

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE *PUBLIC UTILITIES ACT*

- and -

**IN THE MATTER OF RENEWABLE ENERGY COMMUNITY FEED-IN-TARIFFS
(M03632)**

**CLOSING SUBMISSIONS ON BEHALF OF
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NOVA SCOTIA
AS REPRESENTED BY
THE DEPARTMENT OF ENERGY
AND
THE DEPARTMENT OF ENVIRONMENT**

Stephen McGrath
Department of Justice (NS)
4th Floor, 5151 Terminal Road
PO Box 7
Halifax, NS B3J 2L6
Tel: (902) 424-6288
Fax: (902) 424-1730
Email: mcgratst@gov.ns.ca

INDEX

INTRODUCTION.....	Page 1
LEGISLATIVE CONTEXT.	Page 3
THE CURRENT PROCEEDING.	Page 5
THE PROPOSED BIOMASS TARIFF RATE.....	Page 10
EVIDENCE OF E3 ANALYTICS.....	Page 13
CONCLUSION.	Page 18

INTRODUCTION

1. Please accept these submissions on behalf of the Nova Scotia Department of Energy (“NSDOE”) and the Nova Scotia Department of Environment (“NSE”). As this proceeding is the result of legislation and regulations administered by NSDOE, most of the comments in these submissions are made on its behalf. NSE wishes to emphasize its endorsement of certain comments, noted herein.
2. Both NSDOE and NSE wish to thank the Nova Scotia Utility and Review Board (the “Board”) and all intervenors in this proceeding for their participation, and the value that they have added to this proceeding in bringing forward information and issues to assist in the development of the Community based feed-in tariff (COMFIT) program. These Departments wish to thank, in particular, the independent consultants retained by Board staff for their engagement of stakeholders and for their considerable efforts in the development of specific proposals for COMFIT rates.

THE COMFIT

3. In April 2010, NSDOE released the [*Renewable Electricity Plan*](#) (the “Plan”).¹ The purpose of the Plan was addressed in its opening paragraphs as follows:

This Renewable Electricity Plan sets out a detailed program to move Nova Scotia away from carbon-based electricity towards greener, more local sources.

The motivation for this plan is simple: nearly 90 percent of the province’s electricity supply comes from fossil fuels—most of it coal. Coal made more sense when it was mined here in Nova Scotia, but now we buy it from others. This over-reliance on a single fuel source weakens our energy security, binds us to the volatile and upward trend of international prices, and drains wealth

¹ Excerpts from the *Renewable Electricity Plan* were identified in this proceeding as [Exhibit B-24](#).

away from the province. Equally important, it has a negative impact on both our health and our environment.

The province is committed to making a change—and to keeping its commitment to make life better for Nova Scotia families.

4. Underpinning the Plan is a commitment to a 2015 target of 25% renewable electricity. This commitment has been embedded in s.6 of the [*Renewable Electricity Regulations*](#), N.S.Reg. 155/2010 (the “Regulations”). The Plan also identified a goal of 40% renewable electricity by the year 2020.
5. The Plan outlined different mechanisms to achieve the transition to new, local, renewable energy sources, including the establishment of a COMFIT:

Community Projects: Fixed Price

To encourage a range of projects widely dispersed throughout the province, this plan establishes a community-based feed-in tariff (COMFIT) for an expected 100 megawatts of renewable electricity projects connected to the grid at the distribution level. The plan also introduces a variety of programs to assist community groups in the technical, financial, and regulatory work needed to develop these projects. (p. 2)

6. The plan goes on to state:

2. Community-Based Feed-In Tariff

...

This plan introduces a Community-Based Feed-In Tariff (COMFIT) to encourage the development of local renewable energy projects by municipalities, First Nations, co-operatives, and non-profit groups....Projects will be connected to the grid at the distribution level. Due to distribution level capacity, projects will typically be less than 2 MW, but potentially up to 5 or 6 MW depending on location. ...

