PRELIMINARY DECISION **2024 NSUARB 94**
M11150

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE ELECTRICITY ACT

- and -

IN THE MATTER OF AN APPEAL by **NOVA SCOTIA POWER INCORPORATED** under s. 48 of the Renewable Electricity Regulations of the Minister's decision directing a penalty of $10 million

BEFORE:	Stephen T. McGrath, K.C., Chair Roland A. Deveau, K.C., Vice Chair M. Kathleen McManus, K.C., Ph.D., Member
APPELLANT:	**NOVA SCOTIA POWER INCORPORATED** Colin J. Clarke, K.C. Geoff Breen, Counsel Blake Williams, Counsel
RESPONDENT:	**MINISTER OF NATURAL RESOURCES AND RENEWABLES** Daniel Boyle, Counsel
BOARD COUNSEL:	William L. Mahody, K.C.
MOTION DATE:	March 12, 2024
DECISION DATE:	**June 6, 2024**
DECISION:	**The Board orders that some redactions in the Record be removed.**

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1.0 INTRODUCTION

[1] On April 6, 2023, the Honourable Tory Rushton, Minister of Natural Resources and Renewables (NRR), directed Nova Scotia Power Incorporated to pay a $10 million penalty for failing to comply with s. 6A(1) of the *Renewable Electricity Regulations*, N.S. Reg. 155/2010. Section 6A(1) requires NS Power to supply its customers with renewable electricity in an amount equal to or greater than 40% of the total electricity supplied to its customers for each year between 2020 and 2022 (renewable energy standards or RES).

[2] NS Power appealed under s. 48 of the *Regulations*, asking the Board to overturn the Minister's decision to issue the penalty. It relies on ss. 47(2) of the *Regulations* which says that a person is not subject to a penalty if they can establish that they: (a) exercised due diligence; or (b) reasonably and honestly believed in the existence of facts that, if true, would render the conduct of the person excusable. NS Power also submitted the penalty is excessive.

[3] The pre-hearing procedures set by the Board for the appeal required the Minister to file a Record for the decision under appeal. The Record filed with the Board included two documents that were heavily redacted. NS Power asked for the unredacted documents but was advised by NRR that the redacted parts of the documents were being withheld because they were not relevant and were subject to a claim of public interest immunity.

[4] NS Power asked the Board to schedule a preliminary hearing to hear its motion to be provided with full access to the documents. Before the hearing, the Minister provided the Board with a sealed copy of the unredacted documents in dispute. After considering written and oral submissions from the parties, and reviewing the unredacted

versions of the documents, the Board finds that much of the redacted information is not relevant and deals with discussions about potential changes to legislation and regulations that should not be disclosed.

[5] However, certain redactions include information the Board considers relevant to issues NS Power may wish to raise in this appeal. In these instances, the Board finds the evidence supporting the Minister's claim that the information should be withheld on the basis of public interest immunity to be inadequate to meet the burden on the Minister to demonstrate that the information should be withheld. The Board directs that the documents at Tabs 3 and 4 of the Record be refiled with the redactions covering this information removed.

2.0 BACKGROUND

2.1 Procedural History

[6] The circumstances leading to this appeal were fully described in the Board's Preliminary Decision dated October 12, 2023, reported at 2023 NSUARB 181. In summary, in a letter dated April 6, 2023, Minister Rushton directed NS Power to pay a $10 million penalty by December 31, 2023, for failing to comply with s. 6A(1) of the *Regulations*, which required NS Power to supply their customers with renewable electricity in an amount of at least 40% of the total electricity supplied to its customers for each year between 2020 and 2022. NS Power appealed under s. 48 of the *Regulations*, asking the Board to overturn the Minster's decision to issue the penalty. In its Preliminary Decision, the Board concluded that the appeal will be considered using a hybrid approach in which the Board can consider any relevant and useful evidence in addition to the

Record that was before the Minister, while giving due deference to the process before the Minister and the decision rendered by the Minister.

[7] Accordingly, the Board issued a Hearing Order on November 15, 2023, setting the matter down for hearing during the week of June 24 to 28, 2024. The Hearing Order also established a timeline for the disclosure of evidence in advance of the hearing, starting with the filing of the Record by the Minister on December 20, 2023. The Minister filed the Record with the Board on that date and copied NS Power. However, the Minister redacted portions of Tabs 3 and 4 of the Record and claimed that those redacted portions should be kept confidential. While confidentiality is an issue that normally arises in Board proceedings, in this appeal the Minister asserts that the redacted material should not even be disclosed to NS Power, the appellant.

[8] On January 23, 2024, NS Power's counsel wrote to the Board requesting a motion to consider the removal of some or all of the redactions that the Minister made to Tabs 3 and 4 of the Record. In a letter dated February 1, 2024, the Board set out a timeline for its consideration of the motion. To assist in its assessment of the motion, the Board requested the Minister to identify which parts of the documents were redacted for relevance and which parts were redacted for privilege, as claimed by the Minister. Where privilege was claimed, the nature of the privilege being asserted also had to be provided. The Board also stated that it did not believe it would be able to assess the relevance or any privilege associated with the redactions of the documents without seeing them, so it asked counsel for the Minister to file sealed unredacted versions of the documents with the Board only. An oral hearing was scheduled for March 12, 2024.

[9] On February 8, 2024, counsel for the Minister filed a sealed unredacted copy of Tabs 3 and 4 of the Record with the Board. He asserted that all redactions were made as a result of irrelevance and public interest immunity, stating, in part:

> Claims of privilege and, alternatively, irrelevance, apply to each redaction contained in these documents. All redactions should be considered under these alternate bases. The nature of the privilege claimed is public interest immunity.
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> The documents included in the Record at Tab 3 and at Tab 4 were prepared for briefing purposes and were considered by the Minister in this context. Ministerial briefings, including the one where these documents were considered, do not deal with individual discrete issues but consider multiple facets of government policy. Consistent with this practice, the documents included in the Record as Tab 3 and Tab 4 contain material which is subject to public interest immunity, and which are irrelevant to the discrete decision now under appeal. …
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> [NRR letter, February 8, 2024, p. 1]

