DECISION

NSUARB-NSPI-P-128.10(DWP)
2011 NSUARB 37

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 approval of capital work orders CI# 39323, Digby Wind Project ($70,758,698); CI# 39626, Digby Wind Project Substation ($4,586,277); CI# 39627, Digby Wind Project Network Upgrades ($4,156,325); and CI# 39628, Digby Wind Project Interconnection ($3,270,060), for a total cost of $82,771,360

BEFORE:

Margaret A. M. Shears, Q.C., Vice chair
Kulvinder S. Dhillon, P. Eng., Member
Roberta J. Clarke, Q.C., Member

COUNSEL:

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CONSUMER ADVOCATE
John P. Merrick, Q.C.

NOVA SCOTIA DEPARTMENT OF ENERGY
J. Mark McCrea, Q.C.
Richard Penny

QUETTA INC.
John Reynolds, P. Eng.

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

HEARING DATE: January 5, 2011

FINAL SUBMISSIONS: January 21, 2011

DECISION DATE: **March 9, 2011**

DECISION: Application approved subject to reduction of $3 million from proposed cost; Reduction due to disallowance of a $1 million bonus payment to affiliate company Emera Utility Services and a further reduction of $2 million, or more, based on final construction costs.

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I INTRODUCTION

[1] This Decision is made pursuant to a public hearing conducted by the Nova Scotia Utility and Review Board (the "Board") on January 5, 2011, in the matter of an Application by Nova Scotia Power Incorporated ("NSPI", the "Company", the "Utility") dated July 23, 2010, for approval of capital expenditure work orders CI# 39323, Digby Wind Project ("DWP", the "Project") ($70,758,698); CI# 39626, DWP Substation ($4,586,277); CI# 39627, DWP Network Upgrades (revised to Transmission Line) ($4,156,325); and CI# 39628, DWP Interconnection ($3,270,060), for a total cost of $82,771,360. NSPI's Application was made pursuant to s. 35 of the *Public Utilities Act*, R.S.N.S. 1989, c. 380, as amended, (the "*PUA*") which reads as follows:

> s. 35 No public utility shall proceed with any new construction, improvements or betterments in or extensions or additions to its property used or useful in furnishing, rendering or supplying any service which requires the expenditure of more than two hundred and fifty thousand dollars without first securing the approval thereof by the Board. R.S., c. 380, s. 35; 2001, c. 35, s. 30; 2010, c. 24

[2] In addition, s. 52 of the *PUA*, set out below, gives the Board the responsibility of balancing the reasons for, and costs of, NSPI's proposed projects and activities while ensuring that approval of such requests is in the best interest of the ratepayers. In effect, while the Board encourages innovation and progressive changes by NSPI, it must satisfy the Board that expenditures are necessary, costs are justifiable, and projects are beneficial to its customers. The provision reads as follows:

> s. 52 Every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. R.S., c. 380, s. 52

[3] NSPI is a regulated public utility and is the successor to Nova Scotia Power Corporation, a Crown Corporation which was privatized in 1992. As of January

1, 1999, NSPI became the principal subsidiary of Nova Scotia Power Holdings Incorporated, now known as Emera Incorporated ("Emera"), and currently serves more than 480,000 customers.

[4] As noted above, pursuant to s. 35 of the *PUA*, NSPI is required to file a request for Board approval of capital expenditure work orders in excess of $250,000 in order for the cost of a project to be included in the Company's rate base. The rate base can be defined as the net value of the total assets held by NSPI. This, together with determining an appropriate rate of return for NSPI, forms the basis on which the Board reviews NSPI's calculation of proposed rates to be charged to various categories of customers for the service of electricity. The largest component of rates is Operation and Maintenance ("O&M") costs. In an effort to make the review of capital expenditures more transparent, accessible, and open to the public for comment, in correspondence dated November 26, 2009, the Board outlined procedural changes in this regard, stating that:

> Following consultation with various interested parties the Board has determined that there should be more certainty and transparency with respect to the processing of Nova Scotia Power's capital work orders pursuant to Section 35 of the Public Utilities Act. Effective January 1, 2010, the following rules will apply with respect to work order approvals:
>
> . . .
>
> 3. On certain capital work orders (for example Nuttby Mountain or Water Street) the Board, on its own initiative, will initiate a consultation process either by means of a public hearing or written submissions.
>
> . . .
>
> 5. Certain capital work order matters in excess of $5 Million, or capital work orders that will require an increase in OM&G costs in excess of $10 Million annually, may justify stakeholder IRs, evidence and submissions. Stakeholders wishing more formal participation in these significant matters should advise the Board within seven (7) days, assuming notification has not already been given by the Board pursuant to paragraph 3. The Board will determine whether such a process is justified and set out the process and time line for that particular capital work order.
>
> [Board Letter to NSPI, November 26, 2009, pp. 1-2]

[5] In the matter at hand, NSPI is requesting approval to include into rate base a rounded cost of $82.8 million for the DWP, a facility which has been completed and is currently functioning. In addition to the usual process of considering proposed capital expenditures, this Project involves the acquisition of the assets and development rights of the DWP by NSPI from its affiliate, 3240384 Nova Scotia Limited ("324 NSL") and a construction contract with another affiliate, Emera Utility Services ("EUS").

[6] NSPI submits that the contracts with its affiliates and, ultimately, the expenses which will be proposed to be passed on to customers in the next general rate application, are justified. It states that inclusion of the cost of the DWP in its rate base will provide a benefit to customers through the creation of another clean source of electricity, which is a positive development for them. NSPI also points out that the speedy completion of the Project, before the March 31, 2011 qualification deadline for incentives under the Federal ecoEnergy program, is a benefit to customers. In addition, it will also allow NSPI to comply with the Province's 2013 Renewable Energy Standards ("RES"). NSPI states that, should the Board deny the request as submitted, to incorporate the DWP into rate base, it will simply revert to acquiring the energy through a Power Purchase Agreement ("PPA") with 324 NSL (which could potentially be assigned to a third party in future) which, by NSPI's calculation, would result in higher costs to customers. While there are a number of somewhat complex matters before the Board which require an in-depth review and analysis, this Decision will be based on the answers to the following straightforward, commonsense questions:

1. Is NSPI's acquisition of the DWP necessary for customers and for NSPI?

2. Is the $82.8 million cost of the DWP a fair, reasonable and justifiable cost, particularly in view of the interaction with affiliate companies?

3. Does the acquisition of the DWP provide the 'best available deal'?

[7] A summary of the Board's findings on these questions, reasons for which will be detailed later in this Decision, are set out below:

1. The Board has determined that, based on the evidence before it, the answer to question 1 is yes.

2. The Board finds that the proposed cost of the DWP of $82.8 million requires a reduction of the $1 million bonus payment to EUS due to non-compliance with the Code of Conduct and inadequate evidence to support this payment as justifiable or warranted. The total cost of the DWP will be further reduced by a minimum of $2 million, based on the final construction cost.

3. Despite the affiliate transactions and corresponding non-compliance with the Code under these unusual circumstances, and subject to the reductions in cost noted above, the Board is satisfied that the answer to question 3 is yes.

II BACKGROUND

[8] On April 16, 2010, NSPI filed a letter with the Board requesting that:

> NSPI seeks to confirm that the UARB has no objection to NSPI continuing with project construction, pending the Capital Work Order review and approval process and before receiving a Board decision on the Capital Work Order Application. NSPI customers will not become responsible for these costs unless and until the UARB approves the Capital Work Order Application and the inclusion of the costs in rate base.
>
> Given that NSPI will take over the Digby project from an affiliate, the Affiliate Code of Conduct will apply to the transaction. NSPI anticipates that the capital work order process will provide an appropriate opportunity for the Board to confirm compliance with the Code of Conduct and approve the affiliate transaction.
>
> [NSPI letter to Board, April 16, 2010, p. 3]

[9] On April 23, 2010, the Board responded to this request stating that:

> The Board notes that this request is similar to one involving the Nuttby Mountain Wind Project. In that case, the Board determined, in part, as follows::
>
> > The Board has no objection to Nova Scotia Power undertaking these advance expenditures at shareholders' risk on the understanding this will not be considered by Nova Scotia Power to constitute any form of approval of the capital work order application...
> >
> > [Board letter to NSPI, September 15, 2009, p. 1]
>
> After reviewing the Digby Wind Project request, the Board believes that the comments noted above also apply in this case. In addition, since the Digby Wind Project involves a transaction with 3240384 Nova Scotia Limited, an affiliate of NSPI, both the work order expenditure request and the circumstances involving the corresponding affiliate transaction will be the subject of a rigorous review by the Board and interested parties. Directions on procedure will be issued when the capital work order is filed with the Board.
>
> [NSUARB letter to NSPI, April 23, 2010, p. 2]

[10] As earlier noted, on July 23, 2010, NSPI filed this Application with the Board for approval of the DWP capital expenditures, outlining the reasons for acquisition of the Project and justification for having the $82.8 million Project included in rate base. NSPI requested that the proposal should be dealt with in the following manner:

> 1. A written hearing process, with written requests for intervention in accordance with Board Rule 11;
>
> 2. UARB approval of the proposed form of Confidentiality Undertaking, and confidential treatment of certain information filed in support of the capital work order as described herein and in accordance with Board Rule 12; and
>
> 3. UARB approval of this Application for Capital Work Order Approval, in the amount of $82.8 million, not later than December 20, 2010.
>
> 4. UARB confirmation that the affiliate transactions associated with these capital work orders comply with the Code of Conduct.
>
> [NSPI Letter to Board, July 23, 2010, p. 5]

[11] Following a review of NSPI's Application, the Board determined that the DWP request warranted a public hearing and issued a letter on July 27, 2010, which stated that:

> The Board has reviewed NSPI's request for approval and has determined that in view of the total cost of $82.8 Million of the capital expenditures proposed for this project and the fact that it involves an affiliate transaction, the public interest is best served by holding a public hearing on this application.
>
> [Board Letter to NSPI, July 27, 2010, p. 2]

[12] The public hearing was duly advertised and the Board's timeline was set out as follows:

Preliminary Issues List	Monday, September 20, 2010
Notice of Formal Intervention	Monday, September 27, 2010
Comments on Preliminary Issues List	Monday, October 4, 2010
Final Issues List	Friday, October 8, 2010
Information Requests to NSPI	Thursday, October 14, 2010
NSPI Responses to Information Requests	Wednesday, November 3, 2010
Intervenor Evidence	Monday, November 15, 2010
Information Requests to Intervenors	Thursday, November 25, 2010
Intervenor Responses to IRs	Thursday, December 9, 2010
Letters of Comment	Wednesday, December 15, 2010
Reply Submission from NSPI	Friday, December 17, 2010
Hearing Commences	Wednesday, January 5, 2011

[13] Six Formal Intervenors gave notice of their intent to participate in this matter. The Intervenors were John Merrick, Q.C., Consumer Advocate, ("CA"); Nancy Rubin, on behalf of Avon Valley Greenhouses Limited, *et al.* ("Avon"); J. Mark McCrea, Q.C., on behalf of the Provincial Department of Energy (the "Province"); John Reynolds, P. Eng., of Quetta Inc. ("Quetta"); Don Regan, Municipal Electric Utilities of Nova Scotia Co-operative ("MEUNSC"); and David MacDougall, NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Company Limited ("NPB"). MEUNSC and NPB were not active participants in the process. The Board received several letters from the public

expressing their views of the DWP. No evidence was filed by any of the Intervenors and only the CA issued Information Requests ("IRs").

