysis could involve where NSPI currently lacks the internal capacity to do the proposed work:

MR. MELANSON: Did I understand -- there was a discussion and there was considerable evidence on self-provisioning, and especially in situations where Nova Scotia Power does not have the capacity or the equipment to actually do the work? But if I understood the evidence correctly, you're now indicating that you will attempt to do some type of self-provisioning analysis in that circumstance as well?

MR. SMITH: Well, certainly given the wording of the Code, we understand that that is the requirement. So we would undertake to do some form of that for sure.

MR. MELANSON: And from your perspective, what would that self-provisioning analysis - what are the factors involved in doing that kind of self-provisioning analysis where you don't have the existing capacity?

MR. SMITH: Yeah, we would hope to get some direction or some guidance from the Board on that for sure. You know, if you were to say, "How do you do fibre optic work?", we could definitely figure out what it would cost to buy a fibre truck and what it would cost to train new personnel and buy the testing gear. We could do some work on that. We don't think that's a good approach for a tiny contract, in that case, less than \$15,000. We don't think that's a real good approach.

So there's probably a better framework and we haven't really figured out exactly what that's going to look like.

MR. MELANSON: Well, some of the factors you would consider would be how likely that type of work would come up again; correct?

MR. SMITH: Absolutely, yes.

MR. MELANSON: And the magnitude of the work involved would be one of the factors?

MR. SMITH: Yeah, definitely.

MR. MELANSON: And what kind of time horizon would you be looking at when you think about whether or not you're going to be doing similar work in the future?

MR. SMITH: Well, I think there has to be a business case that says it's the right thing to do. There may be something where you're going to say, well, you're not going to do it very often, but to gear up to do it isn't that expensive and it actually is a good decision. And then there's other things where we would say it's just become a part of our business and we should be gearing up to do it.

MR. MELANSON: And is there any kind of consideration when you're doing a self-provisioning analysis as to whether or not the acquisition of the expertise will be of some benefit in the future, the same as when you contract out your work? If you lose the expertise, that might not be such a good idea?

MR. SMITH: Yeah, definitely. And again, I think, you know, we do this. I think it was interesting to hear, yesterday, Mr. Bennett talk about thermal visions. So thermal vision has become an integral part of our business. We do thermal scans, thermal visions on a monthly basis, on a weekly basis, every day, really, if it's -- if they're doing a substation, they're going to do a thermal scan. So we actually went out and bought thermal cameras for our crews, and we do thermal vision. That's a good example where self-provisioning actually worked out for us.

[Transcript, pp. 556-559]

4.1.2.1 Analysis and Findings

[150] Protocol 2.1 of the Code clearly requires that a self-provisioning analysis precede the affiliate transactions referenced therein. Such an analysis must be sound, objective, transparent, and supported by reasonable documentation.

[151] The importance of doing the analysis before entering into the transaction is to ensure the Company has properly considered all available options so it can determine and demonstrate that the option chosen is the best available option for NSPI customers.

[152] It is also important to achieve the goal of transparency. Stakeholders must be confident that the analysis was in fact performed prior to entering the transactions, and documented contemporaneously. In this regard, the Board agrees with the CA that a "no harm, no foul" approach is not sufficient. Doing an analysis after the fact, when an audit is being conducted, does not comply with the Code, and does not instill confidence that the obligations under the Code were taken seriously in the first place.

[153] NSPI acknowledged it had not done a self-provisioning analysis where it did not have the internal capacity to do the work. The Code does not provide such an exception. NSPI has undertaken to rectify the situation.

[154] The Board notes that to rely on undocumented internal assessments as to capacity and costs, or "gut reactions", such as in the Sissiboo Falls project example, are not what the Code requires.

[155] The Board finds that NSPI has not been compliant with the Code with respect to the performance of a self-provisioning analysis in all cases as required by the Code. NSPI must comply in the future.

[156] Compliance with the Code should not be an exercise in *post facto* justification. The Board would caution that given the significance of appropriate analysis preceding affiliate transactions, if NSPI fails to properly evidence compliance with the Code in future, the Board will have to consider whether, as a result, the transaction costs were not sufficiently supported at the time of the transaction, and whether they should be disallowed, in whole or in part, on that basis, regardless of any proven harm to ratepayers. To do otherwise encourages continued *post facto* rationalization.

[157] While the Board is not in a position to establish all the factors to be considered in a self-provisioning analysis, where NSPI lacks internal capacity, it should at least analyze and document the following factors, discussed in the evidence:

- A clear documented explanation as to why the work cannot be done internally;
- Whether the Company expects to do more of the type of work under consideration, or work that could be completed by other internal resources, in the future; and if so, how much work is anticipated, and over what timespan;
- The cost of acquiring the required personnel, equipment, knowledge and expertise compared to contracting with an affiliate, or outsourcing;
- The value to the Company of any expertise gained or lost, depending on whether the work is done in-house, or through an affiliate, or an independent contractor.

[158] With respect to a self-provisioning analysis, where NSPI is the provider, the Board agrees that the wording of Protocol 2.1 creates a conceptual difficulty, since NSPI cannot internally provide a service which is being offered to another.

[159] The Board agrees with Mr. Bennett's testimony that one of the concerns is whether the cost of providing the service is such that the service should not be offered in the first place. This is an area that should be explored when looking at Code amendments.

4.1.3 Prudence Review

[160] In Recommendation 7, NorthStar said the Board should order a detailed prudence review of NSPI's transactions with EUS "to ensure that the failure to sufficiently evaluate and document economic and operational alternatives as well as reasonable management of NS Power resources has not resulted in cross subsidization or additional cost to ratepayers." [Exhibit N-1, p. E-8]

[161] The CA agrees with NorthStar's recommendation, pointing out that a compliance audit, such as performed by NorthStar, is not a substitute for this type of review.

[162] NSPI opposes a prudence review, arguing that compliance issues were found in a small minority of EUS transactions, and that the Board already has before it all the information and explanations related to these transactions in order to assess the situation.

[163] The Industrial Group submits that, on a go forward basis, the scope of the Affiliate Audit "should clearly include a prudence and management review to evaluate the

best interests of ratepayers, and the Auditor should not feel constrained to simply review compliance with the strict letter of the Code.” [Exhibit N-48, p. 8]

[164] The Board recognizes NorthStar’s concerns related to the lack of documented analysis relating to the EUS contracts. The Board also observes that EUS contracts reviewed during the audit represent a relatively small percentage of dollar value of transactions between EUS and NSPI.

[165] NSPI points out that the majority of EUS transactions, both in terms of volume and monetary value, fall under the PLT line services contract. The Board notes that while Mr. Bennett indicated NorthStar had not found compliance issues with the PLT contract, it was not negotiated within the audit period.

[166] In its evidence, NSPI stressed the monetary significance of the PLT contract in comparison to all other EUS transactions. NorthStar did not have the opportunity to review the analysis which preceded this contract as part of this audit. NorthStar indicates the contract was signed on October 1, 2014, for a five-year term. Given the concerns raised in this hearing surrounding the analysis preceding other EUS contracts, the Board directs NSPI to advise it should the current PLT contract be extended or renewed with EUS; or should a procurement process result in a new PLT contract with EUS, or any other Emera affiliate. The Board will then consider whether it need take steps to review the contract in relation to Code compliance.

[167] While not condoning non-compliance with the Code, there are potential amendments to the Code, and the creation of a detailed CAM, which might assist with many current non-compliance issues. The Board has received an extensive record concerning the most controversial contract related to the transformer oil testing program.

[168] While acknowledging this was not within the context of a prudence review undertaken by NorthStar, the Board is concerned with the duplication of expense and effort involved in a separate EUS prudence review.

[169] The Board prefers the approach suggested by Ms. Rubin. In any future audit, the Board will clearly spell out that a prudence review and management review are within the audit scope.

[170] As the transactions discussed in this audit were not subject to a prudence review, the Board reserves the right to revisit the need to conduct a prudence review for the transactions covered by this audit, should there continue to be issues with compliance in future audits.

[171] With respect to the recommendation that a proper self-provisioning analysis for the remainder of the transformer oil testing program be performed, the Board finds the “after the fact” analysis conducted by NSPI is sufficient to address this recommendation at this time.

4.1.4 Procurement

[172] The EUS contracts raised a more overarching concern related to procurement in general. The four contracts which were the subject of much discussion showed a limited response to NSPI’s procurement process.

[173] The transformer oil testing program had its own limiting factors, given the preference for the patented technology, which allowed for the conduct of the program while the transformers were energized.

[174] The fibre optics installation project only received one independent third party proposal. The Sissiboo Falls project only received a submission from EUS. Both

of these were relatively small contracts. Only one independent third party contractor responded to the Canso Crossing project, despite it being a multi-million dollar contract.