This approach manages costs and gives us experience with the introduction of intermittent power sources at the distribution level. ...Government will review, and if appropriate adjust, the COMFIT program in 2012, to ensure that we learn from our experience and ensure that the objective of supplying

100 MW through community/small-scale renewable electricity projects is met.

...

Nova Scotia's COMFIT will include the following features:

- Municipalities, First Nations, co-operatives, local non-profits, as well as small businesses operating through Community Economic Development Investment Funds (CEDIFs), will be eligible to receive the COMFIT.
- The purpose of limiting access to community-based participants is to ensure that projects are rooted in the community and investment returns remain there. Regulations will establish the precise definition of community following consultation.
- Electricity produced from wind, biomass, tidal, wave, in-stream hydro as well as combined heat and power projects will be eligible for COMFIT rates that reflect basic cost-recovery, including the cost of capital.
- COMFIT-eligible projects will connect to the grid at the distribution level (i.e. below a substation).
(Note: see tidal section, p. 18, regarding a special FIT for tidal arrays at the transmission level.)
- The UARB will set the COMFIT rate according to government-set criteria.
- In 2012, government will review the program and, if appropriate, adjust the COMFIT program to ensure that we learn from our experience and ensure that the objective of supporting community/small-scale renewable electricity projects is met.

The community-based FIT will increase geographical distribution of renewable electricity sources, thereby contributing to our energy diversity and security. It should also promote greater public understanding and acceptance of renewable resources. And it will provide rural economic activity associated with the construction and operation of renewable energy projects—helping create good jobs and grow the economy. (pp.10-11)

LEGISLATIVE CONTEXT

7. Amendments made to the [*Electricity Act, S.N.S. 2004, c.25*](#) (the “Act”) in 2010 provided the statutory basis for the COMFIT. Further details were added as amendments to the Regulations in the fall of 2010. In setting tariffs, the board is guided by s.18 and s.19 of the Regulations:

18 (1) For the purposes of clause 4A(7)(e) of the Act, a run-of-the-river hydroelectricity generation facility is a class of generation facility to which a tariff applies.

(2) Subject to subsections (3) and (4), the Board must set a tariff for all of the following classes of electricity generation facility:

(a) all of the following, as required by clauses 4A(7)(a) to (d) of the Act:

- (i) wind power,
- (ii) biomass,
- (iii) small-scale in-stream tidal arrays,
- (iv) developmental tidal arrays;

(b) run-of-the-river hydroelectricity.

(3) The Board must set separate tariffs for wind power with a capacity greater than 50 kW and wind power with a capacity of 50 kW or less.

(4) The tariff for biomass must apply only to the electricity produced from a combined heat and power plant.

19 (1) In this Section and in Section 20, "community feed-in tariff" means a tariff set by the Board for any class of generation facility referred to in Section 18 except for a developmental tidal array.

(2) In setting a community feed-in tariff, the Board must determine, for each class of generation facility, the cost of the physical assets of a facility and may make allowances for any of the following matters:

- (a) depreciation;
- (b) cost of labour and supervision;
- (c) necessary working capital;
- (d) organization expenses;
- (e) overhead costs for engineering, superintendence, legal services, taxes and interest during planning and construction, and similar matters not included in the cost of the physical assets;
- (f) costs in whole or in part of land acquired in reasonable anticipation of future requirements;
- (g) costs to interconnect the generation facility with the electrical grid;
- (h) return on investment;
- (i) additional matters that the Board considers appropriate.