[14] A Final Issues List was established by the Board and is set out below:

1. Transactions between NSPI and its Affiliates
2. Compliance with Code of Conduct
3. Power Purchase Agreement between NSPI and Skypower (Appendix 5)
4. Contract between 3240384 Nova Scotia Limited and Emera Utility Services Inc. (Appendix 10)
5. Project cost and economic analysis
6. Project justification
7. Renewable Energy Standards requirements for NSPI
8. ecoENERGY incentive

[Board Final Issues List, October 8, 2010]

[15] The submissions by the Intervenors were predominantly focused on NSPI's compliance with the Code of Conduct, the PPA between NSPI and SkyPower (subsequently 324 NSL) and the construction contract between 324 NSL and EUS. As a result, while the other items listed above will be considered by the Board, these three issues will be reviewed in greater detail.

III CHRONOLOGY

[16] In NSPI's response to Board IR-1, a detailed description of the history of the DWP, and the events which subsequently occurred, was provided. For ease of reference, following is a summary of that information, along with insertions included by the Board:

March 12, 2007	NSPI issues the 2007 Request for Proposals (RFP).
August 31, 2007	SkyPower submits its response to the NSPI RFP by this date.
November 7, 2007	NSPI informs SkyPower that is was not selected for the RFP due to the levelized cost proposed.
February 5, 2008	SkyPower offers to reduce its proposal price.

March 31, 2008	NSPI and SkyPower execute a Power Purchase Agreement.
October 3, 2008	SkyPower reports to NSPI that they have lost financing for the project.
January 6, 2009	SkyPower receives the System Impact Study from NSPI. The SIS triggered the requirement in the PPA to increase the performance security.
January 27, 2009	SkyPower tops up their performance security with cash. The total performance security required is $750,000.
August 12, 2009	SkyPower files for restructuring under the terms of the Companies' Creditors Arrangement Act.
October 5, 2009	NSPI provides its initial offer to purchase the rights to develop the SkyPower project.
October 14, 2009	NSPI formally offers to purchase the rights to develop the SkyPower project.
October 22, 2009	NSPI requests Emera to take over the acquisition process. NSPI's reason for the request (as stated in UARB IR-1, Attachment 1) is to allow greater flexibility in the event the project is required for 2011 RES compliance or it does not receive regulatory approval.
October 23, 2009	324 NSL enters into a Purchase and Sale Agreement with SkyPower.
November 6, 2009	324 NSL Board passes a resolution to purchase the SkyPower project. NSPI states (UARB IR-1, Attachment 1) that Emera determined that purchasing the Digby project in a special purpose entity allowed greatest flexibility in case NSPI decided to purchase the project or sell the project to a third party.
December 23, 2009	324 NSL closes the purchase transaction with SkyPower including assignment of the PPA to 324 NSL.
December 2009	Scotian WindFields is granted an option to purchase 51% or 100% of the Digby project until March 1, 2010. Scotian WindFields agrees to convey all its interest in the Digby project to 324 NSL.
February 4, 2010	Generation Interconnection Agreement executed between NSPI and 324 NSL.
February 9, 2010	The Digby Wind Farm construction contract is executed between 324 NSL and Emera Utility Services.
March 1, 2010	Scotian WindFields option to purchase the project expires.
March 5, 2010	EcoEnergy agreement is executed between Natural Resources (NR) Canada and 324 NSL.
Spring 2010	Emera and NSPI take action to transfer the Digby Wind Farm into NSPI. NSPI states in its closing submission that "Once it became clear in the spring of 2010 that the Digby project was not likely required to achieve compliance with the

	2011 RES, although it would contribute to 2013 compliance, Emera and NSPI took appropriate action to transfer the Project into NSPI."[1]
April 2010	Prior to taking over the project, NSPI requires 324 NSL to engage CBCL to re-estimate the scope of work. NSPI states that this re-estimate would account for updated pricing, the new turbine layout, and revised civil work and electrical requirements.[2]
April 16, 2010	NSPI sends a letter to the UARB advising that NSPI will take over the project, and asking the Board to confirm that it has no objection to NSPI continuing with construction of the project prior to receiving Board approval of the work order.
April 23, 2010	A Board letter to NSPI confirms that the UARB has no objection to NSPI proceeding with the Digby Project provided the advance expenditures are at shareholders' risk.
	The Province releases a new plan for renewable energy including a target for 2015 of 25% and a goal of 40% by 2020.
May 5, 2010	CBCL's re-estimate of the scope of the work is provided to EUS.[3]
May 10, 2010	EUS begins project construction.
May 23, 2010	The 324 NSL ecoEnergy agreement with NR Canada is transferred to NSPI.
May 28, 2010	NSPI purchases the Digby project assets from 324 NSL, and assumes the turbine supply agreement with GE, the construction contract with EUS, and the land rights and other arrangements for work that is underway.
	The PPA remains with 324 NSL. NSPI explains that this is in the event the capital work order application is not approved as filed or the project needs to be sold for 2011 RES compliance.
July 16, 2010	NSPI receives environmental approval of the final site plan.
July 23, 2010	NSPI applies to the Board for approval of four work orders pertaining to the Digby wind project.
December 16, 2010	All twenty machines of the Digby wind project are fully in-service and commissioned.[4]

[1] NSPI Closing Submission, January 14, 2011, p. 6
[2] NSPI Closing Submission, January 14, 2011, pp. 16-17
[3] NSPI Closing Submission, January 14, 2011, p. 17
[4] Transcript, p. 116

IV ISSUES

A. Transactions Between NSPI and its Affiliates

[17] The issue of transactions between NSPI and its affiliated companies under the umbrella of Emera Inc. has been, for some time, a major area of concern to the Board. In the Board's view, a brief overview of the history of the development of a Code of Conduct ("Code"), which directly applies to the case at hand, may provide a helpful understanding of the reasons why a Code was deemed necessary by the Board.

[18] Following NSPI's change of ownership to Emera Inc., a number of affiliate companies were developed. Certain of these companies did business with NSPI, and some of the transactions raised concerns that the affiliates may have been deriving undue financial benefits to the detriment of ratepayers. In a decision of the Board dated March 4, 1996, the need to ensure that unregulated subsidiaries of NSPI were not "subsidized" by NSPI customers was established.

[19] In an Order dated March 16, 2001, the Board established an Interim Code of Conduct which stated, in part, that:

> 4. Notwithstanding that the Interim Code of Conduct does not formally come into force until September 16, 2001, NSPI and its affiliates shall, to the extent feasible, conduct their business activities in accordance with the provisions of the Interim Code of Conduct, effective immediately.

[20] The development of the Interim Code was as a result of the Board's concerns noted above and, as a consequence, a detailed review by Board consultants of transactions between NSPI and affiliates was ordered. The parties worked cooperatively and a draft of the Code was provided to the Board and subsequently

reviewed. The formal version of the Code at that time came into effect on September 16, 2001.

[21] Compliance with the Code by NSPI was monitored through annual reports. Over the years there have been a number of transactions between NSPI and its affiliates which, in the Board's view, were questionable. Several examples are:

- Request for approval within seven days for an immediate purchase of a $34.5 million gas turbine owned and stored by Emera Inc., with NSPI's justification that without it, a significant risk of loss of service to customers, and a detriment to the economic development of the Province, would be created;

- Salaries paid to senior officials conducting business for both Emera and NSPI without adequate records of time spent, resulting in the Board significantly reducing the amount of costs which could be used by NSPI for the purpose of calculating customer rates;

- Outsourcing of fuel procurement to Emera Energy Services which the Board deemed inappropriate;

- A proposed assignment of NSPI's interest in a gas contract with Shell Canada Ltd. to Emera Energy Inc. at "no cost" which, following IRs issued by the Board, was abandoned by NSPI, an action first disclosed to the Board in testimony by NSPI officials at a 2002 public hearing on a general rate application;

- A three year contract between NSPI and EUS without an adequate process to satisfy the Board that an appropriate evaluation of costs and ability by other potential suppliers was carried out before awarding the contract to EUS.

[22] In response to transactions similar to those described above, over time the Code has been revised in order to improve the protection provided to ratepayers – some of these changes reflected suggestions of Intervenors involved in past NSPI hearings. The current version of the Code was approved by the Board in an Order dated February 24, 2009. The Code states, in part, as follows:

> **1.0 PURPOSE**
>
> **1.1** The primary purpose of this Code of Conduct is to ensure that all transactions Nova Scotia Power Inc. (NSPI) enters into with affiliates are designed and carried

out in a manner reasonably expected to produce demonstrable benefit to NSPI customers, when compared with all other available options.

2.0 STATEMENT OF PRINCIPLES

2.1 NSPI 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 NSPI, (iii) joint NSPI/third-party provisioning, (iv) joint NSPI/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 NSPI provides sufficient documentation to demonstrate that the transaction complies with the demonstrable benefits standard of Section 1.1 of this Code and that NSPI's actions to meet that standard preceded the decision to transact with an affiliate.

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

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

2.4 Competition in markets where NSPI's affiliates are active will not be impaired by nonmarket behavior by NSPI.

[23] The Board also expressed its strong concern regarding continued affiliate transactions in its letter dated February 24, 2009, which accompanied the Order, noting that:

> . . .
> However, the Board notes this is the second formal revision to the Code necessitated by NSPI's performance under the first two versions. Events such as the proposed assignment of the Shell Contract and outsourcing of fuel procurement some years ago, to the more recent events identified in the affiliate audit, have cost NSPI the "benefit of the doubt" on this issue.
>
> A strong Code is required.

[24] As noted earlier, in this case the Board must determine whether the affiliate transactions involved in the DWP are necessary, of benefit to the ratepayers and the best available option for NSPI's customers. The Board carries the responsibility under the *PUA* to ensure that rates charged by NSPI to its customers are fair and reasonable. NSPI carries the responsibility to satisfy the Board that this transaction complies with these requirements.

B. Compliance with Code of Conduct and EUS Construction Contract

[25] There is no disagreement among the parties that the transaction between 324 NSL and NSPI is subject to the Code. However, there is a difference of opinion between NSPI and some of the Intervenors as to whether the Board is entitled to examine the construction contract between 324 NSL and EUS for compliance with the Code.

[26] For the reasons which follow, the Board considers that it is both within its jurisdiction and necessary to examine the EUS contract in light of the Code. If the Board is mistaken in this conclusion, then the Board is satisfied that, as part of its review of the NSPI/324 NSL transaction, it can consider whether NSPI taking an assignment of the EUS contract as a part of that transaction was justified within the context of the Code.

[27] As noted in the chronology set out earlier in this Decision, SkyPower, the original developer of the DWP, and counterparty to NSPI in the PPA, filed for creditor protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") in August, 2009. Under the terms of the PPA, NSPI had certain rights to offer

to purchase the Project, in the event a sale process was initiated[5]. After a short period of negotiation, NSPI made a formal offer to purchase the rights, and by October 23, 2009, NSPI had requested Emera to step into its shoes. This resulted in a Purchase Agreement between 324 NSL and SkyPower, with Emera as Guarantor[6]. That transaction was completed on December 23, 2009. At the same time, 324 NSL also acquired the interests of Scotian WindFields in the DWP, subject to a re-purchase option.

[28] On February 9, 2010, 324 NSL entered into the EUS construction contract. The extent of the information made available to EUS prior to the execution of that contract is of some significance and is discussed later in this Decision.