[175] NorthStar made the following recommendation:

6. Perform a comprehensive management audit of NS Power Procurement and Accounting practices. Focus on levels of competitive procurement versus sole sourcing, materials and service areas lacking competitive alternatives, activities that NS Power is conducting to promote competition locally, controls over inspection and approval of work performed by contractors prior to payment, and policies/procedures/approvals for change orders and rework or work rejected due to poor quality.

[Exhibit N-1, p. E-7]

[176] The issue was explored in more detail with NSPI by the Board:

MS. CLARKE: Do you have a sense of why companies are not bidding? Is it because they think EUS is guaranteed to get the job because it is an affiliate?

MR. CASEY: So absolutely not. So we do reach out to all potential bidders. And in general, what we find -- these are small markets, and in general what we find is they're busy, that their work plans are busy and they just don't have the resources to compete -- or to bid.

MS. CLARKE: I noted you mentioned Sissiboo Falls being a small or remote area but, I mean, other areas of the province might be considered remote. I mean, is there something about Nova Scotia that makes it unattractive for companies to bid?

MR. CASEY: No, definitely not. Each case stands on its own, so in the case of the first one which was the customer work, it's just a very, very small job, so it is hard at times to find somebody who can bid on a small job just by its very nature. It's a small job for a contractor.

The second one, Sissiboo Falls, that is a remote area of Nova Scotia for sure. It's very difficult to generate a market in that area. But again, what we find is that -- so in that case, the resources -- they may have resources, they may have available resources, but to mobilize and to go that distance -- and this was a complex job where we were requesting them to come, do some work, leave for about a week and then come back and do some more work. So take the wire down, leave, come back and put the wire back up, very sort of a unique job.

So we found it a struggle for people to kind of compete with that travel and mobilization.

And in the case of Canso, it's just such a large job, so it's the opposite of the first one. It's just such a large job that there is definitely a limited pool of people with the availability to do it. Lots of people with the skill and ability to do it, but it was the availability. It's just a - what -- the feedback we received was a lot of work going on out west, a lot of work going on in Newfoundland and just not able to bid at this time. But their letters made it very clear that they were very interested in bidding at work in the future.

[Transcript, pp. 581-583]

[177] NSPI takes the position the evidence before the Board does not justify following the recommendation. Ms. Rubin, on behalf of the Industrial Group, supported NorthStar's recommendation:

The Industrial Group agrees that such an assessment may be beneficial. The Board has, in prior decisions commented that an RFP is the preferred method to solicit competitive bids. At this stage, it may warrant a deeper review as to whether there are any overt or systemic biases to limit competition in favour of affiliates. There may also be suggestions or mechanisms for NSPI to undertake to improve its chances of securing competitive bids. Certainly, this has been done in the fuel procurement context and, there is no reason why this should not have similar success on a non-fuel side.

[Exhibit N-48, p. 5]

[178] The Board notes that, while Ms. Rubin's submissions made an important point, fuel procurement is more global in scale than procurement for the types of projects discussed in this audit.

[179] This said, it is important that NSPI's procurement process not be intentionally, or unintentionally, designed to limit response, and favour an affiliate. The evidence, in the small sample of contracts which fell within the audit period, is not sufficient to establish such a pattern.

[180] The Board will continue to monitor the situation, but believes it is premature to order a comprehensive management audit. If a pattern emerges, the issue will be revisited. In the more immediate future, the CAM process, discussed later in this Decision, should assist in assessing this matter.

4.2 Dealing with Other Affiliates

[181] While the EUS transactions were a major area of disagreement in this matter, numerous issues arose in relation to NSPI's dealings with Emera and other affiliates.

[182] The concerns raised by NorthStar related primarily to shared systems, shared services, and personnel (including confidentiality), together with accounting issues.

4.2.1 Shared Systems

[183] Protocol 6.2 says NSPI must maintain separate financial records and information systems from its affiliates. The systems must have sufficient protections to preclude access by non-NSPI employees. The systems administrators are required to test access protections and attest to their effectiveness.

[184] While NorthStar found that NSPI's financial records and reports are separate from its affiliates, the Company does not maintain separate information systems. This is acknowledged by NSPI, which says the Company's IT department houses and owns all systems and software.

[185] In its evidence, NorthStar described the shared applications, the manner in which access was controlled, and the testing procedures undertaken by NSPI.

[186] NorthStar was concerned that NSPI's "testing methodology does not include tests for unauthorized access – often referred to as penetration tests to detect unauthorized access."

[187] The financial systems are Oracle-based. NorthStar noted that NSPI's Compliance Guidelines say that certain Emera employees require access to NSPI financial information in Oracle, and have been granted "read-only" access, which is prohibited by Protocol 6.2.

[188] NorthStar said that NSPI's VP Finance was also Emera's VP Finance, providing a conduit between financial systems during the audit period.

[189] Where employees were transferred, NorthStar indicated unless authorizations are cancelled upon transfer, unauthorized access could occur for 30 days. To address this, NSPI has developed a mechanism which ties employee transfers with computer access, by creating a direct connection between payroll changes and computer access.

[190] NorthStar appears particularly concerned about the Global Intercompany System (GIS), which is an Oracle product shared between NSPI and its affiliates. It provides an inter-company billing mechanism where one party generates a charge with GIS, which is sent for approval to an affiliate (or vice versa), creating a situation where financial transactions flow within one common system.

[191] In Recommendation 19, NorthStar said NSPI should obtain a waiver or Board approval for sharing information systems, or separate their use and data.

[192] NorthStar also indicated, in Recommendation 20, that NSPI should discontinue the use of the GIS system for charging affiliate transactions, and require monthly invoicing, with itemized services, dates and cost.

[193] NSPI says the Board has approved an \$89 million Capital Work Order application for an enterprise resource planning system (ERP), which includes the Oracle E-Business Suite, PeopleStaff, and Maximo. Part of the rationale for the project was to allow cost sharing of the system with NSPI's affiliates, which generates approximately \$20 million annually to NSPI.

[194] NSPI further states certain Emera employees require read-only access to NSPI's financial system information for purposes such as preparation of consolidated

quarterly financial statements. The employees are listed in the Exceptions Report, filed with NSPI's annual Affiliate Code of Conduct Report.

[195] NSPI says the approval of the ERP system contemplated a common financial system. The concern to be addressed is the separation of records, not systems. Separation of the system is impractical and the Code should be clarified.

[196] With respect to the recommendation to abandon the GIS process for the inter-company billing in favor of monthly invoicing, NSPI says this would be inefficient and expensive. It would result in having an additional full-time intermediate accountant at NSPI, charges from affiliates forced to use a manual system, and additional layers of approval.

[197] NSPI says, to assist with transparency, every transaction is now listed on a cover sheet for each category of transactions every month.

4.2.1.1 Analysis and Findings

[198] It is apparent there is a discrepancy between the wording of Protocol 6.2 of the Code and the ERP system which the Board approved on April 28, 2017. The Board agrees that this discrepancy, including allowing shared information systems, should be addressed as part of the Code review process.

[199] The Board also acknowledges that as the sole shareholder of NSPI, Emera is entitled to review NSPI's financial information for purposes related to financial reporting. The Code should reflect this reality.

[200] With respect to paper invoicing, between affiliates, the Board is not convinced that this should be ordered at this stage. Rather, the Board is of the view that

any concerns with the methodology, and accounting between affiliates, should be reviewed as part of the CAM process.

4.2.2 Accounting

[201] Protocol 6.15 stipulates that NSPI must maintain “complete and detailed documentation of its procedures for accounting and charging, assigning, and allocating the prices and costs of inter-affiliate transactions...”.

[202] NorthStar concluded that NSPI and Emera “have methodologies for pricing, assigning and billing affiliates.” These methodologies appear to NorthStar to be “institutional knowledge” and not complete and detailed documentation.

[203] NorthStar recommended that NSPI develop “a comprehensive Cost Allocation Manual that integrates all budgeting, allocating, assigning, charging, accounting and reporting of affiliate transactions.” [Recommendation 22, Exhibit N-1, p. VI-37]. All Intervenors supported this recommendation. NSPI has agreed to implement this recommendation, and has provided a work plan.

[204] The Board agrees with the recommendation and addresses the process more fully later in this Decision.

[205] One area where accounting and charging for shared services between affiliates arose relates to Protocol 6.11. For the Management and Administrative (M & A) services listed in this Protocol, the price to be charged by the providing party must be its fully allocated cost. An issue arises with respect to determining and verifying the fully allocated costs of the affiliates. The issue should be addressed as part of the CAM consultation process.

[206] Another issue raised by NorthStar in relation to Protocol 6.11 is that eleven services were being shared by NSPI and its affiliates, and not listed in the Protocol, at fully allocated costs, without having received approval from the Board under Protocol 6.18, and without FMV analysis. The Board directs that these eleven services be discussed as part of the Code amendment and CAM process. In the interim, the Board grants approval, pursuant to Protocol 6.18, for the continued use of fully allocated costs pricing for the eleven services.