8. Although the Regulations require the Board to set tariffs for designated classes of electricity generation facilities, projects must apply to the Minister of Energy (the “Minister”) and receive a feed-in tariff approval in order to participate in the feed-in tariff program. Applicants for such approvals must meet the ownership and other requirements set out in s.20 of the Regulations:

20 (1) For the purposes of clause 4A(8)(f) of the Act, in addition to the entities listed in clauses 4A(8)(a) to (e) of the Act, each of the following entities qualifies as a generator that may participate in the feed-in tariff program:

- (a) a university
- (b) a wholly owned subsidiary of a municipality;

(2) To qualify for a community feed-in tariff, a generation facility must be owned by one or a combination of any of the following:

- (a) a municipality or a wholly owned subsidiary of a municipality;
- (b) a Mi’kmaq band council;
- (c) a cooperative of which a majority of members reside in the Province and at least 25 members reside in the municipality where the generation facility is located;
- (d) a not-for-profit body corporate of which a majority of members reside in the Province and at least 25 members reside in the municipality where the generation facility is located;
- (e) a community economic-development corporation of which at least 25 shareholders or members reside in the municipality where the generation facility is located;
- (f) a university.

(3) In addition to the ownership requirements in subsection (2), to qualify for a community feed-in tariff, a generation facility must meet all of the following requirements:

- (a) it must be a generation facility in a class to which a community feed-in tariff applies in accordance with subsection 19(1);
- (b) if it uses biomass, it must be a combined heat and power generation facility;

(c) it must interconnect with the electrical grid through a distribution system;

(d) subject to clauses (e) and (f), it must be located in the Province;

(e) if it is wholly owned by a municipality or a wholly owned subsidiary of a municipality, it must be located within the boundaries of that municipality or the boundaries of an immediately adjacent municipality;

(f) if it is wholly owned by a Mi'kmaq [Mi'kmaw] band council, it must be located on reserve lands or lands leased or owned by a band-controlled entity;

(g) it must have been issued a feed-in tariff approval.

(4) For the purposes of subsection (3) [(2)], an entity owns a generation facility if it holds at least a majority ownership interest in the generation facility or in an entity that owns the generation facility.

(5) The ownership requirements in subsection 4A(8) of the Act and in subsection (2) do not apply to a combined heat and power generation facility described in clause (3)(b) if the heat is consumed or used by the renewable electricity generator or an affiliate of the renewable electricity generator.

9. Applications for feed-in tariff approvals must include the information or documentation required by the Minister and the information and documentation noted in s. 24 of the Regulations. An approval may also be subject to any terms and conditions that the Minister determines are appropriate (s.28(4)).
10. Pursuant to s.2B(2) of the Act and s.43(2)(e) of the Regulations, the Minister may establish and administer policies, programs, standards, guidelines, objectives, codes of practice, directives and approval processes under the Act and may prepare interpretations of the Regulations, or policies, standards and guidelines under the Regulations. In correspondence circulated to the parties in this proceeding in March 2011, it was noted that the Minister of Energy will establish an Environmental Performance Standard with respect to particular

matter emissions for biomass COMFIT projects. It is anticipated that other standards or directives will be developed to ensure appropriate development of COMFIT projects.

11. Although the Act and Plan are administered by NSDOE, NSE wishes to note its support for community owned cleaner sources of energy and technologies, and for the development of cleaner technologies that it hopes will result from the COMFIT program.

THE CURRENT PROCEEDING

12. As noted above, sections 18 and 19 of the Regulations require the Board to establish a COMFIT for designated classes of electricity generation facilities. To fulfill this mandate, the Board established a public hearing process and Synapse Energy Economics, Inc. ("Synapse") was retained to develop proposed tariff rates for review and a public hearing. Synapse engaged Meister Consultants Group and an independent consultant, Ms. Susan Shaw P. Eng., to assist.

13. The following rates developed by Synapse formed the basis of the COMFIT proceeding:

Generation Facility	Proposed Tariff Rate (\$/MWh)
Wind (50 kW or less)	\$452/MWh
Wind (greater than 50kW)	\$139/MWh
Biomass	\$156/MWh ²

²This is the rate proposed for the year 2012 for biomass CHP projects and is composed of a fixed rate of \$94/MWh and a variable rate of \$62/MWh representing the cost of fuel.