[29] On May 28, 2010, NSPI purchased the DWP from 324 NSL. Prior to this, NSPI had written to the Board stating, after summarizing SkyPower's financial difficulties:

> At this time it became likely that the Digby project as structured was not going to be developed by Skypower or another Independent Power Producer and the energy would not have been delivered pursuant to the PPA.
>
> ...
>
> Absent the involvement of NSPI's affiliate, the development rights for the Digby project as presently configured may have become unavailable, as it is likely that the PPA would have been terminated as a consequence of the CCAA proceedings. The Digby site is a favourable location for wind farm development, and if the PPA had been terminated it is likely that a future competitive solicitation for renewable energy would have included this site at a higher cost to customers.
>
> ...
>
> NSPI would like to preserve the Digby project, which would be beneficial for customers. Given that NSPI will take over the Digby project from an affiliate, the Affiliate Code of Conduct will apply to the transaction.
>
> [Exhibit N-3(C), Response to Board IR-1, Attachment 49, pp. 1-2]

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[5] Application, Appendix 5, Special Provision 38

[6] Exhibit N-3(c),Response to Board IR-1, Attachment 30

[30] The letter went on to indicate that project construction had commenced and that construction contracts had been executed, but it is important to note that NSPI did not disclose that the major construction contract was with another affiliate, i.e., EUS.

[31] As noted earlier in this Decision, NSPI sought confirmation that the Board had no objection to the Project continuing before Board approval, without any responsibility on the part of ratepayers. The Board provided that confirmation, as noted in paragraph [9].

1) Applicability of the Code

Submissions - NSPI

[32] As noted above, in both its April 16, 2010 letter to the Board, and the Application itself, NSPI acknowledged that the Code applied to its transaction with 324 NSL.

[33] In its Closing Submission, NSPI stated that it was seeking:

> ...approval of several affiliate transactions, and, in particular, approval of the acquisition of the Project from ...(324 NSL)...Part of the project costs also includes an affiliate transaction with EUS under its existing power line technician (PLT) contract for the construction of transmission lines associated with the wind farm. NSPI submits that each affiliate transaction associated with the Project offered the best available option to NSPI customers, at the time, in accordance with the ...[Code].
>
> [NSPI Closing Submission, January 14, 2011, p. 2]
>
> 6. Faced with a tight schedule, and needing to redesign and reengineer the Project in order to make it economically viable, 324 NSL retained EUS under [and] EPC contract. <u>At the time of this transaction, neither 324 NSL nor EUS were subject to the NSPI Code of Conduct governing NSPI's transactions with affiliates. Both companies were free to operate like any other private, non-regulated corporation.</u> [Emphasis added]
>
> [NSPI Closing Submission, January 14, 2011, p. 4]

[34] NSPI confirmed this position even more strenuously in its Reply Submission, stating:

> The Code of Conduct is a UARB-approved document that applies only to NSPI. The Code of Conduct does not apply to the transaction between Emera Utility Services (EUS) and 3240383 Nova Scotia Limited (324 NSL), as suggested by the Consumer Advocate. The Board's jurisdiction does not extend to the activities of these private companies which are not public utilities. The Board's jurisdiction in respect of the Code of Conduct is applicable to decisions made by NSPI to engage in transactions with its affiliated companies. ....NSPI disagrees with the suggestion that the UARB's oversight extends to non-regulated contracting parties. (Emphasis added)
>
> [NSPI Reply Submission, January 21, 2011, p. 5]

Submissions – Intervenors

[35] The CA initially took the position that there was no disagreement on the application of the Code to the EUS contract.[7] In response to NSPI's submissions, the CA indicated in his Reply Submission that he disagreed. He argued that:

> In circumstances where a contract is expected to ultimately be transferred to NSPI, Emera and all its affiliates must recognize contracts signed between them must be able to meet the criteria of the Code of Conduct when that contract is ultimately assigned to NSPI. To relieve any contract between affiliates of the requirement of meeting the Code merely opens a back door to permit avoidance of the Code requirements. It would allow Emera and its affiliates to enter into affiliate transactions that did not meet the Code criteria and then transfer them to NSPI by structuring the subsequent transfer in compliance with the Code and claiming that the original contract is exempt from Board review.
>
> Further, at the time an affiliate transaction is being transferred to NSPI, the affiliate transaction itself, and not merely the subsequent transfer, must satisfy Code requirements. The transfer transaction will not contain the substantive provisions which will determine if proper value is being obtained for ratepayers or if undue benefit has been given to an affiliate....
>
> Exempting the 324 NSL and EUS construction contract from the requirements of complying with the Code would be a serious and detrimental restriction of the Code of Conduct. [Emphasis added]
>
> [CA Reply Submission, January 21, 2011, pp. 1-2]

[7] CA Closing Submission, January 14, 2011, p. 2

[36] Of concern to both the CA and Avon was the extent to which NSPI went to distance itself from the EUS contract at the hearing. This was apparent in a number of instances in NSPI's evidence, for example:

> MR. MERRICK: Are you able to tell me whether at the time that EUS stepped in, it was shown or knew of the bid prices that had been tendered by the respondents to the RFP process and the engineering valuation that had been arrived at by CBCL?
>
> MR. BENNETT:...I wasn't -- at the time that EUS stepped into the project, the project was with 324 at that point, and I wasn't involved in that process, so I do not know.
>
> MR. MERRICK: Can either of your panel co-members tell me if at the time that EUS gives its price to do the job, it was aware of or had been advised of the prices that had been bid by the RFP providers as well as the engineering valuation that had been made?
>
> MR. MACADAM: I have no knowledge of that.
>
> . . .
>
> MR. MERRICK: Would your panel that follows this morning be likely to know that?
>
> MR. BENNETT: We weren't involved in that part of the process, so it's unlikely that they can respond. It certainly seems to me that it would be unlikely that they would be aware of that.
>
> [Transcript, pp. 26-27]
>
> . . .
>
> ...I don't know what information they had at the time that they made that decision, so I can't comment on the appropriateness of how the decision was made. I wasn't a part of it.
>
> [Transcript, p. 30]
>
> . . .
>
> ...but you are asking me to speculate in a scenario with circumstances that I wasn't involved in that I really don't know the background. I feel like I can't speculate on an answer.
>
> [Transcript, p. 31]
>
> . . .
>
> MS. RUBIN: So the deal between 324 NS Limited and Emera Utility Services should withstand the same scrutiny as any other NSPI affiliate transaction?
>
> MR. BENNETT: Well, it's -- that deal was not a deal that I or any other NSPI person was a part of because it was not a part of the NSPI organization or company.
>
> It was put there to facilitate the development of a project to bring value to customers, not to provide anything other than preserve our regulatory compliance, some flexibility to achieve that and to move a valuable project along, which we have successfully done.

MS. RUBIN: But you're not suggesting that simply because NSP wasn't a party to that particular agreement that that transaction should be shielded from the Board's scrutiny because it is between the affiliates in the context where NSPI was endeavouring from the beginning to put these assets into the regulated utility?

MR. BENNETT: NSPI was not a part of that and we haven't in any way attempted to shield anything. We've been completely open this morning. We're happy to ask the affiliate to answer the questions that have been posed. We've provided all of the details of the contract, and I'm here to answer the policy questions and the details that I'm aware of.

[Transcript, pp. 85-86]

. . .

MR. OUTHOUSE: In the context of sort of the organization's policy and what I refer to as the plan but ultimately that this asset, barring need for compliance with 2011 RES would wind up in the regulated utility.

I'm just puzzled by the fact that there was this hiatus between, say, the end of November of 2009 when NSPI was actively involved and May of 2010 when the project was transferred back. And I'm referring to the questions that have been put to you about what about the negotiation with the [EUS] US [sic].

And the answer I'm hearing is, "We had nothing to do with that." And you doubted that the next panel would know the answers to those questions either because NSPI seemed to be out of the picture at that stage. And I'm just wondering about that.

Is that what really happened; all the NSPI personnel dropped out? Because I assume they were involved back in November of '09.

Did they just drop out of the picture until the following spring?

MR. BENNETT: Well, what I reported was we were trying to support the project. Obviously, we wanted to see the project succeed as well, but we weren't directly involved in any negotiations with Emera Utility Services or the negotiations that happened between 324 and Scotian WindFields or any of the other work that was going on.

Our, you know, hiatus, I don't think, describes it accurately. We were very busy doing other important things, executing the other projects that we were involved in and moving the business ahead, so we were quite happy to have the support of Emera and EUS moving this project along.

MR. OUTHOUSE: I can appreciate that. But knowing that, ultimately, the goal was to bring this project before the Board for approval, I guess the thought that you would leave it to somebody else to negotiate the construction contract knowing that you were going to have to come here and defend it as NSPI without paying any attention to what was paid or anything else just strikes me as a bit odd, that's all.

MR. BENNETT: Well, I have great faith in my colleagues across the business and I understand their motivation and their intent and their integrity. And I know that they would be doing as good a job as I would do in that role, trying to provide value.

[Transcript, pp. 131-133]

. . .

MR. OUTHOUSE: I realize from your evidence so far that you were not involved in this decision, any of you on the panel.

What's your understanding of why the construction contract wasn't put out to tender?

MR. BENNETT: I don't know. I wasn't there so I don't know how that decision making evolved and I don't like to speculate, but knowing the people involved, I believe that the decisions were made with an appreciation for the timeline of the project and for the value that EUS could bring, a real belief in their ability to execute and produce real value and positive results on the project and nothing more than that.

[Transcript, pp. 142-143]

[37] Avon urged the Board to accept that the EUS construction contract should be subject to Code scrutiny, stating:

> The curtain drawn by NSPI around the 324 NSL-EUS transaction should be pulled aside in these circumstances.
>
> [Avon Closing Submission, January 14, 2011, p. 4]

[38] Avon went on to note Mr. Bennett's testimony regarding NSPI's intentions with respect to this Project:

> Q: Are you suggesting that it was not until the spring of 2010 that the concept occurred to NSPI to bring this into Nova Scotia Power as project?
>
> A: No, not at all. I'm saying that our -- we endeavoured from the beginning -- our intention from the beginning has always been to put the assets that naturally belong in a regulated utility in a regulated utility because we believed that that's where the most value is created for customers and, quite frankly, because it fits our business model of operating regulated enterprises.
>
> Q: Okay, and what is the beginning? You said, "We endeavoured from the beginning."
>
> A: From the beginning of being notified that the project was in bankruptcy and that -- and from our beginning understanding that we needed that project in one form or another to comply with renewable energy standards.
>
> Q: And when was that?
>
> A: That was early fall of 2009.
>
> [Transcript, pp. 83-84]

[39] Neither the Province nor Quetta made any submissions on the applicability of the Code, although Quetta did make a general suggestion that the Board might wish to test some of the wording of the Code.

Findings

[40] The Board is not persuaded by NSPI's evidence referred to above that it can insulate itself from either the negotiation or execution of the EUS contract. The Board notes the evidence of Mr. Bennett, who testified that he has been involved in the renewable energy side of the business from the beginning, and who said that once they knew of the SkyPower financial difficulties, it was the intention that the DWP be brought within the regulated utility. Mr. Bennett explained:

> ... we were part of the initial part of that CCA process just by the nature of our involvement with the project. We were a natural counterparty for the people who were dealing with that financial failure, and the information came to us. Our team engaged and tried to move it along and did the work they needed to do to find out whether or not we ever had even a chance of having ownership or access to the project. When that became apparent, it was obvious to us that the most appropriate way to move things forward was through an Emera involvement, so it could happen quickly and so that -- obviously, again a benefit of having the assurance that it would qualify under the RES standard and keep us compliant with the regulations.
>
> [Transcript, p. 124]

[41] The Board concludes that the primary reason why NSPI did not acquire the assets of the DWP directly was that it might be required for 2011 RES compliance, which would not allow NSPI to self-supply – NSPI could not own a majority interest in the Project under the 2011 RES, and it could not be a party to a PPA with itself.

[42] As a result, the "shell company" was brought into play. Mr. Bennett confirmed this on cross-examination by Board Counsel:

Q: We know that 324 itself brought to the table the fact that it was a separate legal entity from NSPI, correct?

A: Yes.

Q: Beyond that though, as I understand it, it was a shell company without employees?

A: Yes, this is common structure for doing this kind of work.