[10] Before the hearing, NS Power filed the affidavit of Daniel Irvine, a member of the law firm representing NS Power, in support of NS Power's motion "to compel production of the complete, unredacted, record that was before the Minister". The affidavit contained copies of correspondence outlining the procedural history of the present motion. The affidavit also included a copy of a CBC online media report quoting statements by the Minister about the $10 million penalty under appeal. The Minister filed the affidavit of Peter Craig, who was a Manager of NRR at the time the matter was considered and decided by the Minister in April 2023. In December 2023, Mr. Craig became NRR's Director, Clean Electricity. He deposed to the circumstances leading to the Minister's decision about NS Power's failure to comply with s. 6A(1) of the *Regulations*, including the preparation of briefing documents for the Minister, the process involved in ministerial briefings generally and the justification for maintaining the redactions. He stated:

> Several of the considerations contained in the redacted sections of Tabs 3 and 4 to the Record remain relevant to the work of the Department with respect to ongoing regulatory

> or legislative measures. It is possible that these issues will be revisited and that decisions may be taken with respect [to] issues contained in the redacted portions of Tabs 3 and 4.
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> [Exhibit N-5, para. 22]

[11] During the hearing on this motion, after hearing the submissions of counsel, the Board held an *ex parte* session with counsel for the Minister (i.e., in the absence of NS Power and its counsel) to ask questions about the specific redactions and confidential nature of the claims being made by the Minister to redact portions of the Record. The Board took Daniel Boyle, counsel for NRR, through each part of Tabs 3 and 4 of the Record and asked him to specifically outline what claim for confidentiality was being made for each section of the redactions, whether that be the information was irrelevant, or subject to privilege for public interest immunity, or both.

[12] Finally, the Board notes that normally all documents filed in a matter shall be placed on the public record. Rule 12 of the *Board Regulatory Rules* provides for the manner in which requests for confidential treatment are to be addressed. The burden of satisfying the Board that a document should be held in confidence is on the party claiming confidentiality. In this appeal, that burden is on the Minister. The Minister has claimed confidentiality over the redacted portions of Tabs 3 and 4 of the appeal Record. The Minister asserted that these redacted excerpts should be treated confidentially because they are irrelevant or that they are subject to a claim of privilege on the basis of public interest immunity, or both. NS Power denies the claim for confidentiality and requests that the redactions be removed.

2.2 Relevance

[13] NS Power asserts that the redacted portions of the documents in Tabs 3 and 4 of the Record filed by the Minister are relevant to this appeal and the redactions should be removed. NS Power submits that the information in Tabs 3 and 4 is relevant information because it was presented to the Minister and he may have considered the information before making his decision.

[14] Relevance is the initial threshold for the introduction of evidence before the courts and administrative tribunals like the Board. Unless the evidence is relevant to the issues to be decided, it must not be considered by the decision maker. Relevance was considered by the Supreme Court of Canada in *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 (*BC Judges*):

> [57] Evidence is relevant when it has "some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence": *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 36, quoting D. M. Paciocco and L. Stuesser, *The Law of Evidence* (5th ed. 2008), at p. 31. Put another way, [translation] "a fact is relevant, in particular, if it is a fact in issue, if it contributes to rationally proving a fact in issue or if its purpose is to help the court assess the probative value of testimony": J.-C. Royer and C. Piché, *La preuve civile* (5th ed. 2016), at para. 215.
>
> [58] Evidence is thus relevant to a proceeding when it relates to a fact that is in issue in the proceeding. The pleadings, which must be read generously and in light of the governing law, define what is in issue: see *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 41.
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> [*BC Judges*, paras. 57-58]

[15] As noted above in *BC Judges*, the pleadings in a matter define what is at issue in a matter. The pleadings in the current matter originated with NS Power's notice of appeal filed on May 26, 2023, requesting that the Board overturn the Minister's decision to issue a $10 million penalty for its failure to comply with s. 6A(1) of the *Renewable Electricity Regulations*. NS Power relied expressly on s. 47(2)(a) and (b) of the *Regulations*, which provides that a person is not subject to penalty if the person

establishes that they (a) exercised due diligence; or (b) reasonably and honestly believed in the existence of facts that, if true, would render the conduct of the person excusable. Thus, NS Power submitted that any information before the Minister that would pertain to those issues should also be relevant in this appeal:

> 18. It is well-settled in Canadian law that the threshold for relevance is a low one. Therefore, if Tabs 3 or 4 have any bearing on the issues raised in this Appeal, including NS Power's due diligence and reasonable and honest belief defences under section 47(2) of the *RES Regulations*, or quantum of penalty under section 47(1) thereof, they should be produced.
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> ***Thornridge Holdings Limited v. Ryan*, 2023 NSSC 11 at para. 21 – 25**
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> 19. However, it is important to emphasize that the Minister's obligation to produce the Record is not confined by a typical relevance analysis. Production of the Record is not the same as a party's production requirements in a civil discovery process. The Record is to be comprised of the documents that were before the Minister (as decision maker) when making the Decision.
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> ***Rudderham v Nova Scotia (Environment)*, 2018 NSSC 172 at para. 29**
>
> [Emphasis in original]
>
> [NS Power Written Submissions, February 15, 2024, paras. 18-19]

[16] The Board observes that in *BC Judges* the scope of the review conducted by the lower courts (i.e., which in the present appeal translates to the Minister's review) was an important factor for the Supreme Court in determining what should constitute the Record in that matter. The Board notes that this point had a restrictive impact in *BC Judges* because that case involved a limited *Bodner* review of the legislature's decision:

> [51] More importantly, in my view, the *Provincial Judges Reference* and *Bodner* describe a unique form of review distinct from judicial review in the ordinary administrative law sense. In contrast to judicial review, *Bodner* review is available even when the decision-maker is the legislature (or any part of the legislature): see *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 558; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 59. Further, the grounds for a *Bodner* review are narrower than those for a usual judicial review. The *Bodner* grounds centre on the legitimacy and sufficiency of a government's reasons for departing from a commission's recommendations, whether the government has respected the commission process more generally and whether the objectives of the process have been achieved.