[207] There is potential conflict between Protocol 2.1, which requires a comparative analysis to precede any affiliate transaction; Protocol 7.8, which stipulates additional self-provisioning analysis in relation to large transactions; Protocol 6.11, which requires M & A services to be provided at fully allocated costs; and, Protocol 6.12, which states the cost of personnel providing any service shall be based on real time reporting.

[208] The Board directs that this potential conflict be reviewed and discussed as part of the Code amendments and CAM process.

5.0 COMPLIANCE WITH THE AFFILIATE CODE OF CONDUCT

[209] NorthStar's report identified that, of the 53 protocols of the Code which were audited for compliance during the audit period, NSPI had complied with 24 of them, had failed to comply with the same number of protocols, and had only partially complied with the remaining 5 protocols. Its findings were discussed in detail in the report and resulted in 33 recommendations.

[210] Mr. Bennett testified that not all instances of non-compliance were material. NorthStar had prepared "...a Compliance Impact Scoring hierarchy to assess magnitude

and actual or potential harm to ratepayers...” resulting from each identified violation of the Code [Exhibit N-1, p. E-4].

[211] In its Reply evidence, NSPI accepted 23 of the recommendations and proposed an Action Plan respecting them. It identified the key areas of disagreement with the findings and recommendations regarding:

- Corporate governance and utility management;
- Certain transactions with EUS;
- Utility financing.

[212] The Board expects NSPI to consider the concerns expressed and the findings in this Decision as they relate to the Action Plan.

[213] The Board understands from the Reply evidence that even in instances where NSPI disagreed with NorthStar’s recommendations, it did accept some aspects of them.

[214] While the approach taken by NorthStar was to examine compliance with the direct language of the Code, NSPI appeared to suggest that NorthStar applied too literal an interpretation. NSPI opined that it acted in accordance with the spirit and intent of the Code. NorthStar stated that a part of the scope of its work was to identify whether NSPI had “...complied with the specific requirements of the Code as well as with the spirit of the Code” [Exhibit N-1, p. E-2].

[215] In its Rebuttal evidence, NorthStar said:

NorthStar believes that the Code should be interpreted literally as a fundamental and basic threshold for compliance. In fact, NS Power’s belief that the “spirit of the Code” is controlling actually creates a *higher* compliance requirement, not a lower one. The “spirit of the Code” must reflect the intent of the Code—to prevent self-dealing affiliate transactions. The regulated utility has the burden to demonstrate that its affiliate transactions are not detrimental to the ratepayer.

[Exhibit N-16, p. 5]

[216] The concept of the spirit and intent of the Code was explored at the hearing with Mr. Bennett in exchanges with Counsel for the Industrial Group and with the Board:

MS. RUBIN: And I understand, and particularly from the questioning this morning, that you were very careful to adopt a literal interpretation of the Code. The words of the Code themselves are what NSPI's actions are to be measured against; correct?

MR. BENNETT: Correct.

MS. RUBIN: How do you interpret compliance with the spirit and intent above and beyond or in the context of the literal Code wording?

...

MR. BENNETT: I believe the spirit of the Code and transparency are particularly important when one talks about the obligations to perform an objective analysis preceding affiliate transactions. I think that those words are particularly important when applied to the production of documentation, whether those -- whether that spirit of Code and transparency existed, even if it in fact included the business documents of its affiliates. And just simply to conclude that, we were precluded from looking at many documents that were owned by affiliates.

MS. RUBIN: So just -- is it your evidence that having made findings that they failed to comply with certain Code protocols it would lead to non-compliance with spirit and intent? So it's not something over and above, it's just non-compliance?

MR. BENNETT: No. I believe that spirit and intent of the Code go beyond the direct wording of the Code. They did not comply with the direct wording of the Code and we've provided conclusions and examples of that. Beyond that is the spirit and intent of the Code. We were cautious not to go into additional interpretations of the meaning, the context or the intent of the Code, but merely to look at whether or not the company complied, the utility complied with the Code itself.

MS. RUBIN: And I'll hesitate to ask one more question; my friend's panicked at the ready. Is this a subjective or an objective measure? Like, I'm having a hard time understanding what it is above and beyond.

MR. BENNETT: The spirit of the Code can get very subjective. We tried to stay away from that and provide a very clinical objective analysis of whether or not the company complied or did not comply with the direct wording of the Code.

[Transcript, pp. 136-139]

...

MS. CLARKE: What did you identify as the spirit of the Code?

MR. BENNETT: We identified the spirit of the Code as providing transparency to the documentation, and the analysis, the management that's being performed. Transparency, for example, in the governance of both the holding company, the regulating utility, and its affiliates; and, also, the world of documentation. I'd say the world of documentation did not exist with respect to fair market value and analysis of options preceding this election of an affiliate to perform work.

MS. CLARKE: So what did you conclude then, with respect to the spirit of the Code?

MR. BENNETT: I believe you will find that in the second bullet down on page E4, that our review showed that in a number of cases NS Power exhibited a level of management indifference to the Code and its Code requirements.

[Transcript, p. 274]

[217] This was further explored with the NSPI panel by the CA:

MR. MAHODY: In relation to the Code, Ms. Hutt, what is Nova Scotia Power's understanding as to the spirit and intent of the Affiliate Code?

MS. HUTT: It's a good question.

From our perspective, it's about commitment, and having the organizational commitment to ensure that we're doing everything that we can to meet the obligations under the Code. And part of that commitment is being transparent in how we operate and how we behave. And I think in the context of this proceeding, we have provided in the tens of thousands of pieces of information related to this exercise.

I would also point to the annual report that you referenced earlier. That's a 500-page report that we submitted that outlines all of our affiliate activities. So, certainly, we are working hard to be transparent and demonstrate in our commitment through that.

And the other aspect that I would very openly say is our commitment to learn and improve. We're the first ones to say, if I could sit here and tell you right now that everyday 1,700 employees are in lockstep perfection of this; I wish I could. That's not the case. But can I tell you that we're turning ourselves inside out to try to make it that way? We are.

MR. MAHODY: You do agree, Ms. Hutt, that one aspect of the intent of the Code is to prevent self-dealing affiliate transactions?

MS. HUTT: Yes.

MR. MAHODY: And to [*sic*] you agree, Ms. Hutt, that complying with the spirit and intent of the Code is a higher compliance requirement than simply complying with the specific words of the Code?

MS. HUTT: I think -- in that particular regard, I think having the most clarity possible to ensure that we're all acting in a way that was intended and that people are comfortable with is what we're seeking.

MR. MAHODY: And do you agree, Ms. Hutt, that Nova Scotia Power, as the regulated utility, has the burden of demonstrating through clear documentation that affiliate transactions are the best option for ratepayers and comply with the Code?

MS. HUTT: Yes. And if we aren't doing well enough, then we need to do better at that. I agree.

MR. MAHODY: And Ms. Hutt, operating under an Affiliate Code is not a game of catch as catch can, is it?

MS. HUTT: No. The Code allows for us to provide value to customers. That is our objective. And so, if there is an additional layer of clarity or areas that we can resolve, in terms of ambiguity; we all want the same thing in the end and that is to deliver the best value for customers. And so if additional clarity can provide that, then we're first in line to accept that.

MR. MAHODY: First in line to accept the obligation to transparently demonstrate full compliance with the Code of Conduct?

MS. HUTT: Yes.

MR. MAHODY: In addition, Ms. Hutt, to what's set out in your evidence, have -- has NSP come up with any additional initiatives that would ensure that NSPI operates within the spirit and intent of the Code?

MS. HUTT: Perhaps I'll ask Ms. Ross to add to that question.

MS. ROSS: We have certainly realized, Mr. Mahody, through this process, that there are areas where we can improve. And so as a result of the findings of the audit we have accepted some of the recommendations; and as Ms. Hutt has stated, we have already started to make some of those improvements.

[Transcript, pp. 361-365]

[218] Ms. Ross then went on to describe some of the steps that NSPI has initiated or is undertaking, which the Board discusses elsewhere in this Decision.

[219] Earlier in this Decision, the Board explored in detail some specific areas where NorthStar concluded that NSPI had not complied with the Code. Considering all the evidence, the Board identified a concern that NSPI held a casual or indifferent attitude to compliance with the Code. Some examples of this are inadequate self-provisioning analysis, and the failure to seek waivers from the Board when required.

[220] While Ms. Hutt said that she did not agree with the characterization of a "casual attitude", she acknowledged the need for improvement. In her opening statement, she spoke of NSPI's commitment to compliance, and how the audit process had made it aware of that need. She said, in response to the CA, "...we've embraced this process as a way to improve and get better, and at every turn be as transparent as we possibly can..." [Transcript, p. 327].