Q: It had no other assets?

A: Yes.

Q: You agree with me it had no other assets?

A: I do, to the best of my understanding.

Q: Yes, okay. Sorry, it was a poor question.

A: I did not set the company up but to the best of my understanding, the only assets in the company were assets related to this project as they were acquired in the course of the bankruptcy.

Q: So obviously, it was required to pay money out at various junctures for the asset purchase and so on. Who was providing that money?

A: Emera.

Q: Okay. Emera Inc. we're talking?

A: Yes.

Q: Now, since it was -- the reason for 324's involvement was, as you say, to keep the project moving. There were uncertainties going forward, what would happen with the project, but the preference and the plan, provided that this project wasn't necessary for 2011 RES compliance, was that it would be brought into NSPI as part of the utility's rate base.

A: Yeah, even describing that as a plan is too narrow of a term; it's more of an encompassing policy to operate within the regulated entity.

[Transcript, pp. 126-128]

[43] The Board accepts that 324 NSL will have no assets at the end of this process (if the Application is approved) as both Mr. Bennett and Ms. Porter testified.[8] Subject to comments later in this Decision about consulting fees paid to Emera Energy Services ("EES"), there was no additional cost incurred by using this structure.

[8] Transcript, p. 129 and pp. 220-221

However, the Board considers it superficial on the part of NSPI to suggest that the intervention of a "third party" corporate structure such as 324 NSL takes the transaction out of the realm of Board scrutiny. NSPI, EUS, and 324 NSL are all affiliated by virtue of Emera Inc.'s control. For the reasons set out in paragraph [41], the Board concludes that NSPI would have completed the purchase directly from SkyPower and Scotian WindFields to save the Project which it describes as having such a favourable wind regime and low PPA costs, as well as the benefits of the ecoENERGY funding.

[44] Consequently, the structure of the transaction is somewhat contrived. Therefore, it is justifiable for the Board to examine whether the 324 NSL/EUS contract complies with the Code. The Board agrees with Avon's suggestion that the "...curtain should be pulled aside".[9] Otherwise, the concerns about how transactions might be structured to avoid scrutiny, as expressed by the CA, could be realized.

[45] As identified by the CA, the difficulty arising from this manner of business is that it opens up the opportunity for NSPI to circumvent the Code by using intervening parties in many transactions, and then distancing itself by claiming that it knew nothing about, and had no involvement in, the transactions.

[46] The Board does not intend to suggest that in this particular transaction, NSPI was seeking to use a "back door" process. The Board understands that the creation of 324 NSL and the involvement of Emera were necessitated by the failure of SkyPower, and by the RES requirements at the time, when an important and cost-effective PPA needed to be preserved.

---

[9] Avon Closing Submission, January 14, 2011, p. 4

[47] The Board has concluded that it should view the EUS contract through the lens of the Code. NSPI takes the position that all the Board can do is to examine the assignment of the contract as part of the entire transaction with 324 NSL for Code compliance. As noted earlier, the Board does not share that view but, in any event, it clearly can examine the contract as one element of the transaction.

2) Does the EUS construction contract comply with the Code?

[48] As noted earlier, the Board has determined that it can make a finding on whether the EUS contract between two affiliates of NSPI complies with the Code. Therefore, the Board now turns to an examination of the contract and the context in which it arose.

[49] For the reasons that follow, the Board finds that the EUS contract does not comply with the Code. The Board will discuss the consequences of this finding later in this Decision.

Submissions - NSPI

[50] As described in paragraphs [33] and [34], NSPI took the position that 324 NSL and EUS were not subject to the Code. Consequently, NSPI said:

> ...324 NSL was under no obligation to undertake a competitive solicitation, particularly in circumstances where such a process would delay construction and put the federal incentive in jeopardy.
>
> [NSPI Response to U-1, p. 1]

[51] NSPI states that its compliance with the Code can be judged based on a number of factors, including 324 NSL's motivation:

> ...to complete the project at the lowest possible cost because the PPA price is so low as to make it difficult for any independent entity to earn value from the Project unless it could

> be constructed at low cost. Further, low construction cost was a key way for 324 NSL to obtain value for the Project in the event it had to be later sold to an independent third party not affiliated with NSPI to achieve compliance with the 2011 RES.
>
> [NSPI Closing Submission, January 14, 2011, p. 4]

[52] NSPI also justified the EUS contract on the basis that when 324 NSL took over the Project from SkyPower, there was insufficient time to seek new bids and meet the deadline to qualify for ecoEnergy credit. The loss of this credit to the DWP would have been approximately $10 million over a 10 year period.

[53] NSPI further noted 324 NSL's reasons to retain EUS to complete the works:

> 6. Faced with a tight schedule, and needing to redesign and reengineer the Project in order to make it economically viable, 324 NSL retained EUS under an EPC contract...
>
> 7. By hiring its affiliate, 324 NSL ensured that it could control the Project and achieve the desired outcome – on time commissioning that would save the ecoEnergy incentive. 324 NSL used industry standard methods to enhance the ability to commission the Project on time and under budget...
>
> [NSPI Closing Submission, pp. 4-5]

[54] The low cost contract was achieved, according to NSPI, because EUS was provided "with extensive pre-existing information received from SkyPower about the original project design and costs".[10] NSPI says that the provision of a bonus in the contract was appropriate as it represented a shifting of some of the risk for timely project completion to EUS.[11]

[55] NSPI, in its Reply Submission, went on to justify the price paid to EUS:

> . .
>
> The all-in price for the EPC contract was not adjusted upwards to include an incentive payment. Rather, the opposite occurred. 324 NSL and EUS negotiated a reduction to the base contract amount, with the difference being assigned to associated risk to be borne

[10] NSPI Closing Submission, January 14, 2011, p. 5

[11] NSPI Closing Submission, January 14, 2011, p. 5, and NSPI Reply Submission, January 21, 2011, p. 9

by EUS. This made EUS, not 324 NSL (and not NSPI customers) bear the risk of late completion. EUS reduced its original contract price in respect of several key contract components. Per the revised contract price, EUS would only earn the additional amount if substantial completion was attained on December 20, 2010. This also reflected a change in the substantial completion date from December 31, 2010.

[NSPI Reply Submission, January 21, 2011, p. 10]

[56] NSPI indicated that EUS advised:

... it was aware of the pricing information received under the solicitation conducted by SkyPower and the CBCL pricing summary, which were based upon the original design and layout for the project as tendered by SkyPower. 324 NSL requested EUS to provide a proposal for a full EPC contract to detail engineer, procure, construct and project manage the new layout specified by 324 NSL.

[NSPI Response to U-1, p. 2]

[57] That response also listed the information made available to EUS prior to its establishing its price. NSPI noted, however, that when EUS and 324 NSL executed the contract (February 9, 2010), the revised CBCL estimate which is referred to later in this Decision, had not yet been prepared.[12]

[58] In response to Avon's recommendation that the Board deny the bonus to EUS, NSPI stated:

The Avon Group argues that one cannot tell if the EUS contract is the "best available option" in the absence of a competitive solicitation. This argument misstates the test for determining the appropriateness of an affiliate transaction on a number of levels. Price is only one relevant factor in the review of an affiliate transaction. Further, a competitive solicitation is not an absolute requirement of the Code of Conduct. As set out at Section 6.7 and 6.8, NSPI can use alternate means to establish that the price obtained reflects fair market value, as set out above.

[NSPI Reply Submission, p. 11]

[59] Additionally, NSPI concluded that since EUS had already started work, there would be risks to completion in time to secure the ecoENERGY incentive, and construction-related risks if they stopped the work and solicited new tenders.

---

[12] NSPI Reply Submission, January 21, 2011, p. 6

Submissions - Intervenors

[60] Avon and the CA stress that the test for compliance, referring to section 2.2 of the Code, is that the transaction must be "...demonstrated through sound documented analysis to be the best available option for NSPI's customers at the time". They state that there is no evidence before the Board on which it can safely conclude that the EUS contract meets this test.

[61] The CA and Avon submit that because so much information was supplied to EUS, there was no competitive bidding. Both argued that all EUS did was to meet an existing price, established from the original SkyPower tendering process overseen by CBCL. The CA points to the failure of NSPI to take up the suggestions of Mr. Desdunes, Project Director, Eastern Region, of SkyPower, that two of the original bidders might be approached to revise their bids. The CA argues that this demonstrates a lack of due diligence on the part of NSPI.

[62] The CA questioned the contract price paid to EUS:

> We can only speculate as to how the original price was obtained for the contract. It is not probable that EUS and Emera did any negotiating. It certainly was not the situation of two unrelated parties each pushing the other to obtain the best advantage. Rather the evidence, such as it is, suggests a number was picked based on the value determined by the engineering analysis (see evidence of Mr. Bennett at p. 31-32, see also p. 33-36).
>
> The fact that the initial EUS contract price came in at the amount of the engineering analysis supports the conclusion that the parties were simply matching the engineering cost analysis. When that question was put to Mr. Bennett, he acknowledged that he did not know whether EUS merely bid the amount that they were told they had to meet. (p. 31-32)
>
> Both EUS [sic] appear to have been satisfied that the number was "within the market range that's appropriate" (see p. 46-47, 49).
>
> A price that is within a market range does not meet the criteria of the Code that requires a price that is the best available option. There is a significant difference between asking an affiliate to meet a given price and asking it to provide its best price.
>
> Indeed a test of a market range gives sufficient variance or "looseness" that it could lead to pricing that while within the market range would still permit inappropriate affiliate

> transactions that would provide unwarranted benefits to an affiliate at the expense of ratepayers.
>
> [CA Closing Submission, January 14, 2011, pp. 2-3]

[63] The CA argued that the EUS contract is not the best available option for NSPI customers as required under the Code. He stated that 324 NSL should have asked for bids from original bidders after the change in the scope of the Project. In the CA's view, EUS merely matched its bid to the engineering estimate.

[64] The CA also questioned the timing of the bonus payment to EUS:

> It is the position of the Consumer Advocate the evidence does not establish the required justification for the payment of the bonus in the circumstances.
>
> To begin with the evidence does not establish that the bonus had become payable under the contract. Article A3 "Contract Price" of the Construction Contract (exhibit N-1, Appendix 10, p. 3) provides that the bonus payment is to be made upon "Total Completion of the Works in the event that Substantial Completion of the Work is achieved by December 20, 2010". For the bonus to be payable, there must be not only Substantial Completion but also Total Completion.
>
> Substantial Completion is defined in the definitions (GC 1) as being:
>
> > **"Substantial Completion of the Work"** shall have been achieved when the Work is ready for use or is being used for the purpose intended and is so certified in writing by the Project Designer and the only outstanding Work is the Punch List Items.
>
> "Total Completion of the Work" is defined as:
>
> > **"Total Completion of the Work"** means when the entire Work including the completion of all Punch List Items, except those items arising from the provisions of GC 25 WARRANTY or otherwise agreed by the parties, has been performed to the requirements of the Contract and is so certified in writing by the Project Designer.
>
> For the bonus to be payable, all Punch List Items, excepting only warranty deficiencies or agreed items, have to have been performed.
>
> [CA Reply Submission, pp. 2-3]

[65] The CA stated that the payment of a bonus to EUS is premature as it has not met the contract requirements. He also argued that the payment of a bonus is based on total completion of the work by December 31, 2010, and substantial completion by December 20, 2010. He argued that, based on NSPI's evidence, the

Project is not yet complete, pointing to Mr. Savory's evidence that some "...punch items..." were still outstanding as of the hearing date. [13]

[66] The CA and Avon questioned the amount of the EUS contract on the basis that it was not the lowest possible cost, but a cost based on CBCL's estimate. Both have recommended that the bonus amount in the EUS Contract should not be approved by the Board.