> [52] In the usual context of judicial review, the record generally consists of the evidence that was before the decision-maker: see *Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin. L.R.(5th) 301, at para. 42; *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41, 80 B.C.L.R. (5th) 243, at para. 52. However, the rule that the record generally consists of the evidence that was before the decision-maker cannot be automatically transposed into the limited context of *Bodner* review.
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> [*BC Judges*, paras. 51-52]

[17] Again, the Board notes that *BC Judges* involved a narrow *Bodner* review, which does not apply in the present appeal. In this appeal, the Board decided in its preliminary decision [2023 NSUARB 181] that it would apply a hybrid approach in its review, which will allow the parties to supplement the Record:

> [4] Having reviewed the written submissions and the case authorities, the Board concludes that the appeal will be considered using a hybrid approach in which the Board can consider any relevant and useful evidence in addition to the record that was before the Minister, while giving due deference to the process before the Minister and the decision rendered by the Minister.
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> [Board Preliminary Decision, para. 4]

[18] NS Power also submitted that the redacted materials in Tabs 3 and 4 of the Record may be relevant to help determine if the Minister considered irrelevant facts or issues in reaching his decision to impose a penalty and its quantum. It referred to the Supreme Court of Canada's judgment in *Vavilov*:

> 20. Therefore, the Minister should not be permitted to retroactively edit the Record to now suit what he deems relevant to the Appeal. … In *Vavilov*, the Supreme Court of Canada addressed the importance of reviewing the record (including evidence) before an original decision maker when reviewing their decision, stating:
>
> > The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would also have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him.
> >
> > ***Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 126**

> 21. While the quotation above is specifically made in reference to a "reasonableness" analysis, NS Power submits that the points raised are necessarily applicable in any case where any deference will be afforded to the original decision maker.
>
> 22. Accordingly, it will be critical to this Appeal that the Record include all information that was before the Minister and considered as part of making the Decision. The Board will, as part of its analysis, need to be able to consider whether the Minister's Decision was in error based upon the information before him, which may include a finding that the Minister ignored relevant information or denied rights, but also whether the Minister relied upon irrelevant or otherwise improper information or factors in making the Decision. In other words, irrelevant information on the Record may be just as important to the disposition of this Appeal as information deemed relevant to the substantive issues. [Emphasis in original]
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> [NS Power Written Submissions, February 15, 2024, paras. 20-22]

[19] NS Power submitted that it was important for it to have access to the redacted portions of the documents to fully understand the decision-making process of the Minister and to allow it to have a fair opportunity to present its appeal. In particular, the documents confirm that three "options" were presented to the Minister in the briefing documents, but portions of Option 1, and all of Options 2 and 3, were redacted, among other redactions:

> 25. The redactions made by the Minister to Tab 3 include: approximately half of the section "Context/Current Situation"; portions of "Option 1"; all of "Options 2 and 3"; portions of the section "High level comparison of the Options above"; all of the section "Other Considerations (Legal/Financial)"; all of the section "Recommendation"; and two full pages without any form of description or identification.
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> 26. NS Power submits that the entire content of the section "Context/Current Situation" is relevant. NS Power believes that this section will provide greater insight into the context reviewed by the Minister when considering the due diligence and reasonable and honest belief defences, include consideration of entirely irrelevant factors, and the penalty to NS Power.
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> [NS Power Written Submissions, February 15, 2024, paras. 25-26]

[20] Option 1 in the documents contemplated "penalizing NS Power the maximum $10 million for failing to meet the Renewable Electricity Standard (Recommended)". NS Power submitted that since Option 1 appeared to outline the ultimate decision of the Minister, the entirety of that Option should be unredacted. Further, NS Power said that since the Minister was presented with, and must have considered,

Options 2 and 3, those redactions should be removed as well so that the Utility can ascertain whether those options "included any analysis concerning NS Power's defences of due diligence, honest and reasonable belief, and/or how these options considered the potential penalty". It added that this information would "provide important context and insight into the Minister's decision-making process and why the Decision to issue the penalty under the RES Regulations was made".

[21] NS Power's counsel also claimed that the redacted portions of Tabs 3 and 4 may well be relevant in this appeal because from their reading of the documents these sections appear to present some issues to the Minister that may have led him to consider irrelevant issues or matters in reaching his decision. NS Power argued that "the interests of justice supported production of information that could be found to demonstrate that irrelevant and irrational considerations were relied upon when the decision under review was made", referring to the judgment of the Supreme Court of Canada in *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2020 SCC 21 (*NS Judges*). In *NS Judges*, the Court referred to the principle of the administration of justice in canvassing redactions of irrelevant considerations, noting the relevance of the redacted information to the issues in the litigation:

> [68] Turning to the interests of the administration of justice, the most important consideration is the degree to which the document bears on what is at issue in the litigation and the extent to which its exclusion from the record would undermine the court's ability to adjudicate the issues on their merits.
>
> [69] I am satisfied that the exclusion of these components of the Attorney General's report from the record would impact the reviewing court's ability to determine the merits of the *Bodner* review.
>
> [70] Some of the considerations mentioned in the discussion of government-wide implications and in the communications plan were not rational or legitimate bases on which to vary or reject the commission's recommendations. If the Supreme Court of Nova Scotia concludes that Cabinet relied on these considerations in reaching its decision, then these documents would tend to show that one or more of the requirements from *Bodner* was not met. The fact that the legislature gave the Lieutenant Governor in Council the power to

> vary or reject the commission's recommendations is not itself a reason to vary recommendations. Likewise, the impact of accepting a recommendation on labour negotiations is generally not a legitimate basis for varying a recommendation made by a commission: see *Bodner*, at para. 160. The communications plan indicates that the government may have been concerned about the risk of an uninformed public reaction.
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> [*NS Judges*, paras. 68-70]

[22] The Minister maintained its position that the redaction of much of the information in Tabs 3 and 4 was justified because it did not relate specifically to the subject matter of the appeal, but to legislative initiatives that the Minister, Cabinet or government could ultimately pursue.

2.3 Public Interest Immunity

2.3.1 Minister's Claim of Public Interest Immunity

[23] Counsel for the Minister objected to the removal of the redactions in the disputed documents citing, in part, public interest immunity. He submitted that the documents contained ongoing policy advice by civil servants to the Minister which could lead to the enactment of legislation.