[221] The Board considers that this audit could well be described as a "wake up call" for NSPI. Although the Board does not accept all the recommendations of NorthStar, the Board finds it is critical that NSPI learn from this process. Accordingly, the Board provides direction to NSPI in this Decision for a number of actions.

[222] As noted in Paragraphs 60-61 of this Decision, the Board could prohibit affiliate transactions entirely. However, there is no evidence before the Board that persuades it that ratepayers have actually been harmed by NSPI's actions during the audit period. Further, the Board is satisfied that, where the protocols of the Code have been observed, affiliate transactions will have been demonstrated to be the "best available option" for ratepayers, as set out in Protocol 2.2.

[223] The Board is encouraged by the steps described by Ms. Ross regarding employee transfers, training in the Code, confidentiality undertakings, and amendments to affiliate contracts and purchase orders to provide for access to the books and records of the affiliate, for example. The Board also notes that NSPI has stated in its Reply evidence that it has already begun to implement those NorthStar recommendations which it endorsed.

[224] In addition, Ms. Hutt's agreement to preface the Code with statements like those contained in the Emera Code of Conduct from the Chief Executive Officer and Chief Legal Officer give the Board some assurance that the "tone at the top" of NSPI's management will be reinforced for the entire NSPI organization. However, the Board believes that more than mere statements is required.

5.1 Board Directives

[225] In response to questions from the Board, NorthStar did not offer any specific guidance to the Board about how it might approach the failure of NSPI to comply with the Code, but noted that the Board should be attentive to "...themes such as documentation, transparency and analysis" [Transcript, p. 275].

[226] The Board has addressed the submissions on corporate governance and cross-appointments offered by the SBA, the CA, the Industrial Group, and NSPI's position on these issues earlier in this Decision. It has also addressed the issues surrounding the EUS contracts and the proposed prudence review.

[227] Utility financing and submissions on ring-fencing and bankruptcy covenants have also been the subject of Board findings in Paragraphs 92 and 97.

[228] Where NSPI has agreed with the recommendations of NorthStar, either in whole or in part, the Board agrees that the necessary steps to carry out those recommendations should be undertaken, guided by the Board's comments below, and earlier in this Decision, on specific recommendations.

5.1.1 Revision of Affiliate Code of Conduct and Guidelines

[229] NorthStar observed that there is some ambiguity in the Code and Guidelines, and potential overlap between protocols of the Code. It recommended that in some cases, the protocols need to be more specific, noting several instances at p. I-6-7 of its report. Mr. Bennett did not propose modifications to the Code, but merely testified that it should be re-addressed for clarification.

[230] NSPI also suggested that there is a need for clarity in some areas of the Code. In the Action Plan filed with its Reply evidence, NSPI set out what it proposes to do in response to the recommendations on revision of the Code and the Guidelines; however, it did not include a timeline to accomplish this.

[231] If indeed the current Code is ambiguous, the Board observes that no party had sought to clarify how any ambiguity might be interpreted. NSPI appears to have chosen to apply its own interpretation. The Board acknowledges that the ongoing audit

may have been a factor in deterring NSPI from seeking clarification as it awaited the results of the audit.

[232] Nevertheless, the Board accepts the NorthStar recommendation that, where the provisions of the Code are not sufficiently clear, or overlap, the Code should be reviewed and potentially revised. All parties support a collaborative process for this task.

[233] The Board finds that a collaborative process will provide the opportunity for NSPI and the interested parties to examine and suggest clarification of the Code. However, in the view of the Board, the process must be led by an independent party. The Board will seek a consultant to take on this role. As part of the scope for engagement of the consultant, the Board will seek input from NSPI and the stakeholders on the timeline for completion of the revision of the Code. As discussed below, the Code revisions will need to include protocols relating to the Cost Allocation Manual, for which NSPI provided a tentative timeline in its response to Undertaking U-1.

[234] The Board will need to approve the Code when a final draft is provided. Board staff will participate in the review process, as required.

[235] The Guidelines were last reviewed by Liberty in 2015. They provide NSPI employees with guidance on how the protocols of the Code are to be interpreted and applied. The Board understands from the evidence of Ms. Ross that NSPI has been working on revisions of the Guidelines for some time. The Board does not approve the Guidelines as they are internal to NSPI; however, the Guidelines must clearly be consistent with the Code. The Board understands that the Guidelines in effect now were

last updated in 2012, and therefore are not based on the current version of the Code.

NorthStar stated in its report:

- In a number of cases NS Power's compliance Guidelines are incomplete, in some instances they are not followed and in some other instances if they were followed they would result in noncompliance.

[Exhibit N-1, p. E-4]

[236] The Board is mindful that a revised Code will undoubtedly lead to the need for revised Guidelines. That likely means the work done to date by NSPI to revise the Guidelines will need to be revisited. Revised Guidelines cannot be inconsistent with the Code protocols. The Board directs that, once revised, the Guidelines be filed with the Board.

[237] In the interim, NSPI is directed to comply with the current Code and to interpret the Guidelines in a manner consistent with the Code, and this Decision. Should there be any doubt about how a protocol should be interpreted, the Board directs NSPI to seek guidance from the Board.

5.1.2 Cost Allocation Manual

[238] NorthStar recommended a comprehensive CAM "...that integrates all budgeting, allocating, assigning, charging, accounting and reporting of affiliate transactions." [Exhibit N-1, p. E-8]. This recommendation was in addition to several others which addressed pricing methodologies and analyses.

[239] The recommendation was supported by the CA, the SBA, and the Industrial Group. NSPI accepted the recommendation and, during the hearing, Ms. Hutt committed to "...move forward with the development of the CAM on an expedited basis" [Transcript, p. 366].

[240] In response to Undertaking U-1, NSPI filed its anticipated timeline for a collaborative process to develop the CAM, with a proposed effective date of January, 2019. Ms. Hutt envisioned a working group with stakeholder involvement, with Board engagement. NSPI pointed out, however, in its Closing Rebuttal that it views the CAM as an NSPI document.

[241] Ms. Ross testified that the completion of the CAM would result in amendments to the Code as well as the Guidelines, and suggested the processes would need to “work in tandem and go hand in hand” [Transcript, p. 388].

[242] In closing submissions, Ms. Rubin said:

The development of a CAM should proceed expeditiously. In Response to Undertaking, NSPI’s proposed timetable contemplated a consensus filing and submission to the Board. There is no indication and no time contemplated for the possibility that consensus is not reached on the content of the CAM and the additional Code revisions discussed during the course of the hearing. The Industrial Group recommends sufficient time to allow for Board adjudication, in the absence of a consensus filing.

[Exhibit N-48, p. 3]

[243] The CA submitted:

There appears to be widespread acceptance of the auditor’s recommendation that a comprehensive Cost Allocation Manual (CAM) be developed.

The Consumer Advocate notes the specific recommendation by Mr. Vondle that the CAM which will include references to asymmetric pricing and fully allocated cost requirements needs to be applicable to NSP and any affiliates with which NSP conducts transactions. This is not a case where the Board would be regulating NSP affiliates. It would simply be mandating that if NSP chooses to conduct business with such affiliates that the CAM provisions will be fully enforced.

[Exhibit N-49, p. 19]

[244] The Board observes that Mr. Vondle, the CA’s expert witness, has long been a proponent of a CAM. He has suggested that the CAM should be an Emera CAM, and not an NSPI CAM. Since the Board does not regulate Emera, it concludes it cannot direct that an Emera CAM be developed. However, the Board sees merit in Ms. Rubin’s suggestion that, without an Emera CAM, NSPI should be “...required to ensure that its

counter-parties agree to adopt and abide by the NSPI CAM” [Exhibit N-48, p. 2]. Such counter-parties would, of necessity, be the affiliates as defined by the Code.

[245] On February 13, 2018, NSPI provided a letter to the Board in which it sought input on the composition of the working group in anticipation of beginning meetings later in February. This demonstrates to the Board that NSPI is committed to moving forward with a CAM.

[246] The Board finds that a CAM should be developed as expeditiously as possible. The timeline set out in Undertaking U-1 does not contemplate Board approval of the CAM. The Board considers that it must be satisfied that the CAM is the product of a working group which is composed of all interested stakeholders, and meets with their approval. Board staff will participate in this process. The CAM, which requires Board approval, must be incorporated into the protocols of the Code, which also requires Board approval.

[247] The Board has considered whether it would be useful to engage a third-party consultant to lead the discussion on the CAM. However, it is aware that the engagement of a consultant could result in significant delay in the development of the CAM, and possible consequent delay in finalizing a revised Code and Guidelines, none of which would be desirable.

[248] The Board agrees with Ms. Rubin that there should be included in the plan to develop the CAM a mechanism whereby any stakeholder can bring the matter back to the Board in the event a consensus cannot be achieved. Based on the proposed timeline, the Board considers that by September 15, 2018, the parties should be in a position to know whether consensus on the CAM is achievable. Any party wishing to bring the matter

back to the Board should therefore indicate its position on or before that date. The Board will reserve the right to direct that an independent consultant be engaged at that point, should it consider that appropriate.