[67] Avon remains unconvinced that the lump sum price being paid to EUS is the best price for NSPI customers, and noted that "...the deal smacks of preferential treatment..."[14]

[68] In its Closing Submission, Quetta supports the process followed by NSPI, and objects to the suggestions of the CA, describing the practice as "...shopping the bids..."[15]. Quetta suggests the Board should focus less on price, and more on the transaction as a whole.

Findings

[69] Section 2.2 of the Code requires that an affiliate transaction be "...demonstrated through sound, documented analysis to be the best available option". Other sections of the Code, for example, the fair dealing guidelines of Section 6.0, and the directions contained in Sections 7.6 and 7.7, require specific steps to be taken to meet this test.

[13] Transcript, p. 116
[14] Avon Closing Submission, January 14, 2011, p. 5
[15] Quetta Closing Submission, January 14, 2011, p. 1

[70] It is clear that the documented analysis required by the Code is to be contemporaneous with the decision and must include sufficient reasons. Sections 7.7 – 7.9 apply to "Large Transactions" such as the DWP.

[71] The Code does recognize that there will be certain situations where some of the prescribed steps may not be taken, and provides alternate requirements.

[72] Section 7.6(e) provides:

> 7.6 NSPI 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.
>
> . . .
>
> (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 NSPI officer's signature signifying the officer's verification that conditions were sufficient to warrant the suspension of normal steps or delay in documenting them.

[73] Section 7.9 provides:

> 7.9 In the event that solicitation of third-party offers is not used for a Large Transaction, NSPI 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.

[74] Nowhere does NSPI say that there were emergency circumstances, triggering Section 7.6(e) of the Code, although, in its Closing Submission[16] it describes the need for quick action, and an extremely tight development schedule, due to the need to preserve the PPA, and to qualify for the ecoEnergy incentive. Even if this

[16] NSPI Closing Submission, January 14, 2011, pp. 3-4

amounted to an emergency, the Board finds none of the requirements of this Section were met.

[75] The payment of a bonus as provided for in the EUS contract is an element of the contract that causes the Board to question whether the activities of an affiliate, i.e., EUS, are being subsidized by NSPI and ultimately the ratepayers, contrary to Section 5.2, and the fair dealing objective of the Code.

[76] The Board accepts NSPI's submission that EUS did not know the revised CBCL estimate when it entered into the contract with 324 NSL. However, it is clear to the Board, as Avon states:

> ...if NSPI was in the position of 324 NSL, it would be in breach of the fair dealing requirements of the Code of Conduct.
>
> [Avon Closing Submission, January 14, 2011, p. 5]

[77] As noted above, the Board has determined that, in these circumstances, the Code should be applied to the EUS contract.

[78] However, as will be seen later in this Decision the Board, in finding that the EUS contract does not comply with the Code, considers this a unique situation where a capital expenditure may be approved. The Board finds that the bonus was not for early completion, but for completion on time, as pointed out by Avon in its Closing Submission.[17] The Board will address the recommendations to disallow the bonus in its analysis of the NSPI/324 NSL transaction below.

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[17] Avon Closing Submission, 6

3) Did the May 28, 2010 transaction between NSPI and 324 NSL comply with the Code?

[79] The transaction by which NSPI acquired the DWP from 324 NSL is a complex one. It must be examined as a whole. The same fair dealing principles and procedures, as noted above, apply to the transaction.

[80] For the reasons which follow, the Board finds that the transaction is not in compliance with the Code. Despite this finding, and after its review of the Project costs, economics and justification, the Board finds that in the very unique circumstances of this Project, the capital expenditure should be approved, subject to the reduction in costs set out later in this Decision.

Submissions - NSPI

[81] NSPI says that the affiliate transaction between it and 324 NSL met the requirements of the Code. The transaction, as documented by the Asset Purchase Agreement dated as of May 28, 2010,[18]provided for an assignment of all assets relating to the DWP held by 324 NSL, excluding the PPA and performance security thereunder.

[82] As noted earlier, on April 16, 2010, NSPI requested confirmation from the Board that it could proceed with the DWP before Board approval. The Board advised NSPI it could do so, at the risk of NSPI's shareholders alone.

[83] NSPI claimed, in its Reply Submission:

> **1. NSPI acted in the best interest of customers in taking assignment of the EUS contract.**
>
> . . .
>
> As part of its due diligence in considering an assignment of the EPC contract in April of 2010, NSPI requested that 324 NSL engage CBCL to prepare a revised engineering estimate for the project. NSPI was able to confirm that the EUS

[18] Exhibit N-1, Appendix 4

> contract was lower than the estimate prepared by CBCL. It was also able to confirm that the EUS contract was $4 to $10.5 million lower than the adjusted tenders received through the SkyPower solicitation.
>
> The Consumer Advocate states at page 3 of its closing submission that, "A price that is within market range does not meet the criteria of the Code that requires a price that is the best available option". NSPI respectfully submits that the EUS contract was the best available option, and that there is no evidence to the contrary. The Code requires the transaction, not just the price, to be the best available option. The EUS price, and certainly the transaction between NSPI and 324 NSL that assigns the EUS contact to NSPI, is compliant with the criteria set out in the Code of Conduct. Section 6.7 of the Code of Conduct states:
>
>> NSPI will charge and be charged prices which reflect fair market value (FMV) for all nonregulated utility goods, services, leases, asset transfers, or other exchanges of value provided to or from affiliates, provided that in all cases NSPI shall charge for such goods and services no less than its fully allocated costs.
>
> The Code of Conduct further provides at Section 6.8:
>
>> NSPI shall determine and document all FMV prices through the use where practicable, of competitive tendering or quotes; otherwise NSPI shall use the most direct alternative means of establishing FMV pricing, including without limitation bench marking studies, catalog pricing or recent market transactions.
>
> Based upon the evidence in this proceeding, the EUS price represents fair market value, as established through a comparison of the EUS price to the CBCL engineering analysis and through a comparison of the EUS price to the competitive tenders received by SkyPower. This analysis is consistent with and satisfies the requirements of sections 6.7 and 6.8 of the Code of Conduct.

[NSPI Reply Submission, pp. 10-11]

[84] Before purchasing the Project from 324 NSL, NSPI retained CBCL to prepare a cost estimate of the work which EUS was retained to undertake. Based on the evidence, the EUS contract is slightly less than CBCL's estimate.

[85] NSPI, in its Application and responses to Intervenor submissions, stated that the EUS contract price, including bonus, meets the Code requirements and is reasonable. It supports this view on the basis that the EUS contract was signed in February 2010 and CBCL prepared its cost estimate in May 2010. So, EUS would not have known what the CBCL estimate was going to be at the time of signing the contract [NSPI Reply Submission].

[86] An important factor is that the Project was re-scoped. NSPI says that in assessing whether the EUS contract could be considered as appropriate, it:

> ... required that 324 NSL engage CBCL to re-estimate the scope of work, accounting for updated pricing, the new turbine layout and revised civil works and electrical requirements.
>
> [NSPI Closing Submission, pp. 16-17]

[87] EUS was provided with this information on May 5, 2010, nearly three months after it had contracted with 324 NSL.

[88] NSPI went on to explain in its Closing Submission, referring to its response to CA IR-3,[19] how it had examined the results of the CBCL re-estimate, compared them with the original tenders, and made the necessary adjustments, and determined the EUS price was lower than the CBCL re-estimate, and lower than the adjusted range of tenders received by SkyPower. It concluded that the contract was in the best interests of its customers.

Submissions – Intervenors

[89] The CA argued that there was a failure on the part of NSPI to determine that the EUS contract was the best option available. He submitted:

> According to the evidence, EUS must have begun work by either the end of 2009 or early 2010. It began work prior to the project being transferred to NSPI. At the time of the transfer NSPI looked at the contract price and merely endorsed the view previously arrived at, that being that the price was within the market range. By doing so they also applied a test that does not satisfy the Code.
>
> Because it appears the contract price was "picked" rather than negotiated, and "picked" on the rationale that it was in a market range, it made it all the more important for NSPI to test or investigate the number to see if it was as low as the work could be done for in the circumstances.
>
> There was no effort made to follow up the suggestion in the email from Mr. Desdunes (Exhibit N-3 attached to response to CA IR-3, attachment 1) suggesting that two of the original bidders were prepared to make a substantial reduction in their bid price (see transcript p. 44-46, 48, 50). Approaching those two bidders to inquire as to what

[19] Exhibit N-2(C)

> reductions they were prepared to make is not bid shopping in the circumstances that occurred. The original project was abandoned. Emera/324 was entitled to make inquiries of interested contractors, as well as making inquiries of its own subsidiary.
>
> Nor did anyone make any attempt to test or determine if the individual components making up the EUS contract price were as low as possible and had been stripped of any duplication. No effort was made to analyze the individual aspects of the bid. (p. 35)
>
> Nor was NSPI able to provide any evidence confirming that the EUS price did not include markups by EUS on amounts being charged by subcontractors. (p. 39)
>
> [CA Closing Submission, p. 3]

[90] Avon questioned the evidence put forward by NSPI, stating:

> Even looking at the pricing comparators offered by NSPI ex post-facto, the evidence is slim that this is the "best option" for customers. To justify the value of the EUS contract, NSPI compared the initial CBCL estimate with a revised CBCL engineering estimate which it states it secured when doing its due diligence on the deal. The second estimate came in at 4.8% less than the first. NSPI then reduced the eight SkyPower bidders by a similar 4.8% (and adjusted for padmounts and project management), concluding that the EUS price was superior.
>
> However, the bids assumed a winter build and a "very compacted construction schedule" and did not account for the reductions due to movement of the turbines to the west of the project area. Two of the bidders had identified a number of areas where a comprehensive value engineering analysis would likely result in a "significant reduction" of project construction costs. Unfortunately, without having had the opportunity to re-bid or be involved in the negotiations, neither ratepayers, nor the Board can state what this "significant reduction" might equate to and whether it would be along the lines of the 4.8% reduction suggested by NSPI.
>
> The best comparator to the EUS contract would be CBCL's re-scoped engineering estimate given that the bids are not an apples to apples comparison. The variance between the engineering estimate and the EUS contract is marginal.
>
> Is the EUS contract a "reasonable" deal? Perhaps. Is it the "best available option"? One cannot say in the absence of a competitive solicitation and particularly in this circumstance where the affiliate was privy to information not made available to non-affiliated bidders. The Avon Group submits that where it was always intended that the Project would be taken into rate base, NSPI cannot simply turn a blind eye to the preferential treatment afforded its affiliate and use an after-the-fact justification.
>
> [Avon Closing Submission, January 14, 2011, p. 6]

[91] The Closing Submission from Quetta Inc. supports the Project and contract awarded to EUS.

Findings

[92] In its Reply Submission, NSPI addressed the CA's statement that the EUS contract price was "...simply matching..." the CBCL revised estimate. NSPI made it clear that the revised CBCL estimate was prepared well after the EUS contract was executed.[20]

[93] The Board notes that none of the Intervenors led any evidence to demonstrate that the price paid by NSPI was not the best available option. However, the burden is not on the Intervenors, but on NSPI, to show compliance with the Code, i.e., that the transaction was the best available option.

[94] The Board agrees with Avon's submission that the evidence filed by NSPI on this question is "...slim."[21] However, after a detailed examination of the transaction as a whole, the Board finds that, surprisingly, it does represent the 'best available option' at the time. This is particularly surprising since the process used by NSPI did not comply with the Code. In the Board's view, this result occurred due to the unusual circumstances in acquiring the DWP, and is in no way an endorsement of actions which are contrary to the requirements of the Code. The 'best available option' result is because of the favourable economics, which will be discussed in greater detail later in this Decision, and the ability to achieve the ecoEnergy funding and comply with RES standards.

