DECISION **2021 NSUARB 20**
M09880

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE PUBLIC UTILITIES ACT

- and -

IN THE MATTER OF an application by **NOVA SCOTIA POWER INCORPORATED** for an exemption from the requirements of the Affiliate Code of Conduct to permit dispatchable renewable electricity purchases from **Brooklyn Power**

BEFORE:	Peter W. Gurnham, Q.C., Chair
APPLICANT:	**NOVA SCOTIA POWER INCORPORATED** Brian Curry, Counsel
INTERVENORS:	**CONSUMER ADVOCATE** William Mahody, Q.C.
	SMALL BUSINESS ADVOCATE E.A. Nelson Blackburn, Q.C. Melissa MacAdam, Counsel
	INDUSTRIAL GROUP Nancy G. Rubin, Q.C.
	MINAS BASIN PULP AND POWER COMPANY LIMITED John Woods
	NOVA SCOTIA DEPARTMENT OF ENERGY AND MINES David Miller
	PORT HAWKESBURY PAPER LP David MacDougall, Counsel James MacDuff, Counsel
BOARD COUNSEL:	S. Bruce Outhouse, Q.C.
FINAL SUBMISSIONS:	February 4, 2021
DECISION DATE:	**February 16, 2021**
DECISION:	**The Board grants NS Power a conditional exemption to the Affiliate Code of Conduct as described in paragraph [32].**

TABLE OF CONTENTS

1.0 SUMMARY

[1] This Decision is further to an application filed by Nova Scotia Power Incorporated for an exemption from the requirements of the Affiliate Code of Conduct to permit additional energy purchases from Brooklyn Power.

[2] The Board finds in this Decision that, to the extent NS Power is required to purchase additional dispatchable renewable electricity to meet the Alternative Compliance Plan; and to the extent that such electricity must be purchased from Brooklyn Power, then NS Power is in a position that it cannot comply with both the Alternative Compliance Plan and the Code of Conduct. To that extent the Board, under Sections 6.3.5, 6.2 and 7.1.2 of the Code, relieves NS Power of the Code compliance obligation.

2.0 BACKGROUND

[3] Brooklyn Power Corporation is a 30-MW biomass power and co-generation facility located in Liverpool, Nova Scotia, which operates under a long-term power purchase agreement (PPA) with NS Power. The PPA was executed in 1992 with a term of 33 years from its proposed in-service date of April 1, 1995.

[4] In 2013, the PPA was assigned to Brooklyn Power, which is owned by Emera Inc. and, therefore, is an affiliate of NS Power. Given the PPA pre-dates NS Power's Affiliate Code of Conduct, it operates as an exception to the Affiliate Code.

[5] NS Power advised that in March of 2020, Nalcor Energy announced it had temporarily paused construction activities at the Muskrat Falls site due to the COVID-19 pandemic. NS Power further advised that the Company's ability to achieve the provincially legislated target of 40% electricity generation from renewable sources in 2020

had been impacted by the associated delay in delivery from the Muskrat Falls project. NS Power asked for relief from the Province.

[6] On May 15, 2020, the Minister of Energy and Mines (Minister) issued an Alternative Compliance Plan pursuant to Section 7(2) of the *Renewable Electricity Regulations* which reads as follows:

> **Nova Scotia Power Compliance Plan for RES 2020**
>
> Recognizing delays related to the delivery of energy from the Muskrat Falls project, compounded further by additional delays related to COVID-19, the Minister of Energy and Mines is providing an alternative compliance plan for Nova Scotia Power Inc. If the company is unable to meet the Renewable Energy Standard of 40% in the calendar year 2020, Nova Scotia Power Inc. is directed to undertake the following immediately:
>
> - Nova Scotia Power shall supply customers with renewable electricity in an amount equal to or greater than 40% of the total amount of electricity supplied to its customers over the three calendar years of 2020, 2021, and 2022. For greater certainty, the total amount of electricity supplied over the three years shall be at least 40% renewable.
>
> - Nova Scotia Power shall also maximize the use of dispatchable renewable electricity from its own facilities, as well as those of renewable electricity power producers in Nova Scotia (excluding COMFIT generation sources). Recognizing this additional dispatch will be burdensome on producers, Nova Scotia Power shall acquire such electricity at prices exceeding current contracts by $30/MWh. Nova Scotia Power should nonetheless make an efficient use of dispatchable generation resources, including by dispatching the facilities in a manner that enables them to operate in such a way that each unit of fuel provides the most electricity, while accommodating the operational constraints of each facility. Additionally, if the renewable electricity power producer uses biomass as a fuel source, Nova Scotia Power shall only pay the additional $30/MWh where the electricity is generated using biomass by-products produced from harvesting or processing primary forest products. However, this plan does not require any biomass-fired renewable electricity generator to make itself available to produce electricity if biomass is not sufficiently available for economic generation. Nova Scotia Power shall not spend more than $7 million to comply with this provision.
>
> [Exhibit N-2, p. 1]