Generation Facility	Proposed Tariff Rate (\$/MWh)
Run-of-the-river hydroelectricity	\$140/MWh
Small-scale in stream tidal arrays	\$652/MWh

14. The general approach that Synapse took when establishing these rates was discussed in the Direct Testimony and Exhibits relating to the proposed rates ([Exhibit B-1](#)):

Q. PLEASE DESCRIBE THE PROJECT TEAM'S OVERALL APPROACH TO THE BALANCING OF COSTS AND POLICY OBJECTIVES?

A. The regulations governing the development of the COMFIT rates clearly call for them to be cost-based. However, the development of such rates requires the exercise of judgment. Our approach has been to balance the impact of the COMFIT program on the cost of electricity against the desire to foster the development of COMFIT projects. To balance the two we have proposed the lowest rates that we believe will result a reasonable level of development activity in each resource class. (p.7 of 34)

15. This was described in Synapse's Opening Statement ([Exhibit B-16](#)) as:

In developing our proposed rates we applied the three step procedure used for utility ratemaking:

- Capital costs and operating expenses were developed for each COMFIT.
- Required revenues were then developed based on a capital structure and debt and equity costs.
- Electric output was used to convert required revenue to a rate per Mwh.

Our ratemaking process was implemented with due attention to the connection between the steps, to the results of similar ratemaking exercises in other jurisdictions and to other concerns such as interest coverage, using the spreadsheet model and inputs to it discussed in our evidence.

Each of the three steps introduces substantial, unavoidable uncertainty into the ratemaking process. This uncertainty is much greater than that encountered in setting rates for a regulated utility. In considering our proposals we believe it is important for the Panel to appreciate this point and to take it into account. We note that at several places in the Renewable Electricity Plan, Government states that they will review and if appropriate

adjust the COMFIT program in 2012. We believe that this review of the COMFIT program will be important, given the uncertainty about the kind of projects that will apply for the COMFIT and the cost of those projects.

16. Synapse's general approach was also the subject of cross-examination during the oral phase of the hearing:

MR. MERRICK: And would it be fair to assume that there's been some degree of subjectiveness input into that analysis on the part of the panel as to what constitutes a reasonable level of activity?

MR. BIEWALD: I suppose on some judgment but you know subject to the guidance from the documents that I reviewed and, you know, from the government with regard to the overall level of hoped for participation in the program and the notion of a kind of broad participation.

But there's certainly some judgment involved in our implementation of that in developing the tariffs.

MR. MERRICK: Yes. And as you note in your report you've had to deal with the difficulty, I guess, of trying to identify a range of possible situations in each scenario or each technology. It wasn't just one specific proposal that was before you; you had to deal with a range of possibilities as to how the developers might come forward?

MR. BIEWALD: Certainly in terms of the project sizes within the defined categories and locations and so on. So for any particular tariff there's a range of possible projects along numerous dimensions.

MR. MERRICK: And you had to make assumptions or choose among various assumptions in deciding how to evaluate the tariff?

MR. BIEWALD: Essentially yes. The way I would say it is that we picked representative projects as described in the opening statement so you pick the project that we think is sort of representative or typical or reasonable for that set of -- for that -- the range of possibilities, with an aim toward, you know, selecting viable, reasonable projects that would be among the more feasible or cost-effective -- within the range of the possible.

So we, you know, try not to make -- set tariffs for example for, you know, the worst possible project site or the least competent owner or the most pessimistic investors. You know we tried to pick something reasonably representative within the realm of you know reasonably attractive, feasible projects and set tariffs in that regard.