[20] NSPI Reply Submission, January 21, 2011, pp. 6
[21] Avon Closing Submission, January 14, 2011, p. 6

[95] The Board notes that, largely due to timing pressures, there was no competitive solicitation. NSPI stated that it was entitled, under Sections 6.7 and 6.8 of the Code to "use alternate means".[22]

[96] The Board concludes that NSPI has not complied with the Code requirements for documentation set out in Sections 7.6 and 7.7. The Board does not accept that, as suggested by NSPI, the documented analysis is comprised in its Application, Evidence and IR Responses.[23]

[97] Earlier in this Decision, the Board set out three basic questions to be answered in this Application. These were distilled from an exchange between the Panel Chair and Mr. Bennett. It is useful to set that exchange out here, as it demonstrates the reasons why the Board is persuaded to approve the DWP:

> THE CHAIR: I just have a few questions, and I realize this is a very complex matter and you know, we've heard complicated questions and answers.
>
> My questions, I don't think, are complicated. Hopefully, they're simple. And for us, I think there are three underlying questions that we need to be satisfied with before we could approve this project.
>
> One is whether NSPI taking over the Digby wind process was necessary for customers and for NSPI. I understand a number of times it's been described how beneficial it is, and I'm not challenging that, but is it necessary? Was it necessary?
>
> The second question is, is the price of this project, which is a big price, you know, $82.7 million, is that fair, reasonable and justifiable, especially given that it's an affiliate transaction?
>
> And thirdly, is this the best deal Nova Scotia Power could have gotten for its customers if circumstances were different?
>
> And I guess I'm wondering whether -- you know, at the moment it looks like all we have -- and I'm not diminishing it -- is your word that the answers to all those questions is yes.
>
> MR. BENNETT: Hopefully I can keep the answers in the order of the questions.

[22] NSPI Closing Submission, January 14, 2011, p. 11
[23] NSPI Closing Submission, January 14, 2011, p. 16

Was it necessary for Nova Scotia Power to engage in this project, to move this project along? I believe that the record shows that it absolutely was necessary.

At the time, we were required to comply with the renewable energy standards of the province and there were onerous penalties associated with non-compliance and, quite frankly, it's just our practice and policy and desire to comply with the laws and regulations. So we work hard to do that.

The Digby project is only one example of the hard work that we've done to ensure compliance.

It includes everything from doing Nuttby, from doing a complicated partnership relationship with RESL at Point Tupper to great flexibility that we've demonstrated with other Power Purchase Agreements, other independent power producers who are successfully producing today because of the flexibility that we exercise in support of their projects.

It included complicated arrangements related to NewPage and an approach to this Board to have a Power Purchase Agreement with NewPage, all in an effort to pursue compliance with the renewable energy standard.

This project, in our minds, at that time, was absolutely necessary to get that work done and comply with the regulations.

Over and above that, we believed in the project. We believe the project is an economic project in a good wind regime with the community support needed to bring a project like this to success and with the opportunity to gain eco-energy credits, millions of dollars worth of eco-energy credits and make those available to customers that won't be there in the future. The eco-energy program is over.

If this project had not succeeded and completed and garnered those benefits, the next project that comes along won't have the opportunity. The next project that comes along will be buying turbines, not out of the bankruptcy process at a discount but in a competitive market at market prices which are increasing.

So we believe that there was a reason, an importance to doing this project to create value for customers, to see the project move ahead in some way and not fail.

Is the price reasonable? I believe the price is absolutely reasonable. It's one of the lowest cost sources of renewable electricity that exists in the province. It is that way because we've executed the project well, because we financed it at the lowest cost that it can be financed at through the utility and because we've leveraged every eco-energy and tax credit benefit for customers that we can out of this project.

So I think it's absolutely a value for customers.

THE CHAIR: I gather, though, even though you are fresh as a daisy to some of these issues, that you do have an understanding of the Board's concern with respect to affiliate transactions?

That concern goes back a long way. That concern was the reason why there was a Code of Conduct imposed by the Board, based on what the Board felt were unacceptable transactions in large part because they didn't go out to tender.

So I guess I'm just, you know, concerned about that side.

You say that, yes, you think it's a justifiable price, but you understand, don't you, why the Board has some concern that really we don't have a lot except for your opinion that it's the best price NSPI could have gotten.

MR. BENNETT: Well, and the evidence that it's lower priced than anything else that anyone has ever brought to the table in the form of a Power Purchase Agreement in this 2007 solicitation. It is -- it's lower than the original PPA. It's nearly the lowest price of any of the projects that have come out of that process.

And I understand the Board's discomfort with the process that has been followed, but I think the Board also appreciates that from my perspective, I know the work that's been done.

I've been in the middle of this endeavour to bring renewable energy to Nova Scotians, to comply with the Regulations in this province, and I've lived it with my colleagues, heart and soul, and the work that we've done is honourable work.

It's valuable work and there is no reason in my mind to suspect that someone could have done a better job at a lower price. I'm sure that's always a possibility, but it's not a test that we can take now. The project is done and it's been done well, and we're putting this forward as a complete package that has, in regulation, more value for customers than it has outside of regulation.

And our opportunity is to put it where it belongs, which is within the regulated utility. I shouldn't suppose where it belongs, I'm sorry -- where I believe it belongs.

I'm obviously, you know, very engaged and, as I said this morning in my introduction, I've been with these projects from the beginning, from the inception of these Power Purchase Agreements through the successes and failures with each of the proponents right to the very end, and I wanted to see these things done and I wanted to see them done well for our customers and that's why I'm here.

So do I think it's the best deal? I absolutely think it's the best deal and I think it's been done in the best way it could be done given all the circumstances and complications of the last couple of years that we've worked it.

THE CHAIR: And I guess that's your response to my third question, which was, "Is this the best deal NSPI could have gotten?"

MR. BENNETT: I believe it's a very good value. I believe everyone's intentions were forthright and honourable. I have no reason to believe that we didn't get the best value.

I appreciate the concerns about the affiliate transactions, and we operate with those concerns every day within Nova Scotia Power.

THE CHAIR: So do we.

MR. BENNETT: We appreciate very much the importance of transparency, and we're starting the new year endeavouring to be even more transparent in a process that's already extraordinarily transparent.

But we want to be absolute sure that we give the Board the confidence that we're doing these things aboveboard [sic] and we're doing them always with the best interests of our customers at heart.

We ---

THE CHAIR: And I guess that's the point of our concern, is that we need to ensure that expenditures made in this project and in any other project is in the best interests of the ratepayers because ultimately they will shoulder the cost of it. And so that's -- you know, that's why we're expressing these concerns with respect to affiliate transactions that have occurred.

MR. BENNETT: And I know, Madam Chair, that me giving my word, which I am under oath, I'm telling you exactly how I feel and how committed I am to this. What you describe as service to our customers, I know well as my job, that's what I try to do every day and that's what we're trying to do here.

We're trying to put this project in service in a way that brings the best value to customers.

[Transcript, pp. 183-190]

[98] While the Board is prepared to approve the capital expenditures, its approval is qualified. The Board, as discussed earlier, finds the payment of a bonus to an affiliate in this case is inappropriate and unjustifiable. As a result, the inclusion of a $1 million payment (filed on the basis of confidentiality but disclosed to the public during the hearing) to EUS is not approved. Accordingly, the Board orders that the proposed cost of the DWP to be included in rate base be reduced by that amount.

[99] The second issue arises from fees paid to EES. The CA recommended that any additional costs from the structure of the transaction should be disallowed.[24]

[100] There is evidence that there were costs of EES consulting fees, and costs, as Board Counsel described them, of "papering" the transaction.[25]

[24] CA Closing Submission, January 14, 2011, p. 4
[25] Transcript, p. 225

[101] Mr. Bennett testified that some of the amount paid would have been expended if a third party had been involved, and he described the services provided by EES as having produced value.[26]

[102] The Board notes that the structure was necessitated mainly due to concerns about RES compliance and preservation of the PPA. Therefore, a reasonable argument could be made that a portion of these costs were unavoidable. The amount involved is not material when compared to the entire Project costs. While the costs might be described as additional, the Board finds that they were justifiable and that a disallowance of this cost is unnecessary.

4) Does the EUS transmission line contract comply with the Code?

Submissions – NSPI

[103] NSPI retained EUS to complete the transmission lines associated with the Project using the Power Line Technicians (PLT) Agreement signed between the parties. This Agreement has since expired (December 31, 2010).

[104] The Company noted its reasons to retain EUS to complete the transmission work:

> 8. NSPI retained EUS to complete the transmission interconnection under its existing Master Agreement for PLT services. NSPI's existing workforce was fully deployed and not available to complete this additional project based work. This work was completed by EUS at prices that were established by a competitive solicitation process when the Master Agreement was originally established.
>
> [NSPI Closing Submission, p. 6]

[26] Transcript, pp. 164-165

Submissions – Intervenors

[105] None of the Intervenors made any submissions regarding the line-related contract work.

Findings

[106] The Board is familiar with the existence of the Master Agreement with EUS for PLT services. Mr. Bennett referred to it as a "standing" or "multi-year" contract.[27]

[107] In previous requests for capital expenditure approvals, the Board has expressed concerns about the tendering process surrounding the contract. The Board has cautioned that every project involving work under the contract would be subject to close scrutiny.

[108] After a review of this transaction, there is no evidence to suggest that retaining EUS to complete the transmission interconnection was inappropriate. Given the time constraints under which NSPI was operating, the Board considers it was not unreasonable for NSPI to contract with EUS, and in doing so does not breach the Code. The Board does wish to make it clear that this finding should, in no way, be considered as a precedent for future applications. As indicated earlier in this Decision, the unique circumstances of this case are an overriding factor. NSPI should be fully aware that the Board will continue to scrutinize each and every application for capital work order approval on its own merits.

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[27] Transcript, p. 139

C. Power Purchase Agreement – NSPI and SkyPower

[109] As a result of negotiations after its RFP to Independent Power Producers ("IPP"), NSPI entered into a PPA with SkyPower on March 31, 2008. As part of this Application, the PPA was filed by NSPI[28], and contained commercial terms which resulted in its being described in the Hearing as "one of the lowest cost elements of renewable energy available to customers on the network".[29]

[110] The PPA was an "Excluded Asset" in the Asset Purchase Agreement between NSPI and 324 NSL. As part of the transaction, NSPI granted 324 NSL a License to Use Assets and Option Agreement ("L&O Agreement")[30]. This permitted 324 NSL to operate, and to repurchase, the Project. Most importantly, provisions for the termination of the PPA upon expiration were included in the L&O Agreement.[31] These provisions mean that if the Board approves the capital expenditure Application on terms acceptable to NSPI, the PPA would be terminated. Conversely, if the Board does not approve the Application, or imposes conditions which are unacceptable to NSPI, 324 NSL would be required to exercise its option. The PPA would, therefore, be preserved and either 324 NSL would operate the DWP under it, or it could sell the PPA to a third party. This was confirmed by Mr. Bennett's testimony.[32]

Submissions – NSPI

[111] NSPI, in its economic analysis which is discussed later in this Decision, contended that its acquisition of the DWP provides a better outcome for its customers.

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[28] Exhibit N-1, Appendix 5
[29] Transcript, p. 167
[30] Exhibit N-6
[31] Exhibit N-6, pp. 8-9
[32] Transcript, pp. 151-156

It says that the cost to NSPI customers is less if owned by the Utility than it would be under the PPA. [33]

Submissions – Intervenors

[112] The Intervenors had little to say about the PPA, except in their comments about the economic analysis, which is addressed later in this Decision. However, the DOE commented that the DWP "...is anticipated to provide good value for ratepayers".[34] None of the Intervenors specifically addressed the L&O Agreement, or indeed any aspect of the PPA, except the specific commercial terms as part of the economic analysis.