[24] Counsel for the Minister filed the affidavit of Peter Craig in support of the claim of public interest immunity. The affidavit states, in part, that:

> **Justification for maintaining redactions**
>
> 22. Several of the considerations contained in the redacted sections of Tabs 3 and 4 to the Record remain relevant to the work of the Department with respect to ongoing regulatory or legislative measures. It is possible that these issues will be revisited and that decisions may be taken with respect issues contained in the redacted portions of Tabs 3 and 4.
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> 23. Effective operation of NRR depends upon frank discourse between the Minister and his staff which could be negatively impacted if internal documents are made publicly available while their contents remain the subject of ongoing legislative and policy priorities.
>
> 24. The subject matter of the redacted portions of Tabs 3 and 4 does not relate to the penalty subject to this proceeding but does relate to activities which are either actively being pursued by NRR or that continue to remain options moving forward for the Minister to consider.
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> [Exhibit N-5, p. 3]

[25] NS Power submits that the Minister's assertions are vague about potential harm to the public interest if the documents were produced without redactions. NS Power submits that the Minister has failed to discharge his onus of showing why production of these documents would be contrary to the public interest, when compared to the other public interest in the administration of justice.

2.3.2 General Principles of Public Interest Immunity

[26] In *The Law of Evidence in Canada*, 6th ed. (LexisNexis Canada, 2022), Sopinka, Lederman and Bryant define public interest immunity as follows:

> The public interest in the administration of justice is promoted through full access of litigants to relevant information. The public also has an interest in protecting the country from the damage to national security and international relations that could be caused by the disclosure of state secrets. Also, damage to the process of government decision-making and functioning may be caused by disclosure of other government documents. In those areas where the public interest favours non-disclosure, the government may assert an immunity from disclosure. (p. 1206)

[27] The seminal decision on public interest immunity is the Supreme Court of Canada's decision in *Carey*. In *Carey*, the Crown objected to disclosing Cabinet materials, which included the minutes of the discussions as well as documents prepared by subcommittees of Cabinet for cabinet use and briefing materials. The Crown sought protection of the Cabinet documents as an absolute privilege. That is, if the document was identified as a Cabinet document, then it was excluded from disclosure regardless of its contents. The Crown asserted that disclosure of cabinet documents would "lead to a decrease in completeness, in candour and in frankness" if it was known that such documents could be produced in litigation and this would "detrimentally affect government policy and the public interest" (see: *Carey*, at p. 656).

[28] In *Carey* and subsequent decisions, the Supreme Court acknowledges that Cabinet secrecy is an important rule but rejects that it is an absolute Crown privilege. Instead, the Court recognizes Cabinet secrecy as a qualified public interest immunity (see: *Carey*, at pp. 653-654; and *BC Judges*, at para. 99). The Court found that the decision to protect a Cabinet document based on public interest immunity requires a balancing of the public interest in Cabinet confidentiality with the public interest in maintaining confidence in the administration of justice, usually determined in each context by assessing the significance of the litigation.

[29] In *Carey*, the Court agreed that the impact disclosure could have on "candour and frankness" in Cabinet deliberations was a relevant consideration, but stated care had to be taken not to exaggerate its importance. It said at page 657:

> I am prepared to attach some weight to the candour argument but it is very easy to exaggerate its importance. Basically, we all know that some business is better conducted in private, but generally I doubt if the candidness of confidential communications would be measurably affected by the off-chance that some communication might be required to be produced for the purposes of litigation. Certainly the notion has received heavy battering in the courts.

[30] The Court found in *Carey* that a more significant consideration for maintaining Cabinet secrecy arose from assessing how disclosure could harm the proper functioning of government. It acknowledged that while Cabinet secrecy is important for the functioning of government, it should not be used as a shield to protect wrongdoing. It may also be unnecessary in circumstances where the decision has no ongoing import and time has passed. The Court said at page 659:

> …the business of government is sufficiently difficult that those charged with the responsibility for running the country should not be put in a position where they might be subject to harassment making Cabinet government unmanageable. What I would quarrel with is the absolute character of the protection accorded their deliberations or policy formulation without regard to subject matter, to whether they are contemporary or no longer of public interest, or to the importance of their revelation for the purpose of litigation…

[31] The Court restated this principle in *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at paragraph 18:

> ...The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly.

[32] In considering that disclosure of Cabinet deliberations could create political repercussions which would harm the proper functioning of government, the Court in *Carey* referred to Lord Reid's reasons in *Conway v. Rimmer*, [1968] UKHL 2, [1968] AC 910 at page 952 (see: *Carey*, at pp. 658-59). As the matter before the Board involves the ability of civil servants to engage in frank policy discussions free from public scrutiny, it is useful to also include the last two sentences in the quote from Lord Reid at page 952:

> I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest. But I do not think that many people would give as the reason that premature disclosure would prevent candour in the Cabinet. To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind. And that must in my view also apply to all documents concerned with policy making within departments including it may be minutes and the like by quite junior officials and correspondence with outside bodies. Farther it may be that deliberations about a particular case require protection as much as deliberations about policy. I do not think that it is possible to limit such documents by any definition. But there seems to me to be a wide difference between such documents and routine reports. There may be special reasons for withholding some kinds of routine documents, but I think that the proper test to be applied is to ask, in the language of Lord Simon in *Duncan's case,* whether the withholding of a document because it belongs to a particular class is really " necessary for " the proper functioning of the public service ". [Emphasis added]

[33] In *Carey*, the Court concluded that Cabinet documents, like all evidence, would require disclosure, unless it can be demonstrated disclosure would be against the public interest. It states, however, that the decision-making at the highest level of government is just one of several factors that should be considered when deciding whether to order disclosure. The Court writes at page 670:

> ...The fact that such documents concern the decision-making process at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular contents of the documents are, I would have thought, even more important.

[34] *Carey* then set out a series of factors which are helpful to this analysis and will be considered below. Applying this analysis, the Court determined that a policy concerning the development of tourism, which was historic in nature, did not meet the threshold of public interest in maintaining cabinet confidence.

[35] The *Carey* analysis has been applied in many different contexts in the last four decades, including in *Leeds v. Alberta (Minister of the Environment)*, 1990 CanLII 5933 (ABQB), where the Court found policy documents concerning the development of transportation and utility corridors around the City of Edmonton were not of sufficient public interest to warrant the privilege. In contrast, in *New Brunswick v. Enbridge Gas New Brunswick Limited Partnership*, 2016 NBCA 17, the Court found that policy documents, including those that dated back over 20 years, came under public interest immunity as they were prepared for the purpose of giving advice to the Minister and Executive Council to assist in the development of natural gas policy in the Province of New Brunswick.