5.1.3 Assessment of Procurement and Accounting Practices

[249] The CA and the Industrial Group endorsed NorthStar's recommendation that there should be a "comprehensive" assessment of NSPI's procurement and accounting practices. NSPI submitted in its Closing Rebuttal that such a review would be "unnecessary, and certainly premature" [Exhibit N-50, p.12] in light of the development of the Cost Allocation Manual.

[250] The Board finds that the process leading to a CAM will have to include such an assessment, and therefore, will not direct any separate assessment of past or present practices. The Board expects that the product of the CAM working group, if consensus can be achieved, will be informed by such an assessment, and will be a template for future practice.

5.1.4 Service Level Agreements

[251] Mr. Vondle noted in his evidence that he had made certain recommendations in the previous review of the Code, and repeated several of them in this matter. One of his recommendations was:

Require service level agreements for all NS Power affiliate relationships. The agreements should specify the services or products provided; pricing according to the Cost Allocation Manual; service levels to be provided, and other commercial details of the relationship. The service level agreements should be signed by appropriate arms-length representatives of NS Power and the affiliate. Require that the current copy of each service level agreement be filed with the Board.

[Exhibit N-14, p. 24]

[252] He further testified that every time there is a change in the services or types of transactions in NSPI's relationship with affiliates, the service level agreements would require updating and should be filed with the Board.

[253] In Mr. Vondle's opinion, having service level agreements is a matter of good practice.

[254] NSPI, in its Rebuttal submission, agreed to review service level agreements as part of the development of the CAM; however, it rejected the need to file such agreements with the Board as it said it does not do so for other similar agreements.

[255] The Board understands from the evidence of Ms. Ross that NSPI currently has service level agreements in place, for example, for Information Technology. If there are other areas of the business where NSPI transacts with affiliates on a regular basis, whether for long-term or short-term services, the Board finds NSPI should have such agreements in place, if they are not already.

[256] The Board is satisfied to leave the issue of service level agreements to further discussion amongst the CAM working group. At present, the Board does not consider it necessary that the agreements be filed with it, but expects that they would be available for review in any future audit. Thus, any auditor can determine if the agreements comply with the protocols of the Code.

5.1.5 Separate Service Company

[257] Another of Mr. Vondle's recommendations is for the formation of a separate service company:

MR. MELANSON: The last area of questioning I have, and it's really only a couple of questions, relates to the concept of the separate legal entity service company to have all cost centres ---

MR. VONDLE: Yes.

MR. MELANSON: --- and employees who serve NSP and at least one other entity.

And would the cost from your analysis -- so the cost of the structure flow through to ratepayers?

MR. VONDLE: So normally there's a lower cost approach. The service company and how holding companies with multiple subsidiaries and particularly multiple utility operating companies it's how they achieve economies of scale.

MR. MELANSON: Right.

MR. VONDLE: And so in -- there's always exceptions, but in general the service company benefits the utility operating companies by concentration of experts. So you have experts in customer service, or treasury, or information technology, all of the things that utility operating companies need. You can have -- if they're concentrated in a service company you can have a higher level of expertise, economies of scale, that then benefit the utility operating company.

It also -- the service company also solves the problem of shared executives where if there were a service company for Emera, NSP Power could have its dedicated utility operating company executives who are not shared with other legal entities and the service company could house the executives who serve multiple subsidiaries, including NS Power.

MR. MELANSON: But presumably there is some type of overhead charge, some type of charge aside from the service that's provided to the various affiliates, in particular here Nova Scotia Power. Presumably there's some sort of overhead to operate that company that would be allocated between the various affiliates, including Nova Scotia Power. Would that be your way of seeing how this works?

MR. VONDLE: So the total cost -- so subsidiary A and subsidiary B both have information technology and customer service system operations separately, so they incur costs individually.

MR. MELANSON: Yes.

MR. VONDLE: If you consolidate the information technology and customer information system operations in the service company, there is an opportunity for economy of scale, you know, again concentration of expertise, so that the total cost for company A and company B is less and therefore the cost to the -- the cost that's allocated back to the operating company is lower than it was when the service was in the operating company.

MR. MELANSON: But if the companies are sharing services without the shared services company structure, why is there an additional -- why wouldn't that be a cheaper way than with the actual service company -- separate service company?

MR. VONDLE: I'm sorry; could you ---

MR. MELANSON: Yeah. Sorry. My understanding of the way it works now is that there are shared services between the various Emera and NSPI -- there's various affiliates and they share services. And there's a concern that's been raised about how the costs and so forth are allocated. But there are certain services now, if you set up a separate structure to provide those same services isn't there an additional cost?

MR. VONDLE: No, I think it's extremely confused at the moment. There are shared services at Emera that are charged to NS Power. There are shared services at NS Power

that are charged to multiple affiliates. I don't know that the -- what the situation is with the Florida company, the Caribbean company, the Mexico company. It's just very confusing.

And actually it would be quite difficult to audit the affiliate, their relationships and transactions, with the current structure. It would be much cleaner to have a service company where all the costs are identified in -- all the common costs are identified in one legal entity, and then you can see clearly what is being charged to NS Power and the other subsidiaries.

It's -- I believe it's much more efficient for -- it would be much more efficient for Emera to do it that way. I don't know why there's reluctance to implement it. And it's certainly much easier to regulate affiliate relationships and transactions when there is a service company cost allocation in service level agreements, all the normal things that occur in most companies of the size and complexity of Emera.

[Transcript, pp. 631-635]

[258] Mr. Vondle went on to say that having a service company would simplify operations and provide more transparency and visibility and, therefore, lead to better regulation of affiliate relationships and transactions.

[259] The Board questioned whether such a structure would mean that this Board would have less oversight. Mr. Vondle's opinion was that it would not, but he agreed it would require either legislative authority or "enforceable agreements" to allow the Board to have access to the records and books of the service company.

[260] NSPI took the position that NorthStar did not recommend the formation of a separate service company, and that Mr. Vondle's recommendations arose from his previous participation in the review of the Code and had already been addressed by the Board.

[261] Ms. Rubin suggested that, while Mr. Vondle's suggestion of a separate service company might be useful, with the anticipated CAM, "...it may be a matter which can be monitored for present, without being foreclosed" [Exhibit N-48, pp. 3-4]. She suggested that it could be re-visited in the future.

[262] The Board agrees with Ms. Rubin, noting that it has concerns about its jurisdiction to regulate or oversee the activities of a separate company which would not appear to be a public utility, according to the *PUA*.

[263] NSPI noted in its Closing Rebuttal that "...the evidence and analysis necessary to determine whether this [the service company] would be in customers' best interest has not even been canvassed in this Audit process" [Exhibit N-50, p. 12].

[264] The Board is prepared to leave this issue to another day when all parties would have the opportunity to fully address it with a complete evidentiary record, should that be desired.

5.1.6 Costs

[265] In closing submissions, the CA recommended the following remedy, among others:

1. Given that the actions of NSP have increased the work undertaken by the Auditor, and made this hearing process more contentious than it otherwise should have been, NSP and not ratepayers should bear at least a majority of the costs associated with the audit and hearing process;

[Exhibit N-49, p. 21]

[266] No other intervenor commented on this issue. NSPI, however, rejected the request as "completely without merit" [Exhibit N-50, p. 13].

[267] While it is clear to the Board that the audit process was not entirely without its challenges, there was nothing during the proceeding to cause the Board to conclude that costs should be awarded against NSPI. It was entitled to present its position and respond to the audit recommendations, and to the evidence of the Intervenors.

[268] The Board is not prepared to grant the remedy sought by the CA on this point.

5.2 2016 Affiliate Code of Conduct Report

[269] NSPI filed the annual Affiliate Code of Conduct Report for 2016 (2016 Report) with the Board on May 31, 2017, [Exhibit N-3 in this matter] in accordance with an extension granted by the Board from the April 30 filing date. The Board advised NSPI by letter dated August 24, 2017:

As this Report contains material currently the subject of a process regarding the Affiliate Code of Conduct Audit (Audit), the Board panel assigned to the Audit... will review this material as part of the ongoing Audit process. The Report will form part of the evidence in the Audit processing, Matter No. M07755.

[270] The 2016 Report noted that affiliate transactions during 2016 were included in the scope of the audit. NorthStar reviewed such transactions and activities during the calendar year 2016 as part of its audit. Its report referred, where necessary, to concerns which arose.

[271] Other than the issues raised by NorthStar, no party raised any specific matter arising out of the 2016 Report itself during the proceeding. Mr. Bennett confirmed that he and his team had not reviewed the 2016 Report as it was not submitted to the Board until after the audit had been completed.