Findings

[113] The Board observes that the transaction between NSPI and 324 NSL was specifically structured to preserve the PPA should the Board deny this Application as submitted, or approves it with conditions which are unacceptable to NSPI. If the economic analysis bears out the contention of NSPI that there is greater benefit to ratepayers as a result of the transaction than there would be under the PPA, then this would certainly weigh in favour of approval.

[114] However, the Board is aware from other cases when it examined a PPA, or considered other facilities operated by IPPs, that there can be certain advantages flowing from a PPA. If NSPI owns the DWP, then any risk of additional costs or underproduction would be borne by the ratepayers; under the typical PPA, the IPP

[33] NSPI Closing Submission, January 14, 2011, p. 11
[34] DOE Closing Submission, p. 4

would bear that risk. This was illustrated in an exchange between Board Counsel and Mr. Bennett:

> MR. OUTHOUSE: So you would have a PPA on the one hand, a company-operated project on the other, and with the company-operated project, you have a project which is now built, a lot of the risks are behind us from the, at least the non-performance issue, the non-construction issue is behind the ratepayers and NSPI, but under the PPA the risk of underproduction would be borne by the proponent, the IPP?
>
> MR. BENNETT: That's correct.
>
> MR. OUTHOUSE: The risk of increased operation and maintenance costs would be on the IPP, right?
>
> MR. BENNETT: Yes.
>
> MR. OUTHOUSE: And the risk of higher than anticipated sustaining capital, as it's called, that would be on the IPP?
>
> MR. BENNETT: Yes. The operating and maintenance costs are secured, to a large extent, under a maintenance agreement that's in place today and embedded in the costs. So those are not -- there is not a lot of risk of over-expense in the OM&G side of things.
>
> [Transcript, pp. 159-160]

[115] In the case of the DWP, the evidence of NSPI is that construction is complete and the wind farm is in operation. The Board concludes, therefore, that any construction deficiencies would be covered in the warranty from EUS, and not at ratepayer expense. The Board also notes that there is a warranty for the turbines, and an O&M contract is in place.

[116] In addition, as pointed out by Mr. Bennett, when the term of a PPA is reached, the project is re-capitalized and the value of the infrastructure will have a useful life beyond the term of the PPA. This would result in certain assets being re-capitalized a number of times. Mr. Bennett said:

> In the case of a utility owned project like Digby at the end of the period, at the end of the 20-year period, there will be a need to re-capitalize the site, but again, customers will have already realized the value of many of the basic infrastructure components. Those components will live on and will have been fully depreciated.

> MR. OUTHOUSE: The ---
>
> So the cost for customers in the second and third phase of development on these projects, when they're within the utility structure, is very, very advantageous compared to a Power Purchase Agreement.
>
> [Transcript, pp. 161-162]

[117] Mr. Bennett went on to say that this "terminal value" is not a part of the economic analysis of the project.[35]

[118] For these reasons, the Board finds that any advantages which might flow from a PPA are adequately offset in this case.

D. Project Cost, Justification and Economic Analysis

Submissions – NSPI

[119] NSPI's Application, as noted earlier, includes four work orders to complete the Project, with a total forecast construction cost of:

Digby Wind Project- CI# 39323	$70,758,698
Digby Wind Project Substation – CI# 39626	$4,586,277
Digby Wind Project Transmission Line– CI#39627	$4,156,325
Digby Wind Project Interconnection –CI# 39628	$3,270,060
Total	$82,771,360

[120] The Company provided the scope of work for each work order as follows:

> Wind Project Development: This project provides the costs for the engineering, procurement, installation and commissioning activities associated with the development of the 20 unit, 30 MW Digby Wind Farm.
>
> Substation: This project provides for the costs to construct a 69 kV to 34.5 kV substation at Gulliver's Cove. The substation will include a 69 kV breaker, 30 MVA transformer, two 34.5 kV breakers, the control building, revenue class metering and all the associated site development, structures, protection control and instrumentation.
>
> Transmission Line: This project provides for the costs to construct a transmission line from the Digby Wind Project Substation to the existing NSPI Substation at 77V-Conway. The line will be built with single pole construction and operated at 69 kV. Transmission

[35] Transcript, p. 163

> line construction labour for this project is being sourced through NSPI's existing Power Line Technician (PLT) Service Agreement with EUS. This is aligned with NSPI's workforce planning model which is designed to optimize the allocation and execution of PLT resources among work requirements.
>
> Interconnection: This project provides for the costs to upgrade the existing 69 kV system in Digby area to accommodate the addition of the 30 MW Digby Wind Farm. The upgrades include the addition of a 69 kV breaker terminal at NSPI's 77V-Conway Substation, the addition of a 69 kV capacitor bank and shunt reactors at 9W-Tusket, the upgrade of one span of conductor L-5533, metering upgrades at 13V-Gulch, 11V-Paradise and 51V-Tremont and the addition of a special protection system at 51V-Tremont, the installation of communications infrastructure and all the associated protection and control modifications for the above.
>
> [Exhibit N-1, pp. 21-22]

[121] The scope of work for the EUS construction contract included: Project management; transmission line right of way clearances; earthwork; wind turbine foundations, installation and electrical installation; substation; and commissioning of the Project. It did not include procurement and transportation of turbines; new transformer procurement; environmental and building permits; and land easements/leases.

[122] As noted earlier, NSPI also retained EUS to complete the transmission works associated with the DWP using its PLT Agreement with EUS, which expired on December 31, 2010.

[123] An economic analysis of the DWP to determine impact upon its customers is included in the Application as Appendices 16 and 17. This analysis compares the cost of the DWP with that of the PPA signed by NSPI with SkyPower in 2008 using the discount cash flow method (Appendix 16) and levelized cost method (Appendix 17).

[124] Based on the economic analysis provided, NSPI calculated that the DWP has a Net Present Value ("NPV") over 20 years of $4,878,339 and levelized energy cost of $86.71 per MWh. NSPI explained the calculation as follows.

> Consistent with the terms of the PPA, the Project was modeled using a 20 year life. Energy is produced beginning in the first quarter 2011. The energy production was forecasted by GH.

> At the P50 production forecast, the project provides a positive net present value of $4.9 million, compared with the original PPA. The levelized cost to customers over the analysis period is forecast to equal $86.71/MWh. This is lower than the 2008 PPA between NSPI and Skypower.
>
> [Exhibit N-1, p. 25]

[125] NSPI summarized the advantages which, in its view, would result in benefits to ratepayers if the DWP is approved:

> NSPI's investment in the Project will contribute to the achievement of 2010 in-service dates for six of the original seven 2007 selected PPAs. The Company's ownership of the facility will retain and enhance the benefits of wind development originally proposed for this site.
>
> As a result of the Board's approval of this project:
>
> - 30 MW of wind turbine generation will be added to the NSPI system by the end of 2010.
> - The project will annually generate an average of 110 GWh, approximately one percent of NSPI's total system load.
> - An important element of NSPI's 2013 RES compliance program will be placed in service.
> - The cost of the Project will be lower than the original PPA for this site.
> - Customers will achieve a savings compared to replacement renewable energy of approximately $4.9 million.
>
> [Exhibit N-1, p. 26]

[126] A copy of an operating support agreement between NSPI and General Electric Canada ("GE") for O&M of the turbines was provided in response to Undertaking U-7. The Board notes that the cost of these services, as per the agreement, is less than the amount estimated by NSPI included in its Application. The net effect of this reduction in cost is an overall increase in NPV of $1.5 million and a reduction in levelized energy cost of $1.79/ MWh.

[127] NSPI provided an update on NPV and levelized cost in response to Undertaking U-12, based on a revised expected construction cost of $80.8 million (down from $82.8 million) and GE's O&M cost. Based on an annual energy production of 110,380 MWh (a 10 year average) the revised values are an NPV of $6.6 million and levelized cost of $83.22 per MWh, which is significantly less than the PPA energy price.

[128] The Company also provided a sensitivity analysis in its response to Undertaking U-12, using the annual energy commitment in the PPA and a mid-point chosen by NSPI. The Board has compiled this information in the chart that follows:

Sensitivity	Adjusted MWh (Annual Production)	MWh Profile	Capital ($ Millions)	NPV ($ Millions)	Levelized Cost ($/MWh)	PPA Price Comparison ($/MWh)
1	85,600	Flat	$82.8	($12.1)	$111.49	$92.00
2	100,000	Flat	$82.8	($2.3)	$95.65	$92.00
3	85,600	Flat	$80.8	($9.3)	$107.17	$92.00
4	100,000	Flat	$80.8	$0.6	$91.86	$92.00
5	120,000	10 year average, ramped	$80.8	$11.9	$76.55	redacted

[129] Sensitivity analyses 1 and 2 are based on the DWP construction cost of $82.8 million. Sensitivity analyses 3 and 4 are based on the expected construction cost of $80.8 million and the updated O&M cost from GE. The fifth sensitivity analysis is the same as 3 and 4 except that the annual energy output is assumed to be 120,000 MWh, as estimated in the Garrad Hassan Report ("GHR").

[130] NSPI, in its response to Undertaking U-13, noted that by using the PPA incremental energy rate and its application assumptions, the NPV of the DWP will decrease to $3.7 million. However, this does not take into account the revised construction costs and reduced O&M costs which would enhance the NPV of the DWP in comparison to the PPA.

[131] NSPI's response also noted that using the revised construction cost and updated GE O&M costs, the updated model indicates an NPV of $6.6 million and a levelized energy cost of $83.22/MWh, which is less than the PPA levelized cost.

[132] The Company supported the use of annual energy produced based on P50 in its analysis as follows:

> NSPI's financial analysis provided with its Application assumed an average annual production level of 110.4 GWh. This level reflects the P50 from the Garrad Hassan report. This is consistent with the Board-approved approach that NSPI has taken with respect to its capital applications. NSPI has performed the financial analyses to reflect the production level assumed in the 2008 PPA, as well as a midpoint projection level. NSPI also performed the analysis at a higher production level than that assumed in the Application, which highlights the benefits to customers in the event that the production levels are higher than forecast. While NSPI was deliberately conservative in its modelling of production for the filing, wind studies conducted on this project have estimated average production as high as 123 GWh/year. NSPI included in its calculations the revised O&M costs per the GE Operating and Support Agreement as well as a reduced construction cost as the project is now substantially complete and the construction costs are known to be at least $2.0 million lower than forecast. The impact of these updates at the P50 production level is reflected in an NPV of $6.6 million and a levelized cost of $83.22/MWh, both of which are more favourable than contemplated at the time of NSPI's Application, and lower than the PPA.
>
> [NSPI Closing Submission, pp. 12-13]

Submissions – Intervenors

[133] Avon commented on the embedded costs in the overall cost of the DWP and their affect on NPV and levelized energy cost:

> Since the time of the filing, NSPI entered into an Operation Support Agreement with GE, the turbine supplier. The signed contract costs are lower than what was forecast when NSPI filed its application, resulting in an improved NPV. In addition, the construction costs will be at least $2.0 million lower than anticipated at the time of filing, again bettering the NPV.
>
> While these are beneficial changes, it is noted that when NSPI performed its analysis, it used forecasted annual production of 100,380 [110,380] MWh (10 year average). This output is considerably higher than the energy bid under the PPA. Using a comparable output as the energy bid under the PPA, and even accounting for the favourable updated construction costs, the economics reverse and favour the original PPA over this capital Project by some $12.1 million.
>
> Using a 100,000 MWh production, the economics still favour the original PPA over this Application by some $2.3 million.
>
> NSPI notes that the Garrad Hassan report upon which NSPI relies for its output forecast indicates that it is 90% likely that the 10-year average will be at least 98.9 GWh; the 110.4 GWh production value used in NSPI's application is the P50 estimate according to Garrad Hassan.
>
> The issue of a P50 assumption to calculate the total energy produced versus the use of P90 was an issue as well in the Nuttby Wind Farm application. At the time, NSPI had pointed out that a P50 value is often used for equity purposes and a P90 value used in sizing debt and for debt service coverage ratios. The Board stated this with respect to the use of P50 analysis:
>
>> *[44] The Board is satisfied with the estimates as filed for purposes of approving this Application. NSPI advises that the approach they have taken is a long-standing and traditional approach to economic analysis of capital utility investment. The Board is hesitant to make any general*