[36] The Supreme Court of Canada in *Carey*, and more recently in *BC Judges*, held that there "will be a strong public interest in keeping a document concerning Cabinet deliberations confidential" such that it "must be outweighed by an even stronger public interest to warrant the document's disclosure" (see: *BC Judges*, at para. 7). With this guidance the Board will now turn to the disputed documents in issue on this motion.

2.4 Test for Public Interest Immunity

[37] Applying the *Carey* analysis in *BC Judges*, the Supreme Court outlined a two-stage process to determine whether a claim of public interest immunity will succeed (see: *BC Judges*, at paras. 73-80). First, it must be determined if the disputed materials are relevant to the issues before the Board in this appeal. If the Board determines they are relevant, then the Board must determine if the disputed materials are inadmissible in the appeal because the public interest immunity applies.

[38] As discussed above, public interest immunity is rooted in the principle that there is a strong public interest in maintaining the confidentiality of deliberations among ministers of the Crown. Public interest immunity prevents the disclosure of a document where the Board is satisfied that "the public interest in keeping the document confidential outweighs the public interest in its disclosure" (see *BC Judges*, at paras. 99-100; *Carey,* at pp. 653-54).

[39] The Minister bears the burden of establishing that the evidence should not be disclosed because of public interest immunity (see: *BC Judges,* at para. 102; *Carey*, at pp. 653 and 678). The Supreme Court held that the Minister should put in a detailed affidavit that supports its claim of public interest immunity (see: *BC Judges*, at para. 102; *Carey*, at pp. 653-54).

[40] The analysis of whether public interest immunity applies requires a careful balancing of the competing interests of the public interests in confidentiality and disclosure, with reference to the specific evidence in the context of the specific proceeding.

[41] *Carey* at pages 670-73 sets out six factors relevant to this balancing, as described at paragraph 101 of *BC Judges*:

> (1) the level of decision-making process;
>
> (2) the nature of the policy concerned;
>
> (3) the particular contents of the documents;
>
> (4) the timing of disclosure;
>
> (5) the importance of producing the documents in the interests of the administration of justice; and
>
> (6) whether the party seeking the production of the documents alleges unconscionable behaviour on the part of the government.

[42] The first four factors set out in *Carey* relate primarily to the public interest in keeping the information confidential, while the last two relate to the public interest in disclosure.

3.0 ANALYSIS AND FINDINGS

[43] NS Power submitted the threshold for establishing relevance in this case is low, and there is an obligation to provide a record that includes all documents that were before the Minister when the decision was made.

[44] NS Power also submitted that in the context of the Minister's decision, it would be important for the Board to consider not only whether the Minister ignored relevant information, but also whether the Minister relied upon irrelevant or otherwise improper information or factors in making his decision.

[45] Peter Craig, NRR's Director of Clean Electricity, filed an affidavit supporting the Minister's position that the portions of the documents in the Record that had been

redacted should not be included in the Record of this proceeding. Mr. Craig said the documents at Tabs 3 and 4 of the Record were prepared at his direction.

[46] Mr. Craig said the documents were prepared in a typical fashion to provide information to the Minister. He said they were marked as confidential "to indicate that the material contained in them was known to be sensitive and that staff were speaking to the Minister in a frank and open manner that was intended to be private." He noted that briefings for the Minister may typically cover several topics.

[47] Mr. Craig said the documents at Tabs 3 and 4 of the Record included some commentary about options for considering the RES penalty, but they were not prepared exclusively to deal with the penalty. He said the documents address issues with NS Power broadly and contain information and recommendations on other matters, including recommendations about potential legislative and regulatory amendments. Mr. Craig said that because the Minister has ongoing access to information and system awareness, documents prepared for briefings do not commonly form a complete record about complex subjects or decisions. Mr. Craig said the Minister was briefed on the issue of the RES penalty on April 4, 2023, during a briefing that was primarily focused on another issue and that the documents at Tabs 3 and 4 of the Record were the only documents provided to the Minister before this briefing that referred to the RES penalty.

[48] To assist in this analysis, and to maintain the privilege claimed in the event of an appeal that reverses the Board's decision, the redacted documents from the Minister's Record in this proceeding [Exhibit N-3] have been attached to this decision as Schedule "A". Tab 3 is reproduced (from pages 9-14 of the Record), as well as Tab 4

(from pages 15-16 of the Record). The Board has divided the redactions in these documents into 18 different parts and will discuss each part separately.

3.1 Redaction #1

[49] The redacted information relates to the possible development of regulations, including content that may possibly be included in those regulations. The Board finds that the information in this part of the document at Tab 3 of the Record does not relate to the RES penalty and is not relevant. This information does not need to be disclosed.

3.2 Redaction #2

[50] The redacted information relates to the development of legislation. In this case, the recommendation for legislation has been implemented. However, the Board finds that the information in this part of the document at Tab 3 of the Record does not relate to the RES penalty and is not relevant. This information does not need to be disclosed.

3.3 Redaction #3

[51] The redacted information is a heading for the information that follows; however, it refers to the content of the regulatory and legislative changes discussed previously. This heading does not refer to the RES penalty and the Board finds that the information in this part of the document at Tab 3 of the Record is not relevant. This information does not need to be disclosed.

3.4 Redaction #4

[52] The redacted information completes the sentence for the text that immediately precedes it, which is specifically about the RES penalty and the disposition of funds resulting from the imposition of the penalty. It is relevant to this proceeding.

[53] As noted in *Carey*, the Minister has the burden of demonstrating that the information should not be disclosed because of public interest immunity and the evidence supporting this claim should be "as helpful as possible" and provide "as much detail as the nature of the subject matter" allows. The Board finds that the Minister has not met this burden.

[54] In this case, the information does not deal with the development of legislation or regulations. At best, based on Mr. Craig's affidavit, the argument on behalf of the Minister is that "frank discourse between the Minister and his staff which could be negatively impacted if internal documents are made publicly available while their contents remain the subject of ongoing legislative and policy priorities."