[272] The Board has reviewed the 2016 Report. It notes the exceptions to the Code which NSPI identified in Appendix J of the 2016 Report.

[273] The Board observes that these exceptions were generally the subject of comment and recommendations in the NorthStar audit, to which NSPI has responded.

[274] Consequently, the Board accepts the 2016 Report as filed.

5.3 2017 Affiliate Code of Conduct Report

[275] Under the terms of Protocol 9.1 of the current Code, the Report for 2017 (2017 Report), is to be filed with the Board "by April 30". Until any revision of the Code is

approved by the Board, the protocols in the current Code apply to affiliate transactions during 2017. The Board directs NSPI to comply with the recommendations of the NorthStar audit report which have been accepted by the Board in the preparation of the 2017 Report.

[276] The 2017 Report is to be filed with the Board by Monday, April 30, 2018.

6.0 SUMMARY OF BOARD FINDINGS

[277] NSPI is wholly owned by Emera. From time to time, NSPI shares or obtains goods, services, and personnel with other companies which fall under the Emera umbrella, and at times it provides goods, services, and personnel to such companies, as well as to Emera. These transactions are governed by an Affiliate Code of Conduct, the latest version of which was approved by the Board, effective October 1, 2015.

[278] The Board advised NSPI and interested stakeholders that it would engage a consultant to audit compliance with the Code for the period of October 1, 2015 to December 31, 2016. NorthStar Consulting Group undertook an audit which led to a public hearing in December, 2017.

[279] NorthStar concluded that NSPI had complied with 24 of the 53 Code Protocols, partially complied with five of them, and had not complied with 24 of the Protocols. Its Audit Report contained 33 recommendations. NSPI accepted 23 of those recommendations, and rejected the remainder.

[280] In this Decision, the Board has made findings and given directives to NSPI regarding governance and utility management; utility financing; fair dealing with affiliates; and compliance with the Code in general. These findings and directives are summarized as follows:

1. The UARB requests NSPI to reconsider the structure of its Board and reconsider returning to the good governance practice of having an independent Chair.
2. NSPI is to revise its Guidelines to provide that, in every calendar year, any person who acts as both a Director or Officer of NSPI and a Director or Officer of Emera, or an affiliate, must complete the Emera Code of Conduct training; complete the NSPI Affiliate Code of Conduct training; and, execute a Confidentiality Undertaking with respect to NSPI's confidential information. Confirmation that this has been done is to be given by the President of NSPI as part of its Annual Affiliate Code of Conduct Report.
3. Revision of the Affiliate Code of Conduct is discussed below. The revised Code is to provide that any changes to the composition of NSPI's Executive Leadership Team are to be filed with the UARB. Any changes made that are of concern to the UARB or stakeholders can then be raised with NSPI.
4. The revised Code is to provide that certain sensitive positions, such as the Director of Procurement, who are not on the Executive Leadership Team, and need not be, should not be shared with any affiliate transacting for goods or services with NSPI. These key positions will be identified in the revised Code.
5. The UARB accepts NSPI's approach to improve protection of confidential information.
6. In the process of revising the Code, NSPI and stakeholders are invited to comment on the appropriateness of establishing a holding period for employees who transfer to or from a particularly sensitive position who would be precluded from involvement with any NSPI transaction with the affiliate.
7. The UARB is satisfied that NSPI has appropriate bankruptcy resistant covenants in force, and further ring-fencing provisions are not required.
8. The UARB finds that the question of substantial consolidation from the transfer of tax liabilities has been investigated and satisfactorily addressed.
9. The UARB finds that NSPI did not perform a proper self-provisioning analysis as required by the Code for the EUS transformer oil testing contract.
10. The UARB is satisfied that the payment for the oil transformer sampling was supported during the hearing.
11. The UARB finds that NSPI has not complied with the Code regarding performance of a self-provisioning analysis in all cases as required by the Code and must comply in the future. Should it fail to properly evidence compliance in the future, the Board will have to consider, whether, as a result, the transaction's costs were not sufficiently supported, and whether they should be disallowed in whole, or in part, regardless of any proven harm to ratepayers.

12. The Code Protocol 2.1, where NSPI is providing services to an affiliate, should be examined in the Code revision process, including addressing whether the cost of providing the service is such that NSPI should not provide the service.
13. The UARB will not direct a prudence review of the existing PLT contract at this time. NSPI is directed to advise the UARB should the current PLT contract be extended or renewed with EUS, or should a procurement process result in a new PLT contract with EUS or any Emera affiliate. The UARB will then consider whether any steps need to be taken to review the contract in relation to Code compliance.
14. In any future audit of compliance with the Code, the UARB will direct that a prudence review and management review are within the scope of the audit; the UARB reserves the right to revisit the need to conduct a prudence review of any transactions covered in the present audit should compliance issues continue to be identified in any future audit.
15. The UARB will not order a review of NSPI's procurement processes at this time, but will continue to monitor them, and will revisit the issue, should a pattern emerge that raises concerns.
16. The discrepancy between the provisions of Protocol 6.2 of the Code and the ERP system approved by the Board is to be addressed as part of the Code review process. As well any requirement for Emera to access NSPI financial information, in its capacity as NSPI's sole shareholder, should be discussed.
17. The UARB finds that any concerns with the methodology and accounting between affiliates should be reviewed as part of the Cost Allocation Manual process, discussed below.
18. The UARB finds that the issue respecting determination and verification of the fully allocated costs of affiliates should be addressed as part of the CAM process, discussed below.
19. The UARB finds that the eleven services being shared by NSPI and its affiliates not listed in Protocol 6.11 are to be discussed as part of the process to amend the Code and the CAM process. In the interim, the Board approves, pursuant to Protocol 6.18, the continued use of fully allocated cost pricing for the eleven services.
20. The UARB directs that the potential conflict among Protocols 2.1, 7.8, 6.11, and 6.12 be reviewed and discussed as part of the Code amendments and the CAM process.
21. The UARB directs that, where the provisions of the Code are not sufficiently clear, or overlap, the Code should be reviewed and potentially revised. The review process will be collaborative and led by a consultant chosen by the Board with input from NSPI and stakeholders on the timeline for completion.

The Code revisions will include protocols relating to the Cost Allocation Manual. The revised Code requires UARB approval. Board staff will participate in the review process, as required.

22. The UARB directs NSPI to revise its Guidelines to be consistent with the revised Code, and to file the Guidelines with the UARB.
23. The UARB directs that in the interim, NSPI is to comply with the current Code and to interpret the Guidelines in a manner consistent with the Code, and this Decision. NSPI is directed to seek guidance from the UARB should there be any doubt about how a protocol should be interpreted.
24. The UARB finds that a Cost Allocation Manual should be developed as expeditiously as possible by a working group composed of NSPI and all interested stakeholders, including Board staff. It must be incorporated into the protocols of the Code, and requires approval by the UARB. Should a consensus not be achieved, a party may bring this matter back to the UARB no later than September 15, 2018.
25. The UARB finds that the CAM process will need to include an assessment of NSPI's procurement and accounting practices.
26. The UARB finds that where NSPI transacts with affiliates on a regular basis, whether for long-term or short-term services it should have service level agreements in place. This issue may be further discussed in the CAM process.
27. The UARB finds that the issue of whether there should be a separate service company for shared services between NSPI, Emera and affiliates should not be addressed by it at this time.
28. The UARB does not approve the request of the CA to order that NSPI "...should bear at least a majority of the costs associated with the audit and hearing process".
29. The UARB accepts the 2016 Affiliate Code of Conduct Report as filed.
30. NSPI is to file its 2017 Affiliate Code of Conduct Report by Monday, April 30, 2018.

[281] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 9th day of March, 2018.



Peter W. Gurnham



Roberta J. Clarke .



Richard J. Melanson

APPENDIX A



Nova Scotia Power Inc. (NS Power) 2015 CODE of CONDUCT governing Affiliate Transactions

Statement from the President and CEO:

The Affiliate Code of Conduct governs the conduct of NS Power as it relates to its business dealings with its affiliates. NS Power endorses and respects the spirit and intent behind the Code and adopts it in full as the standard against which its transactions with affiliates will be assessed.

NS Power executives and senior management expect all employees to comply fully with all provisions of the NS Power Affiliate Code of Conduct.

1.0 PURPOSE

1.1 The purpose of this Code of Conduct is to ensure that: (i) NS Power does not cross subsidize and NS Power's customers do not bear any risks or losses because of its affiliates, (ii) NS Power's organization and management is focused on utility operations, (iii) customer information maintained by NS Power is protected in transactions with affiliates, (iv) NS Power's financial records and other financial information are separate from those of its affiliates, and (v) NS Power complies with the Code of Conduct with a sufficient level of transparency.