And then we also look at the comparable experience elsewhere and whether that -- those overall tariffs that we result from building it up from the -- building the rate up from the pieces seems reasonably consistent with -- as a result -- the cents per kilowatt hour result with tariffs adopted elsewhere and projects costs that we've seen in the province and elsewhere. (Transcript, April 4, 2011, pp.29-32)

17. NSDOE and NSE respectfully submit that Synapse's general approach of identifying the lowest rates that it believes will result in a reasonable level of development activity is an appropriate approach to the setting of inaugural COMFIT rates in this jurisdiction. NSDOE and NSE further submit that while the approach taken by the Synapse to develop cost based rates is appropriate, it is important to recognize as Synapse does, that considerable uncertainty exists around the development of average project costs and in respect of a whole host of other issues relating to what are only notional COMFIT projects at this stage.
18. Given this uncertainty, the benchmarking exercises engaged in by Synapse, comparing the rates that it developed to market information available within this province and in other jurisdictions are vital. NSDOE would urge considerable caution in respect of any suggestion of rates that depart significantly from the benchmarks applied by Synapse should be established.
19. As identified in the Plan, and as noted by Synapse, government intends to review, and if appropriate adjust the COMFIT program in 2012 to ensure that we learn from our experience and ensure that the objective of supplying approximately 100 MW through community/small-scale renewable electricity projects is met. This review will also be an important means of addressing any uncertainties that currently exist.

20. From a practical point of view, it would be somewhat easier to expand the scope of the COMFIT program following such a review, than it would be to scale back the scope or rates. For this reason, NSDOE urges a conservative approach to the initial setting of rates. It is expected that a reasonable number of projects will be developed under the COMFIT program, but that does not mean that all possible projects could or should be developed, or that any one particular project could be assured to be economic at the COMFIT rates that will be set.

THE PROPOSED BIOMASS TARIFF RATE

21. While NSDOE does not wish to endorse any particular rate for the proposed tariffs, there are certain aspects of the proposed biomass tariff that it believes warrant additional comment.
22. First, there is a significant difference between the biomass rate proposed by Synapse and the range suggested by the Alliance of Nova Scotia Sawmillers (the “Alliance”) as an appropriate cost-based rate. As a result of this, there was considerable evidence put before the Board on this issue, and there was considerable cross-examination on these points. In response to undertakings, sensitivities using Alliance cost inputs were prepared and filed by Synapse (Undertakings [U-6](#) and [U-6\(a\)](#)).
23. This issue was at the root of some questions posed by the Chair of the Board to the Synapse panel:

THE CHAIR: I guess my other question is, I think I've heard you say on a couple of occasions if you had to run the model again, knowing what you know now, for example parasitic power and the escalation of fuel costs for biomass, whether it's the levelized cost or the initial cost, that you might do it again. But is there anything that has been put to you that would cause you to change your overall recommendation in any of this rates? [sic]

MR. KEITH: No, and I think on the – specifically on the point of biomass, if we were to go back and revisit the rate we wouldn't simply add in some omissions. We would look at all the evidence that we received. You know, evidence from Cape Breton Explorations who says that, you know, the rate's fine with them, and we'd do some more research on that to understand those issues. But I think in the last analysis, if you go back to my image of a supply curve and trying to figure out where we are on it. In some of these technologies, for example, large wind, when we put the pieces together we get a pretty clear picture of the cost of large wind and that's why we're arguing with large wind people over plus or minus 10 -- 5 or 10 percent on the rate. When we try to put those pieces together for biomass we get a tremendous range and so in the face of that, we feel like you really need to look at the market data, and you really need to make sure that whatever rate you start with makes sense. And so we have placed a lot of weight on the data we see in the market and so that's why we believe if we went back at this again and looked at it, we wouldn't come out with a rate that's dramatically different, because we feel like we really need to be respecting the market data.

24. As noted earlier, NSDOE urges a conservative approach to the setting of the COMFIT rates. As such, NSDOE respectfully submits that a rate nearer to the proposal put forward by Synapse may be more appropriate than a rate starting near what it has been suggested by the Alliance.
25. NSDOE also supports the approach taken by Synapse to the allocation of costs between the steam host and the generation of electricity in biomass COMFIT projects. NSDOE respectfully submits that Synapse's approach is more consistent with the requirement in s.18(4) and s.20(3)(b) of the Regulations that the tariff for biomass must apply only to the

electricity produced from a combined heat and power plant and the provision in s.20(5) which relax the ownership requirements for biomass facilities where "...the heat is consumed or used by the renewable electricity generator or an affiliate of the renewable electricity generator". Combined heat and power means that there is a requirement to produce two separate energy outputs from the facility - heat and power.