[55] As discussed previously, while *Carey* suggests that this is a factor to consider, it is easy to exaggerate its importance. In the Court's judgment, delivered by Justice La Forest, the Court doubted that "the candidness of confidential communications would be measurably affected by the off-chance that some communication might be required to be produced for the purposes of litigation." Citing the colourful description of Lord Radcliffe in *Glasgow Corporation v. Central Land Board*, 1956 S.C. (H.L.) 1, the Court suggested experience has shown that Crown servants are made of "sterner stuff".

[56] The Board concludes that it is not enough to simply claim a chilling effect on the candid discussions that Crown servants are duty-bound to have with their Ministers. The affidavit evidence should disclose more specific concerns that are entirely

absent in the evidence presented to the Board in this case. Given the lack of specificity around these concerns, the issues raised in this appeal, and the significant amount of the RES Penalty imposed by the Minister, the Board finds the redacted information in this part of Tab 3 of the Record must be disclosed.

3.5 Redaction #5

[57] The redacted information relates to the possible development of legislation or regulations. The Board finds that the information in this part of the document at Tab 3 of the Record does not relate to the RES penalty and is therefore not relevant. This information does not need to be disclosed.

3.6 Redaction #6

[58] The redacted information follows the sentence that precedes it, which is specifically about the RES penalty. The redacted information references the RES penalty, but discusses it in the context of other items, including the possible development of legislation or regulations. The Board finds the redacted information is relevant to this proceeding.

[59] Aside from the addition of a topic relating to the possible development of legislation, the Board's comments and conclusions in its discussion of Redaction #4 apply here as well. While the Board considers the discussion of potential legislation to be a factor that might lend more support to the claimed redaction, the mere fact that potential legislation is discussed is not sufficient in and of itself, and the affidavit evidence provided by the Minister does nothing to elaborate on the particular issues or harms that would arise from any disclosure of this part of Tab 3 in the Record. The Board finds that these arguments do not, in this case, outweigh the importance of producing the information in

the interests of the administration of justice and ensuring that the Appellant's case can be fairly presented in this proceeding. The Board finds the redacted information in this part of Tab 3 of the Record must be disclosed.

3.7 Redaction #7

[60] The part of Tab 3 of the Record that includes Redaction #7 provides an analysis of various matters discussed in the preceding parts of the document. Much of this information is about potential legislation and regulations, which do not specifically relate to the RES penalty. However, "Option 1", which is covered by Redaction #7, also includes a recommendation about penalizing NS Power.

[61] While the Board understands NS Power's position that it is entitled to all of the information about this option because the recommendation to impose the $10 million RES penalty was ultimately acted upon by the Minister, the Board has had the advantage of reviewing the unredacted document and finds that most of the information under this option discusses possible development of legislation and regulations that is not dependent on the imposition of the RES penalty and not relevant to the issues arising in this appeal. Much of the analysis of these legislative actions is repeated in all the options discussed and does not mention the RES penalty. Option 1 is the only option where the RES penalty is mentioned, and the Board finds that the Minister has been fair in the selection of redactions and has left what the Board considers to be the relevant information about the RES penalty unredacted. The Board does not agree that the redacted information provides relevant context for the unredacted information. The Board finds the redacted information is not relevant and it need not be disclosed.

3.8 Redaction #8

[62] As with Redaction #7, much of the part of Tab 3 of the Record that includes Redaction #8 provides an analysis of various matters discussed in the preceding parts of the document. However, the discussion about "Option 2" deals with potential legislation and regulations. There is no mention of the RES penalty. The Board finds that the information in this part of the document at Tab 3 of the Record does not relate to the RES penalty and is not relevant. This information does not need to be disclosed.

3.9 Redaction #9

[63] As with Redaction #7, much of the part of Tab 3 of the Record that includes Redaction #8 provides an analysis of various matters discussed in the preceding parts of the document. However, the discussion about "Option 3" deals with potential legislation and regulations. There is no mention of the RES penalty. The Board finds that the information in this part of the document at Tab 3 of the Record does not relate to the RES penalty and is not relevant. This information does not need to be disclosed.

3.10 Redaction #10

[64] This is a continuation of the discussion about "Option 3" and the information does not need to be disclosed for the same reasons as Redaction #9.

3.11 Redaction #11

[65] As noted in the document, the part of Tab 3 of the Record that includes Redaction #11 is a high-level comparison of Options 1, 2 and 3. As was the case with the more detailed discussion of these options, the redacted information is about the potential development of legislation and regulations. Likewise, the redacted information does not

discuss the RES penalty. For the reasons outlined for Redaction #7, the Board finds the redacted information is not relevant and it need not be disclosed.

3.12 Redaction #12

[66] While the redacted information in the part of Tab 3 of the Record that includes Redaction #12 is not relevant and does not need to be disclosed.

3.13 Redaction #13

[67] The part of Tab 3 of the Record that includes Redaction #13 provides a recommendation about the options discussed. Although not mentioned explicitly, the recommendation includes proceeding with the RES penalty (as noted in an unredacted part of the document already). It is therefore relevant. While the redacted sentence alludes to regulatory and legislative changes, it does not discuss the details of those. Consistent with the reasons provided when considering Redaction #6, the Board finds the Minister has not provided any evidence to support the contention that harm would be caused by not maintaining the redactions, or that if there was any harm, it would outweigh the importance of producing the information in the interests of the administration of justice and ensuring that the Appellant's case can be fairly presented in this proceeding. There is no other apparent basis for maintaining any form of privilege. The Board finds the redacted information in this part of Tab 3 of the Record must be disclosed.

3.14 Redaction #14

[68] The part of Tab 3 of the Record that includes Redaction #14 is an appendix that contains drafting instructions for regulations. The RES penalty is not mentioned in this appendix. The Board finds the information is not relevant and need not be disclosed.

3.15 Redaction #15

[69] The part of Tab 3 of the Record that includes Redaction #15 is an appendix that contains drafting instructions for legislation. The RES penalty is not mentioned in this appendix. The Board finds the information is not relevant and need not be disclosed.

3.16 Redaction #16

[70] The part of Tab 4 of the Record that includes Redaction #16 presents options for new legislation. The RES penalty is not mentioned. The Board finds the information is not relevant and need not be disclosed.

3.17 Redaction #17

[71] The part of Tab 4 of the Record that includes Redaction #17 presents options for new regulations. It includes a table that provides details about three regulatory initiatives. The RES penalty is not mentioned in any of them. The Board finds the information is not relevant and need not be disclosed.