1.2 For the purpose of this Code of Conduct, the term "affiliate" means:

- a) an "affiliate" in accordance with Sections 2(2), 2(3), and 2(4) of the Nova Scotia Companies Act; or
- b) any business entity deemed by the Board to be an affiliate of the Utility for purposes of this Code.

2.0 STATEMENT OF PRINCIPLES

2.1 NS Power will precede any transaction by which it acquires from or provides to an affiliate any goods, services, leases, asset transfers, or other exchanges of value, with a sound, objective, and transparent process and reasonable documentation;

- (a) The process and documentation shall identify and then compare transacting with an affiliate to: (i) provisioning through other, reasonably available commercial alternatives, (ii) self-provisioning by NS Power, (iii) joint NS Power/third-party provisioning, (iv) joint NS Power/affiliate provisioning, and (v) such other arrangements as may be reasonably available under the applicable circumstances at the time of the decision.
- (b) For transactions below \$125,000 in aggregate value (determined by adding together all similar transactions with the same affiliate during any consecutive 12-month period), the comparison of alternatives and documentation may be abbreviated as appropriate to avoid adding materially to the cost of the transaction, provided that NS Power provides sufficient documentation to demonstrate that the transaction complies with the standards of Section 1.1 of this Code and that NS Power's actions to meet those standards preceded the decision to transact with an affiliate.

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2.2 NS Power will only enter into affiliate transactions when doing so has been demonstrated through sound, documented analysis to be the best available option for NS Power's customers at the time.

2.3 NS Power's customers will not otherwise bear the risks or share the rewards of an affiliate's activities.

3.0 CORPORATE STRUCTURE

Objectives

To separate regulated electric and other utility services¹ from affiliate activities.

Protocols

3.1 Emera, the parent company of NS Power, will create and maintain a corporate organizational structure which ensures that regulated electric and other utility services are provided solely by NS Power and by no other affiliate.

3.2 NS Power will maintain a complete list of all of its affiliates. The list will include the name and address of each affiliate, a brief description of its activities and the names, addresses and telephone numbers of all of its officers. The list will be kept on open file with the Nova Scotia Utility and Review Board (Board).

4.0 UTILITY MANAGEMENT

Objectives

To dedicate to the provision of regulated services, in terms of quality and numbers, a management team capable of maintaining a superior level of performance, at the same time as NS Power affiliates are expanding into other business activities.

Protocols

4.1 NS Power will maintain within the utility a management team capable of delivering a superior level of performance.

4.2 NS Power will prepare and include in the annual report submitted to the Board, as specified in Code Section 7.1, a summary of utility performance.

5.0 UTILITY FINANCING

Objectives

To maintain a capital structure for NS Power which is in accordance with applicable Board decisions.

Protocols

¹ Regulated electric and other utility services are those covered by the Public Utilities Act

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- 5.1 NS Power's capital structure will reflect the Board approved capital structure.
- 5.2 NS Power's capital structure will not be used to subsidize affiliate activities. Affiliate risks or losses will not be borne by NS Power's customers. NS Power shall, unless otherwise approved by the Board: (i) enact bankruptcy resistant covenants that protect the utility in the event of a parent company bankruptcy; (ii) cause all credit facility, debt and preferred stock financings to be solicited, negotiated and acquired independently by NS Power; and (iii) not agree to borrowings of Emera or its affiliates to have recourse to NS Power or permit cross defaults or a cross-default event whereby NS Power will be in default of its borrowings due to the actions of Emera or its affiliates.
- 5.3 NS Power shall not, without the prior approval of the Board: (i) provide loans to, guarantee the indebtedness of, or invest in securities of an affiliate; (ii) enter into any type of money pool arrangement that includes non-utility affiliates; or (iii) pledge financial support or cash flow for the benefit of an affiliate. NS Power shall, unless the Board authorizes otherwise: (i) maintain standalone credit ratings; (ii) keep cash management systems separate from its affiliates; and (iii) make reasonable efforts to settle all inter-affiliate receivables and collectibles monthly.
- 5.4 NS Power's formation of partnerships with affiliates shall not in any way allow avoidance of the restrictions on NS Power's financial assistance or support.

6.0 FAIR DEALING

Objectives

To avoid discrimination in the matter of pricing or in any other manner against non-affiliated buyers of regulated electric utility services.

To avoid subsidy by NS Power of the costs, revenues, or activities of affiliates.

Protocols

- 6.1 NS Power will provide access to regulated utility services on a non-discriminatory basis and will not in respect of those utility services, directly or indirectly provide, state, imply or offer any preference or favored treatment to NS Power's affiliates or persons purchasing affiliate goods and services.
- 6.2 The financial records of NS Power, as well as NS Power's information systems, will be kept separate from those of its affiliates. All systems containing such records shall include sufficient protections to preclude access by non-NS Power employees to NS Power information. The administrator of such systems shall regularly test those protections and attest to their effectiveness.
- 6.3 NS Power will not provide confidential customer information to affiliates or other persons without prior customer consent.
- 6.4 NS Power will make its customer information available to all parties on terms no less favorable than those that NS Power has offered or provided to any affiliates.

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- 6.5 NS Power will charge Board approved rates for all regulated electric and other utility services provided to affiliates. When NS Power is the receiver of tariff services, NS Power will pay the appropriate tariff.
- 6.6 NS Power will charge market rates for any assistance it provides to affiliates and pay market rates for any assistance it receives from affiliates by way of a guarantee or loan. In no case shall the costs for financial assistance provided by affiliates to NS Power exceed NS Power's standalone costs. NS Power will not engage in support agreements or similar undertakings with affiliates that can commit resources effectively provided by NS Power, except on the same terms and conditions NS Power would require from others.
- 6.7 Except where pricing is otherwise specified in this Code or an exception has been explicitly obtained in accordance with Section 6.18:
- (a) NS Power will charge prices no less than the greater of its fully allocated costs or fair market value (FMV) for all goods, services, leases, asset transfers, or other exchanges of value (excepting those otherwise covered by this Code) provided to affiliates.
 - (b) NS Power shall not pay affiliates for such goods and services prices greater than FMV. Where FMV cannot be evidenced, by a minimum of two alternative qualified vendor offers, NS Power shall pay no more than the affiliates' fully allocated costs. In no case should NS Power pay any amount that exceeds NS Power's self-provisioning costs or the costs that NS Power can secure from other, third-party sources.
- 6.8 NS Power shall determine and document all FMV prices through the use, where practicable, of competitive tendering or quotes; otherwise NS Power shall use the most direct alternative means of establishing FMV pricing, including without limitation benchmarking studies, catalog pricing or recent market transactions.
- 6.9 Where prices based on FMV cannot be determined through reasonably direct and substantially supported means, NS Power will document the inability to make such determination, and will charge to its affiliates prices that reflect the utility's fully-allocated costs for the goods and services provided and vice versa.
- 6.10 Where a capital asset is transferred from NS Power to an affiliate or from an affiliate to NS Power, that asset will be transferred at a price to be approved by the Board in advance.
- 6.11 The price for Management and Administrative services between NS Power and affiliates will equal the providing party's fully allocated costs. Management and Administrative services consist of corporate support services in the areas of Internal Audit & Corporate Security, Corporate Secretary and Insurance, Security, Environmental Policy & Programs, Corporate Tax, Controllers, Treasury, Investor Services, Pension Administration, Human Resources and Strategic Human Resources, Safety and Corporate overhead.
- 6.12 The determination of the cost of personnel providing any service shall be based on a positive time reporting that incorporates an explicit, appropriate designation of the beneficiary or group of beneficiaries of the services provided in each pay period. All costs should be directly charged to the clients of the services wherever possible. When direct charging is not possible, costs should next be allocated wherever possible using allocation factors based on cost drivers specifically applicable to the service provided. Only when no other reasonable alternative exists should costs be allocated using general allocation factors not

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directly related to the services provided. Where budgets or estimates of such costs are used as an initial pricing basis, they must in all cases eventually be reconciled to actual time and other resources used.

- 6.13 NS Power shall make no changes in responsibility for the performance of any services regularly provided for or by any affiliate (including but not limited to corporate support services), absent a prior analysis demonstrating that such change is the best available option for NS Power customers.
- 6.14 NS Power shall take appropriate measures to prevent all confidential or commercially sensitive information received from Nalcor, including but not limited to its 24 month forecast received from Nalcor Energy, from being shared with any of NS Power's affiliates.
- 6.15 NS Power shall maintain complete and detailed documentation of its procedures for accounting for and charging, assigning, and allocating the prices and costs of inter-affiliate transactions, including but not limited to: (i) a listing of each type of cost which is allocated or directly charged between entities and the factor(s) which is (are) used in the allocation; (ii) an explanation of the bases for and calculation of each cost allocation factor used for transactions between and among corporate entities; (iii) a listing of the total amount of each cost allocated or directly charged between or among corporate entities during the annual period; (iv) a description of the detailed procedures used for identifying and assigning costs between affiliates; (v) a description of the control procedures for ensuring proper inter-affiliate cost assignment, including organizational responsibilities and accountabilities and review procedures; and (vi) detailed procedures for determining FMV.
- 6.16 All regularly recurring services that NS Power provides to its affiliates or one of its affiliates provides to NS Power shall be subject to an annual budget to which both the service providers and recipients must concur in documents reflecting such agreement. Variances to such budgets will be tracked.
- 6.17 NS Power energy and fuel transactions with affiliates will be included in the annual Code of Conduct Report and will continue to be examined in the Fuel Adjustment Mechanism Audits.
- 6.18 With the approval of the UARB, NS Power may use a pricing protocol other than those described above.