[7] NS Power advised that it would be acquiring dispatchable renewable electricity from the Brooklyn Facility at prices that exceed the current contract price by $30/MWh.

[8] It further advised that by meeting the terms of the direction it will not be able to meet the terms of the Affiliate Code of Conduct. On October 7, 2020, NS Power sought

confirmation from the Board that the RES Adder ($30/MWh) is exempt from the pricing and documentation requirements under the Affiliate Code. By letter dated October 8, 2020, the Board advised NS Power that it was not prepared to proceed with the application until NS Power provided further information which it did in a letter dated November 4, 2020.

[9] NS Power clarified that it is seeking an exemption from the general pricing provisions as outlined in Section 6.3.5 of the Code and confirmation that the general pricing principles under Section 6.2 of the Code and the requirements under Section 7.1.2 of the Code do not apply to the payment of the RES Adder to Brooklyn Power under the terms of the Minister's Alternative Compliance Plan.

3.0 ISSUES

3.1 The Code Provisions

[10] The Board marked the entire Code as Exhibit N-3 in this proceeding and relevant portions of the Code include the following:

> 6.2.1 Affiliate Pricing
> Except where pricing is otherwise specified in this Code or an exception has been explicitly approved in accordance with Section 6.3.5:
>
> (a) NS Power will charge an Affiliate a price for each Affiliate Transaction no less than fair market value ("FMV") or its fully allocated costs ("FAC"), whichever is greater; and
>
> (b) NS Power will pay an Affiliate a price for each Affiliate Transaction no more than FMV or its self-provisioning costs, whichever is less. If FMV cannot be determined, NS Power will pay an Affiliate a price for each Affiliate Transaction no more than the Affiliate's FAC or NS Power's self-provisioning costs, whichever is less.
>
> ...
>
> 6.3.5 Other Pricing Exceptions
> With prior approval of the UARB, NS Power may use a pricing protocol other than those described above.
>
> ...
>
> 7.1.2 Requirements as a Buyer/Receiver

> Except for Affiliate Transactions covered by a pricing exception in Section 6.3, NS Power will precede a new Affiliate Transaction, or changes contemplated to a regularly recurring Affiliate Transaction, on the Affiliate's own account or working jointly with a third-party supplier (whether by partnership, joint venture, or otherwise), with a sound, objective and transparent process, and shall document, contemporaneously with the time of the decision, the following:
>
> (a) the name of the Affiliate and, if applicable, the third-party supplier with which the Affiliate is working jointly,
> (b) a description of the Affiliate Transaction and its terms and conditions,
> (c) the efforts undertaken by NS Power to use offers from competitive tendering or quotes from a minimum of two alternative qualified third-party suppliers, where practicable;
> (d) NS Power's self-provisioning costs or the cost of joint provisioning with a third-party supplier, if applicable,
> (e) the efforts undertaken by NS Power to use the most direct alternative means of establishing FMV prices, if applicable,
> (f) the Affiliate's FAC costs plus, if applicable, the price charged by a third-party supplier with which the Affiliate is working jointly; and
> (g) an explanation describing why the Affiliate Transaction was the best available option for NS Power's customers at the time.
>
> [Exhibit N-3, pp. 6-9]

[11] The Board established a paper process which allowed Information Requests to and responses from NS Power, submissions by interested parties, and reply by NS Power.