3.18 Redaction #18

[72] The part of Tab 4 of the Record that includes Redaction #18 discusses a desire to enable a particular energy resource pathway, including the development of any necessary legislation and regulations. The RES penalty is not mentioned. The Board finds the information is not relevant and need not be disclosed.

4.0 CONCLUSION

[73] The Board finds that much of the redactions are not relevant to this appeal and, since most of the redacted material is comments and recommendations on the development of legislation and regulations, there is no basis for releasing that information.

However, there are a few instances where the redacted information is relevant, and in those cases, the fact that some of it may deal with the development of legislation and regulations is not enough to meet the burden on the Minister to withhold the information in the face of a public interest in ensuring the proper administration of justice in this appeal. The Board directs the Minister to file, no later than June 20, 2024, a revised version of the document at Tab 3 of the Record that discloses the information the Board has identified in this decision as Redaction #4, Redaction #6 and Redaction #13.

[74] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 6th day of June, 2024.

Stephen P. McGrath

Roland A. Deveau

M. Kathleen McManus

9

Schedule "A"

NOVA SCOTIA

DECISION REQUEST
CONFIDENTIAL
Advice to Minister/Deputy Minister
NATURAL RESOURCES AND RENEWABLES

TO: Deputy Minister Karen Gatien

FROM: Keith Collins, Executive Director, Clean Energy Branch

Date: March 4, 2023

SUBJECT: **Performance Standards and Penalties**

DECISION: Seeking direction on new performance standards and penalties.

CONTEXT/ CURRENT SITUATION:
Amendments to the *Public Utilities Act* introduced in the Spring 2022 session created the regulatory authority to expand NSP performance expectations as well as enabling the creation of a new Performance Partnership Advisory Table (the Table). There is now an expectation for increased consideration of ratepayer and stakeholder issues. Further, through legislative changes in the Fall 2022 session, and for the purpose of the Board Case Number M10431, a 1.8% rate increase was approved across all classes for the sole purpose of improving reliability of service to ratepayers.

[redacted]

1

[redacted]

2

[redacted]

3

The Maritime Link is intended to give Nova Scotia access to hydro-electric power from the Lower Churchill Project. When the Maritime Link was approved, it added $170 million/ year (11%) to power rates in NS. While it was supposed to be fully operational by 2018, it has only transported limited and varying amounts of electricity to Nova Scotia because of a series of setbacks, both with the Muskrat Falls project and the

10

LIL transmission line. Ratepayers have already paid more than $1 Billion in associated costs and are still absorbing significant daily costs from underperformance.

In December 2022, the UARB approved a $163.7-million annual bill for 2023 to finance, operate and maintain the Link which will be reflected in NS Power's electricity rates and recovered from customers.

The UARB is currently looking at the monthly holdback and may potentially increase it. However, should government wish in addition to proceed with repercussions for non-delivery of Muskrat Falls, there are three pathways for consideration:

1. Penalize NSP the maximum $10 million for failing to meet the Renewable Electricity Standard (RES). This avenue is already in existence and was primarily caused by the under-performance of the Maritime Link. The penalty would be returned as General Revenue to government; [redacted] As NSP may choose to dispute this penalty - and there will be disclosure in court - the Department and the Province will gain new insight and information. 4

[redacted] 5

Focusing on the $10 million RES penalty will enable the government, for the first time, to hold NSP accountable to that standard. [redacted] 6

RECOMMENDATIONS ANALYSIS:

Option 1: [redacted]

- [redacted]
- [redacted]

Undertake penalizing NSP the maximum $10 million for failing to meet the Renewable Electricity Standard. (Recommended)

Pros:

- Focusing NSP accountability and focus on priority ratepayer issues and concerns, such as reliability.
- [redacted].
- Highlights the importance of meeting the Renewable Electricity Standard.

Cons:

- Significant pushback from NSP.
- May not be viewed as enough by ratepayers.

Risk	Probability	Impact	Risk	Mitigation
[redacted]				
[redacted]				
NSP likely to dispute any Departmental application of a penalty and seek to have the Minister remove it – and could take it to the Supreme Court.	H	M	M	None identified as the Department may use this process to force disclosure by NSP of their efforts to meet the RES. NSP will also have to prove their conduct is excusable or they acted with due diligence.

7

11

Option 2: [redacted]

- [redacted]
- [redacted]
- [redacted]

Pros:

- [redacted]
- [redacted]
- [redacted]
- [redacted]

Cons:

- [redacted]
- [redacted]
- [redacted]

8

Risk	Probability	Impact	Risk	Mitigation
[redacted]				

Option 3: [redacted]

- [redacted]
- [redacted]

Pros:

- [redacted]
- [redacted]
- [redacted]

Cons:

- [redacted]
- [redacted]
- [redacted]

9

Risk	Probability	Impact	Risk	Mitigation
[redacted]				

[redacted]

10

High level comparison of the Options above:

Proposed Work	Option 1	Option 2	Option 3
[redacted]			
In response to the underperformance from the Maritime Link, undertake penalizing NSP the maximum $10 million for failing to meet the Renewable Energy Standard.	✓		
[redacted]			

11

OTHER CONSIDERATIONS (LEGAL/ FINANCIAL):

[redacted]

12

RECOMMENDATION:

[redacted]