> *finding or direction with respect to a P50 versus a P90 analysis as it relates to future applications. If intervenors wish to pursue this issue as it relates to future work order applications, the Board is prepared to hear further submissions.*
>
> At this stage, neither the Avon Group nor the Board is in any better position to evaluate the reasonableness of the use of P50 versus P90. No additional information on the reliability of the Garrad Hassan probabilities has been made available.
>
> [Avon Closing Submission, pp. 2-3]

[134] Avon suggested that:

> .... it may be appropriate to reduce the percentage contingency allowance used in the CBCL engineering estimate to the comparable level allocated to the bids, noting that none of the bids had an allowance which approached the magnitude of the CBCL estimate. Given that the Digby Wind Project has now come in under budget, it would appear that the degree of contingency was not warranted in any event. The Avon Group recommends a disallowance in respect of the contingency of $1.5 million.
>
> [Avon Closing Submission, p. 6]

[135] Avon also made the following recommendation to the Board relating to production based on P50 assumptions in the GH Report:

> The Avon Group recommends that the Board direct NSPI to submit a report correlating its actual output to the assumed output on which its economic analysis are based for the wind projects which have been taken into rate base (and any other wind projects in Nova Scotia). To the extent such information is currently available, NSPI could undertake to file it prior to the Board's decision (recognizing that the time horizon would be quite limited) such that this Board and Intervenors would have greater comfort in the use of the P50 assumption for the economic analysis.
>
> [Avon Closing Submission, p. 3]

[136] The Company, in its Reply Submission, responded to the use of P50 use of energy output in its analysis and provided reasons why the Board should not accept Avon's recommendation:

> Based on early data, even though the Avon Group request would suggest that the Project economics are more favourable than forecast, NSPI urges the Board to resist Avon's call for this additional layer of analysis. The best evidence regarding long term wind production at the site is contained in the Garrad Hassan report. NSPI further notes that the actual wind results will be reported in the FAM monthly reports for future reference by intervenors.
>
> [NSPI reply submission, January 21, 2011, p. 13]

Findings

[137] The Board has reviewed all the information provided and finds that NSPI customers will benefit by including the Project in the rate base. However, the amount to be included in the rate base requires reduction. The Board understands, based on NSPI's evidence, that the final cost approval application to the Board will show a reduction of at least $2 million in the DWP construction cost. This reduction is in addition to other adjustments which are noted in this Decision.

[138] The Board approves the DWP cost, subject to reductions noted earlier in this Decision, resulting in an approximate total cost of $79.8 million..

[139] The Board also finds that NSPI's suggestion that any comparison of actual and assumed energy output from wind projects is premature, given the life of these projects. However, the Board encourages NSPI to provide this information in the Fuel Adjustment Mechanism (the "FAM") filing at the appropriate time. The Intervenors who are part of the stakeholders group in the FAM process will have access to this information and may pursue it, if they wish.

[140] The Board has reviewed the economic analyses presented by NSPI and Avon. NSPI also provided a revised analysis to reflect the true comparison with the PPA. This revised analysis is not favorable for the Project. However, when the revised construction cost and savings in O&M cost, along with the higher energy output (100,000 MWh), are included in the analysis, the Project becomes slightly favorable compared to the PPA. If the energy output of 120,000 MWh is achieved, which NSPI expects to do, the Project is by far superior to the PPA with a NPV of $11.9 million.

[141] The Board also notes the testimony of NSPI that the economic analysis does not includes the benefit of infrastructure beyond the 20 year time horizon used in the economic analysis.

[142] Having considered all the evidence, the Board accepts NSPI's economic analysis that the Project is in the best interest of its ratepayers as compared to the PPA.

[143] The Board has considered Avon's recommendation to disallow the contingency amount, because the amount which will go into rate base will be the final capital cost, which NSPI must file in due course. NSPI's reply evidence notes that the revised cost of the Project is now estimated to be at least $2 million less than the requested cost. Based on this, the Board does not agree with Avon's suggestion that a reduction in contingency costs is warranted.

E. Renewable Energy Standards Requirements & ecoEnergy Incentive

[144] RES, proclaimed by the Nova Scotia Government on January 22, 2007, required that 5% of NSPI 2010 sales be supplied from Independent Power Production sources. The 2010 requirement was later deferred to 2011.

[145] NSPI states, in its Application, that:

> The Provincial RES mandates that by 2013, at least 10% of NSPI's energy sales must be generated by post-2001 renewable low impact generation facilities. The acquisition of this low-impact electricity may come from independent power producers, or up to half of the requirement can be generated by NSPI's own renewable energy generation facilities.
>
> [Exhibit N-1, p. 24]

[146] NSPI is now putting the DWP forward as a utility-owned asset. Energy generated from this facility will qualify for inclusion in the 2013 RES.

[147] The original SkyPower IPP project would have also contributed to meeting the 2011 RES standard. This would also be the case if the project was developed by 324 NSL and electricity sold to NSPI under the PPA. A NSPI owned project would not qualify as part of the low-impact resources required to meet the 2011 RES. In 2009 and 2010 NSPI was uncertain if the DWP would be required to meet the 2011 RES.[36] This uncertainty is one of the reasons for NSPI's October 22, 2009 request that Emera take over the DWP acquisition process. The other reason for this request is to address the possibility that the Project might not obtain regulatory approval.[37]

[148] NSPI has now confirmed that the DWP will not be required to meet 2011 RES.[38] It will, however, contribute to the 2013 RES. The Board notes that the 2013 RES contribution is not affected whether the DWP is a NSPI owned asset or developed as an IPP, selling electricity to NSPI under the PPA.

[149] No submissions were made on this issue by the Intervenors.

[150] The Board finds that, at the present time, no action is required with respect to the RES issue.

[151] The ecoEnergy program provides a Federal Government incentive of $10/MWh of eligible low-impact renewable electricity for the first ten years of a project's operation.[39] Projects must be in-service by March 31, 2011 to be eligible for the incentive.

[152] The economic and financial analyses presented by NSPI in this Application include the benefit of the ecoEnergy program. In its response to Board IR-

[36] Transcript, pp. 82-83
[37] Exhibit N-3(a), p. 2
[38] Transcript, p. 117
[39] Exhibit N-1, p. 6

5(a), NSPI stated that "The ecoEnergy benefit will be a credit to fuel expense, flowing through the Fuel Adjustment Mechanism."[40]

[153] In a letter dated November 20, 2009[41], NR Canada advised NSPI that the DWP qualifies for a contribution agreement under the ecoEnergy program. The ecoEnergy agreement between NR Canada and 324 NSL is dated March 5, 2010[42]. This agreement was assigned to NSPI on May 23, 2010.

[154] The Board understands that as of December 16, 2010, all twenty of the DWP wind turbines are fully in-service and commissioned. The Project, therefore, meets the ecoEnergy eligibility date.

[155] The Intervenor submissions did not contain any comments on the ecoEnergy benefit.

[156] The Board agrees that NSPI's inclusion of the ecoEnergy incentive in the economic and financial analysis of this Project is appropriate and will result in a benefit to ratepayers.

V PUBLIC INPUT

[157] Part of the Board's practice, when conducting public hearings, is to include an opportunity for the public to comment on cases before the Board. Notices on the subject of hearings, and the timeline established for filing dates, are published in newspapers. In this matter, notices appeared in the Chronicle Herald on September 11

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[40] Exhibit N-3, Response to Board IR 5(a), p. 2
[41] Exhibit N-3(a), Attachment 34
[42] Exhibit N-1, Appendix 1

and 17, 2010; the Cape Breton Post on September 11 and 17, 2010; and the Digby Courier on September 9 and 16, 2010.

[158] The Board received four letters of public comment, three from area residents and one from the Digby Area Board of Trade ("DABT"). Two of the residential customers indicated their opposition to Board approval of this Project. In general, the issues raised included concerns that there is "... well known inefficiency of a wind project...",[43] and the impact the Province's decision to "...develop greener energy options...",[44] given that the cost of wind generation would, in their view have a negative impact on customers, since rates will likely go up. In addition, comments were made that the proximity of the DWP to homes can create negative health hazards to nearby residents.

[159] Kristy Herron, President of DABT, wrote two letters to the Board, one as an area resident and the other on behalf of the DABT. Ms. Herron indicated that the DABT is in support of the DWP as it is a green energy development, and that the Project, in the DABT's view, is a positive asset to Digby. Ms. Herron wrote, as a resident of the Digby Neck area, that she has no objection to the presence of turbines. She is impressed with both the reduction in the use of fossil fuels and the interaction the developers of this Project have had with the "...local community, the municipal governments and business organizations."

[160] The Board appreciates the time taken by members of the public to convey their views on the DWP. However, it is important to understand that the matter before the Board is whether to allow the transfer of ownership of the DWP to NSPI from an

[43] Exhibit N-4(1)
[44] Exhibit N-4(4)

affiliate company. While the Board recognizes the position of the residents in their opposition to this Project, these concerns, including the potential for health hazards as a result of wind turbines, have already been considered as part of the approval process conducted by other authorities. As a result, the concerns expressed by area residents opposing the DWP do not fall within the Board's jurisdiction.

VI SUMMARY OF FINDINGS

[161] In general, the Board finds that the acquisition of the DWP by NSPI from 324 NSL is necessary, subject to a disallowance of a $1 million bonus payment to EUS due to non-compliance with the Code and inadequate evidence to justify same. Under these circumstances, along with a reduction in construction costs set out below, the Board is satisfied that the acquisition of the DWP is warranted. The Board does wish to make it clear that this finding should, in no way, be considered as a precedent for future applications.

[162] The Board finds that the Code should be applied to the construction contract between 324 NSL and EUS, two affiliates of NSPI and, in doing so, the Board also finds that the EUS construction contract does not comply with the Code

[163] The Board finds that, while the transaction between NSPI and 324 NSL does not comply with the Code, the resulting acquisition of the DWP represents the 'best available deal' at the time.

[164] The Board finds that the costs paid to NSPI affiliate EES were justifiable and a disallowance is unnecessary.

[165] The Board finds that given the unique circumstances of this matter, the contract with EUS for transmission interconnection is acceptable.

[166] The Board finds that any advantages which might otherwise flow from a PPA are adequately offset in this instance.

[167] The Board finds that the economic analysis provided by NSPI is acceptable, subject to a reduction in costs from $82.8 million to $79.8 million, and a further reduction based on final construction costs.

[168] The Board finds that Avon's submission to require NSPI to provide a comparison of actual and assumed energy output of its various wind projects is not warranted at this time. The Board finds that any adjustment to the construction cost due to the inclusion of a contingency in CBCL's construction re-estimate is not necessary.

[169] The Board finds that despite the position of the residents, and their opposition to this Project, the matter before the Board is whether to allow the transfer of ownership of the DWP to NSPI from an affiliate company. As a result, the concerns of some of the residents, while well-expressed, do not fall within the Board's jurisdiction.

[170] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 9th day of March, 2011.

Margaret A. M. Shears

Kulvinder S. Dhillon

Roberta J. Clarke