3.2 The Brooklyn Contract

[12] NS Power filed, in response to an IR, the Brooklyn Contract. Board Counsel consultant, Bates White Economic Consulting, reviewed the principal pricing provisions in the Contract in their evidence:

> Q. What are the two "most prevalent" revenue streams paid under the power purchase agreement with the Affiliate Facility?
>
> A. "Capacity Energy" is paid a fixed rate updated annually for inflation. Capacity energy is the actual monthly metered energy generated each hour up to the daily dispatch level requested by NSPI.
>
> ...
>
> "Decremental Energy" has a fixed component and a variable component and is paid on all MWh that are (a) above the daily dispatch level requested by NSPI but (b) below the seller's schedule. So if Emera declares that the Affiliate Facility's seller schedule to be 20 MW of availability, and NSPI dispatches the plant to 9 MW, there is a payment for 11 MW of Decremental Energy, while the other 9 MW would be paid as Capacity Energy. In other

> words, Capacity Energy is the cost of MWh actually produced, while Decremental Energy is the cost of MWh *not produced*.
>
> There are two important points to note here. First, the relative *share* between Decremental Energy and Capacity Energy depends in part on the daily dispatch level selected by NSPI. The closer that daily dispatch level is to the seller's schedule (e.g., the higher than daily dispatch level), the greater the amount of Capacity Energy and the lower the amount of Decremental Energy. Second, Capacity Energy is more expensive than Decremental Energy. Decremental Energy is paid subject to both a fixed and variable component.
>
> ...
>
> Thus, the formula for determining the Decremental Energy cost means it is lower than Capacity Energy—this makes intuitive sense because as, noted above, NSPI pays the Capacity Energy price for energy produced (up to the seller's schedule), while it pays the Decremental Energy price for energy *not produced* (between the dispatch level and the seller's schedule). [Emphasis in original]
>
> [Exhibit N-13, pp. 8-9]

[13] Bates White also described the impact of incremental energy and excess energy under the Contract.

[14] NS Power stated that the Brooklyn Facility is the only renewable electricity power producer in Nova Scotia that can provide the dispatchable and renewable electricity under the terms of the Alternative Compliance Plan. Later in this Decision, the Board will make a finding that NS Power's conduct under the Alternative Compliance Plan will be subject to review in the next FAM Audit.

[15] Accordingly, the Board makes no finding on whether the Brooklyn Facility is NS Power's only alternative.

3.3 Is the Energy Needed?

[16] Both the Consumer Advocate and Bates White submitted that NS Power is able to meet the 40% RES compliance objective for 2020 to 2022 without any output from the Brooklyn Facility. In Bates White's view, the Brooklyn Facility is not forecast to have any impact on NS Power's ability to meet the RES requirements or the Alternative

Compliance Plan and is only a minor percentage of its RES percentage over the 2020 to 2022 period.

[17] The CA makes a similar point in his brief.

[18] NS Power, in response, noted that the Directive requires NS Power to maximize the use of dispatchable renewable electricity from its own resources as well as those of renewable electricity producers in Nova Scotia (excluding COMFIT generation). NS Power appears to have taken the position that it is obliged, under the Alternative Compliance Plan, to purchase all dispatchable renewable electricity at the higher price of $30/MWh over the contract prices, until the $7 million cap is reached. This would include all megawatt hours purchased from Brooklyn Power, not just additional production.

[19] In its Reply Argument, NS Power confirmed "it is not requesting that any of the transactions entered into with Brooklyn Power, in compliance with the Alternative Compliance Plan, be exempted from review in any future FAM Audit. NS Power understands that the NSUARB auditors will review those transactions for compliance with the terms of the Minister's direction…".

[20] Accordingly, the Board is not obliged to make a finding on the need issue but does observe it would be odd if NS Power is obliged to purchase dispatchable renewable electricity it does not need to meet RES requirements and pay $7 million, or perhaps an additional $10 million for it and charge it to ratepayers. The Board notes the Minister's direction does say "Nova Scotia Power should nonetheless make an efficient use of dispatchable generation resources including …".

[21] Clearly, Bates White and the CA are uncertain, at this point, of what dispatchable renewable electricity, if any, NS Power is required to purchase from

Brooklyn Power, as is the Board. The Board expects this will be thoroughly reviewed in the next FAM Audit.