13

Approved by Director: _____

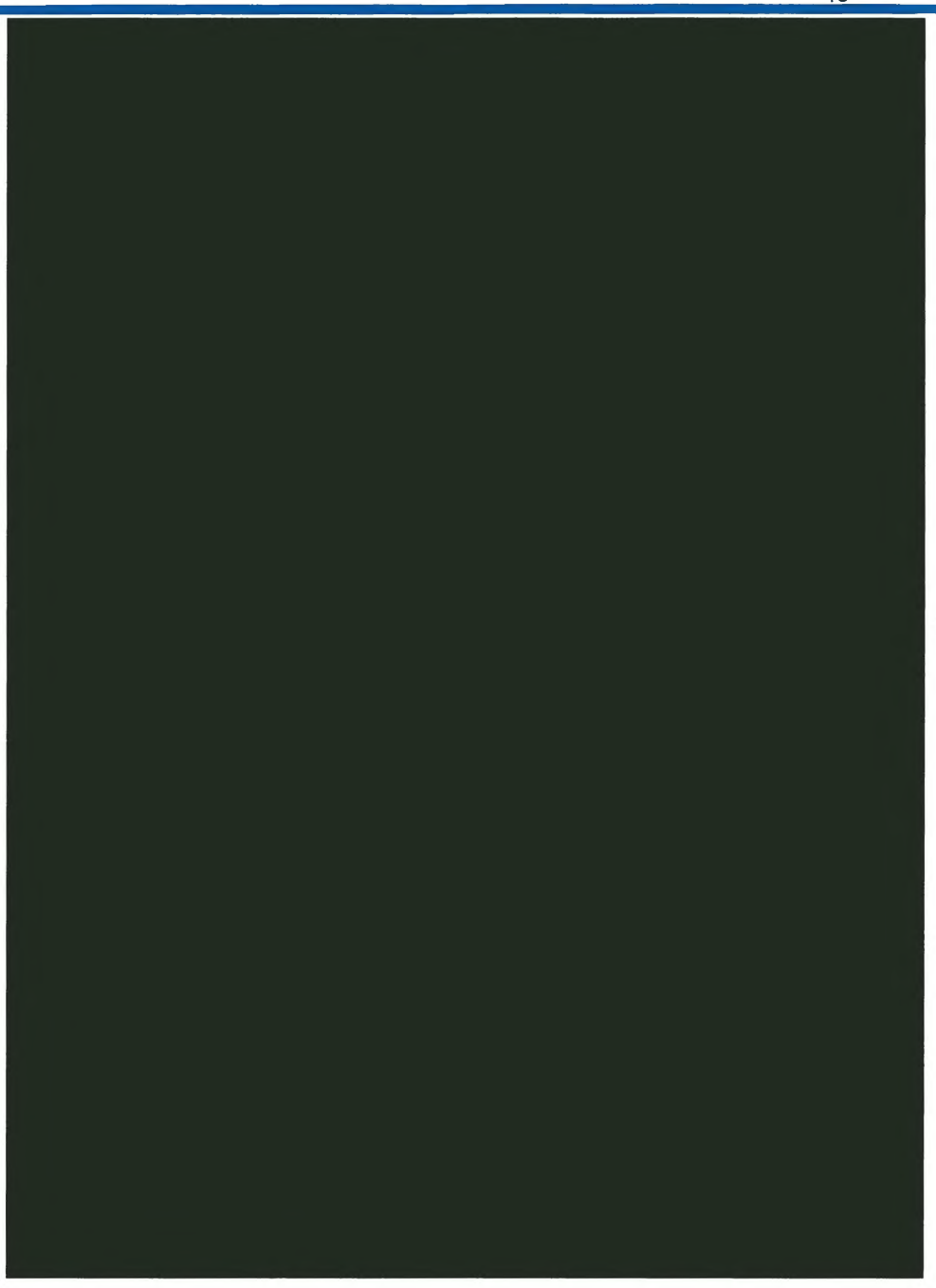
Approved by Executive Director: _____

DM Approval Signature: _____
Date

Minister Approval Signature: _____
Date

[redacted]

13



14

14

15

Spring 2023 Legislative Amendment Requests:

[redacted]

16

Spring 2023 Regulations:

New Regulations	Details	Current Status	Timing for Submission

[redacted]

17

18

"On the proposed amendment to the PUA to make the performance penalty apply to Maritime Link, the document says "Separately, but already in existence, is a penalty for the failure to meet the Renewable Electricity Standard for 2020. NSP could be penalized up to the $10M amount." He is asking if they met this standard. If not, did they get hit with this fine?"

- NSP notified the Department that they did not meet the Renewable Electricity Standard (RES) of 40% of electricity sales from renewable electricity in any of 2020, 2021, or 2022.
    - NSP was granted an Alternative Compliance Plan in 2020 that provided flexibility in meeting the 2020 RES (40% of sales) by making it a multi-year compliance period. NSP was required to obtain 40% averaged across the three years, rather than 40% in any individual year. This was granted based on the delays related to Muskrat Falls and the Labrador Island Link already evident in early 2020. This Alternative Compliance Plan expired in 2022.
    - NSP has averaged 32% renewable electricity in the period 2020-2022.
- NSP will submit their renewable electricity plan on February 28.
- The Department has several options on how to proceed with respect to the penalty, including:

Option 1: Decline to penalize NSP on the basis that the Department believes NSP exercised due diligence or "reasonably and honesty believed in the existence of facts that, if true, would render the conduct of the person excusable".

Risk	Probability (H/M/L)	Impact (H/M/L)	Risk Level (H/M/L)	Mitigation
Failing to apply any penalty to NSP for failing to meet the RES may be seen as demonstrating that the RES regulation does not have an actual impact or power.	M	H	M	None identified?

Option 2: Penalize NSP an amount less than the maximum of $10M, such as $1M on the basis that the Department believe that NSP did not act appropriately or should have taken other steps in this period to mitigate the issue. Note: All penalties applied to NSP are paid by NSP shareholders, not ratepayers.

Risk	Probability (H/M/L)	Impact (H/M/L)	Risk Level (H/M/L)	Mitigation
NSP likely to dispute the Department's application of a penalty and seek to have the Minister remove the penalty.	H	M	M	None identified: The Department may use a judicial process to force disclosure by NSP about their efforts to meet the RES and NSP will have to prove that their conduct is excusable or that they acted with due diligence.
NSP may take the Minister to the Nova Scotia Supreme Court to have the decision judicially reviewed.	H	M	M	

Option 3: Penalize NSP the maximum amount, $10M. Note: All penalties applied to NSP are paid by NSP shareholders, not ratepayers. **(Recommended)**

Risk	Probability (H/M/L)	Impact (H/M/L)	Risk Level (H/M/L)	Mitigation
NSP likely to dispute the Department's application of a penalty and seek to have the Minister remove the penalty.	H	M	M	None identified: The Department may use a judicial process to force disclosure by NSP about their efforts to meet the RES and NSP will have to prove that their conduct is excusable or that they acted with due diligence.
NSP may take the Minister to the Nova Scotia Supreme Court to have the decision judicially reviewed.	H	M	M	