7.0 DEMONSTRATING CODE COMPLIANCE

Objectives

To separately and fully account for the value of goods, services, financial and other support delivered to or from NS Power and its affiliates.

Protocols

7.1 NS Power shall report annually to the Board the following information:

- (a) A detailed listing of all assets, services and products provided to and from NS Power and each of its affiliated companies.

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- (b) Each item on the listing should indicate the price received or paid and, as appropriate, the relevant fully allocated costs or market values, along with notes providing full explanatory detail.
- (c) Where fair market value is used, an explanation should be provided as to how the value was determined, including the comparative source for the value.
- (d) Where cost allocations are involved, a description of the cost allocators and methods used to make the allocations should be included.
- (e) A summary of corporate services and the methodology for ensuring fair allocations of these costs.
- (f) A summary of utility performance providing results under all established utility performance measurements for at least the last three years and detailed definition and explanation of each performance measurement. Other aspects of the utility performance report format, and contents thereof, shall be agreed upon in advance between NS Power and the Board.
- (g) A copy of the latest version of the documentation of inter-affiliate costing pricing procedures required in Code 6.15.
- (h) A list of the number of employees transferred between NS Power and its affiliates during the year by level and job function.
- (i) A list of corporate entities in which NS Power's parent company has any amount of ownership. For those entities that are affiliates, as understood by this Code, the list will include the name and address of each affiliate, a brief description of its activities and the names, addresses and telephone numbers of all of its officers.
- (j) The most recent version of the NS Power's internal Guidelines for implementing this Code of Conduct, as specified in Section 7.11.

7.2 NS Power shall be subject to external audits of affiliate transactions and transfers of employees between NS Power and its affiliates from time to time as the Board determines to be appropriate. The auditor shall be subject to approval by the Board. Understanding that internal control remains an important measure, NS Power shall conduct an internal audit program encompassing an appropriate level of testing affiliate transactions on an annual basis, except in years subject to an external audit by the UARB. Compliance with Internal Audit requirements will be confirmed through a certificate of compliance from NS Power in accordance with Section 8.1.

7.3 All newly entered, renewed, extended, or otherwise altered or amended NS Power agreements with an affiliate (excepting those energy transactions addressed by the agreement between NS Power and Board Counsel as recorded in 2007 NSUARB 174, at para. 42) will contain provisions sufficient to require and assure that the affiliate will make available all of its books and records (notwithstanding any agreement the affiliate has with any third party) as may in the judgement of the Board be necessary to: (a) examine the market competitiveness of the terms and conditions of such affiliate agreement with reference to any similar agreements the affiliate has with third parties, or (b) verify that agreements between the affiliate and NS Power are independent of and in no way linked to

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agreements between the affiliate and third parties in a manner that causes financial or other harm or loss to NS Power. Moreover, if executed by NS Power no such commitment shall be considered binding, or effective in the absence of such provisions.

- 7.4 NS Power shall submit to the Board annually, all internal Code of Conduct implementation guidance along with a summary of significant interpretations or judgements made by NS Power related to the Code during the year.
- 7.5 In order to monitor compliance, the Board at any time may review the records of NS Power and the records of NS Power affiliates as the Board deems required in assuring compliance with any provisions of this Code and with the duty to deal at arm's-length with affiliates.
- 7.6 NS Power will take the following actions to establish that each transaction with an affiliate is demonstrably the best option from among those reasonably available at the time for its customers.
 - (a) Where NS Power decides to transact with an affiliate, it shall document, contemporaneously with the time of the decision, efforts undertaken to identify commercially available alternatives, the alternatives identified, and a description of the basis for its decision to transact with an affiliate.
 - (b) This documentation shall contain a summary table or narrative that identifies all alternatives considered, lists each criterion considered material in deciding with whom to transact, compares each alternative under each such criterion, and explains the reasons for selecting an affiliate.
 - (c) NS Power's documentation shall contain summaries of all verbal communications substantially affecting its decision to transact with an affiliate, which summaries shall be prepared by an identified NS Power participant as soon as practicable following such communication.
 - (d) The documentation required to be maintained regarding affiliate transactions shall be prepared by or under the direction of an NS Power manager responsible for the costs that the transaction will cause NS Power to incur, and shall be accompanied, in all cases where transactions individually or in aggregate over any consecutive 12-month period exceed \$125,000, by an NS Power officer's level signifying the officer's review and approval of transaction decisions made and the sufficiency of the data gathering and analysis underlying them.
 - (e) To the extent that emergency circumstances require the waiver or delay in performing or documenting any normal step in the data gathering, analysis, and decision process, those circumstances shall be described in a document that shall be accompanied by a responsible NS Power officer's signature signifying the officer's verification that conditions were sufficient to warrant the suspension of normal steps or delay in documenting them.
- 7.7 Additional requirements shall apply to all "Large Transactions" with affiliates, which consist of those that meet the following criteria:
 - (a) One-time transactions with a value of \$500,000 or more;

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- (b) Periodic, related transactions reasonably expected to reach in aggregate \$750,000 or more in any consecutive 12-month period;
- (c) Transactions with: (a) a duration of 24 months or greater, taken alone or in combination with related transactions, and (b) with a value of \$250,000 or more.
- (d) Loans or assignments of personnel between NS Power and an affiliate and involving work in more than 6 months of any consecutive 12-month period, or where costs of all employees involved in related activities or projects are reasonably expected to exceed \$500,000.

7.8 NS Power shall for Large Transactions:

- (a) Prepare an analysis of the costs of self-provisioning by NS Power, which shall specifically identify and exclude fixed NS Power costs (*i.e.*, those that NS Power will continue to bear during the term of the agreement).
- (b) Prepare a description of any solicitations of terms and conditions from third-party suppliers.
- (c) Prepare a documented analysis that: (i) identifies the potential third-party suppliers from whom interest was solicited, (ii) the identities of any of them disqualified from submitting offers, (iii) the reasons for such disqualification, (iv) the number and identity of offers received, (v) a list of all criteria used to evaluate the transaction and a description of the relative importance applied to each such criterion, (vi) a ranking of each bid received by cost and by each criterion considered, and (vii) a justification of the decision that addresses the significance of each decision criterion identified as relevant.

7.9 In the event that solicitation of third-party offers is not used for a Large Transaction, NS Power shall prepare a description of: (a) the justification for failing to use such solicitations, (b) a description of alternate means used to identify available commercial alternatives, (c) the criteria used to evaluate and compare those alternatives, and (d) a description of the process and reasons for choosing to transact with an affiliate.

7.10 In the event that NS Power contracts with an affiliate acting in concert with a third-party (whether by partnership, joint venture, or otherwise), NS Power shall document its efforts to consider the propriety, possibility, advantages, and disadvantages of NS Power's working similarly with a third-party as an alternative.

7.11 Proper implementation of this Code of Conduct requires detailed internal Guidelines. NS Power shall prepare, maintain, and review and update at least annually Code of Conduct Guidelines that fully comply with the Code's current provisions and that provide employees with guidance appropriate to ensuring its full, timely, and proper implementation and compliance. The Guidelines shall be organized in the same numbering scheme as the Code, that is, guidelines for each Code provision.

8.0 EMPLOYEE COMPLIANCE

Objectives

Effective: October 1, 2015

To ensure understanding of and compliance with this Code of Conduct.

Protocols

8.1 NS Power will ensure that its employees who perform work for affiliates understand and agree to abide by this Code of Conduct. NS Power will inform all its managers and employees directly involved in affiliate activities of their expected behavior relative to the Code of Conduct and will undertake annual training in Code content and use. NS Power will require annual certifications by all employees having engagement in affiliate transactions and their pricing and documentation that such employees understand and have complied with the requirements of the Code of Conduct and Guidelines. NS Power shall also undertake management reviews of compliance sufficient to enable the President of NS Power to certify to the Board annually in writing that all affected employees have complied with this requirement to the best of their knowledge, information, and belief.

9.0 GENERAL

9.1 All reports referred to in this document shall be provided by April 30 in respect of each preceding year.

9.2 This Code of Conduct replaces the Code of Conduct dated February 24, 2009 (effective June 1, 2009), and shall become effective on October 1, 2015.

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