[22] In addition, Bates White notes that NS Power proposes to only apply the $7 million cap to the additional $30/MWh. In its view, NS Power's approach ignores the additional cost associated with incremental output associated with the Brooklyn Facility beyond the $30/MWh Adder. It explains this additional incremental cost occurs when the Brooklyn Facility is run out of economic order. In Bates White's view, NS Power should track these additional costs as they are incurred and net them against the system marginal cost in the relevant hour. Otherwise, they estimate that ratepayers will incur an additional $2.7 million to $3 million more than the cap and the total cost of compliance with the Directive, as NS Power interprets it, will be $9.7 million to $10 million, not $7 million. NS Power takes the view, which the Board accepts, that this issue does not require a decision in this matter and will be the subject of the next FAM Audit. NS Power proposed to discuss the issue in advance of the next FAM Audit with Bates White.

3.4 Frontloading

[23] Bates White pointed out that NS Power is proposing to frontload its acquisition from Brooklyn Power over the next three years. While the specific percentages are confidential, NS Power is estimating a substantial increase in output in 2020, the first year of the new compliance period, then a much lesser increase in 2021 and a substantial decrease in output in 2022.

[24] In Bates White's view this could have a negative impact on FAM customers.

> Q. Could this approach have a negative impact on FAM customers?
>
> A. It could. First, to the extent output from the Affiliate Facility is material to compliance with the Alternate Compliance Plan RES target of 40% for the three-year period, this approach precludes the impact of either greater-than-forecasted output from other RES-compliant resources or lower-than-forecasted load. Should either or both of

> these phenomena occur, NSPI's RES compliance percentage would be higher than currently forecasted, perhaps alleviating the need to buy additional renewable energy, particularly when it is both higher than the system price and being paid an additional premium (e.g., the $30/MWh adder). Even setting this argument aside, however, there is an additional potential cost involved as it relates to the optimal dispatching of the Affiliate Facility.
>
> [Exhibit N-13, p. 28]

[25] Again, this issue is best left to be decided in the next FAM Audit.

3.5 Letters from the Department of Energy and Mines (DEM)

[26] DEM was granted Intervenor status in this matter pursuant to the timetable set out by the Board at the commencement of the proceeding. DEM filed two letters in this proceeding – neither in compliance with the timetable set out in the Board's Order. The first letter was filed November 13, 2020. The record in this proceeding closed on February 4, 2021, in accordance with the timetable with the filing of NS Power's Reply Submission.

[27] On February 5, 2021, DEM filed a further letter purporting to clarify the intent of the Alternative Compliance Plan. By letter dated February 8, 2021, the Industrial Group objected to the filing of this letter after the record was closed. The Industrial Group stated:

> ... However, having tendered evidence of legislative intent during the course of the proceeding, DEM submitted it yet again following the close of all evidence and submissions when the parties are not in any way able to respond to this additional evidence. This is fundamentally at odds with the principles of administrative fairness and natural justice.
>
> Having formally intervened, DEM is subject to the Board's timetable just as any other Intervenor. The Industrial Group is asking the Board to disregard the letter of February 5, 2021 or, failing this, to reopen the proceedings to allow participants to ask IRs of DEM on its evidence and to permit supplemental submissions.

[28] The Board agrees with the Industrial Group that the filing of the letter on February 5, 2021, is prejudicial to the parties in this proceeding. Given the finding the Board is making in this Decision, it does not believe it is efficient to re-open the proceeding and allow for additional IRs.

[29] Accordingly, the Board has determined the fair result is to disregard the February 5, 2021, DEM letter and remove it from the record. In future, should DEM wish to participate in proceedings, the Board would request adherence to the hearing timetable.

[30] Additionally, the Board is accustomed to interpreting Legislation and Regulations. In doing so, the Board follows the directions of Superior Courts that the words of an Act (or Regulations) are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the Legislature (for example *Sparks v. Holland*, 2019 NSCA 3).

[31] The Board also follows the Rules set out in the *Interpretation Act*. The document the Board may be called upon to interpret is the Alternative Compliance Plan, which is akin to a Regulation. As such the Board would, in the normal course, rely primarily on that document.

4.0 FINDINGS

[32] To the extent NS Power is required to purchase dispatchable renewable electricity to meet the Alternative Compliance Plan; and to the extent that such electricity must be purchased from Brooklyn Power, then NS Power is in a position that it cannot comply with both the Alternative Compliance Plan and the Code of Conduct. To that extent, the Board, under Section 6.3.5, 6.2 and 7.1.2 of the Code, relieves NS Power of the Code compliance obligation.

[33] All other issues raised by the Intervenors and Bates White in this proceeding can be explored in the next FAM Audit.

[34] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 16th day of February, 2021.

Peter W. Gurnham