26. It is respectfully submitted that it would be inappropriate to set costs a level that would encourage the owners of potential biomass COMFIT projects to scrap useful equipment to become electricity generators. In cross-examination of the Alliance panel, Mr. Travis seemed to agree with this:

...There's other issues that come into play. Some of us have very new boilers, 1 in which case, you know, you have to do an economic assessment. If you spent \$10 million on a new boiler, \$5 million on a new boiler and you just built it four or five years ago, you're probably -- even though the COMFIT rate might be good, I don't think that the ratepayers should have to pay a bunch of extra money to incent us to tear perfectly good equipment down; right?

So in that sense, for people -- for sawmills that have equipment that's installed that's -- doesn't -- that's got some useful life left, those guys, even though they probably have the ability to do it, may not do it. Folks like ourselves and Marwood, we've got a bunch of stuff we want -- we don't like anyway and we want to build a new -- probably going to build a new boiler anyway. We're probably going to be in. ... (Transcript, April 5, 2011, pp.606-07)

27. With respect, if new facilities were going to be built anyway, then the allocation of costs proposed by Synapse, based on incremental cost, is the most appropriate.
28. The justification for the approach taken by Synapse was expressed by Mr. Keith during cross-examination by counsel for the Alliance as follows:

MS. RUBIN: Now, what -- he was asking about the range of options and you started talking about the useful life of the boiler. But what is the range of options for the allocation of the cost to produce the steam?

16 MR. KEITH: Well, there's generally two ways that that's done. One way is to cost out a steam-only scenario and then cost out a CHP scenario and take the difference. The other way is to calculate a value of the steam, for example, what someone would pay, a steam host would pay for the steam in an alternative scenario and include that cost.

This is one of those classic ambiguous cost allocation questions that's always hotly debated because there's no unambiguous way to do it.

Now, we have allocated most of the cost of the boilers -- of the steam-only scenario to the steam facility, and I'll tell you why we did that. The regulations require that CHP -- that biomass energy sold out of the COMFIT rate must be combined heat and power energy. They don't tell us -- they don't give us a definition of that but it -- a reasonable reading of that would be that the electricity sold under the Biomass Tariff would be generated at the same time that steam was being generated and used in a highly efficient operation.

Now, the Sawmillers made the argument that it was too risky for them to have us look at a scenario in which the operation of the electric plant was tied to the boiler or tied to the steam host.

And we found that there was merit in that argument and we went with a condensing turbine. But that does open the door to now having a facility that actually generates very little electricity in combined heating power mode and is basically an electricity only plant with a nominal steam host.

And we thought about ways to get around that, you know, as we thought through these policy decisions and we thought about, well, we could establish an annual efficiency standard for this but then we weren't sure how you could police that or enforce it. Would you have somebody visiting the plant and trying to determine how much -- how many hours of the year the steam was being used and that kind of thing?

So we decided to ensure that biomass facilities under the COMFIT are real CHP plants by allocating a large portion of the boiler cost to the steam host and then effectively saying you need to find a steam host who's willing to cover a large portion of these plants. In other words a steam host who needs a lot of steam, they need it on a consistent basis. And so by doing -- by allocating the boiler costs that way that's how we're trying to make sure that electricity sold on the COMFIT Tariff is truly combined heat and power electricity. (Transcript, April 4, 2011, pp.180-82)

29. The final aspect of the proposed biomass tariff rate that NSDOE wishes to address is the proposed adjustment to the rate to account for fluctuating fuel costs. NSDOE submits that the evidence before the Board supports the suggestion that the biomass tariff rate incorporate some mechanism to address changing biomass fuel costs over time.
30. Synapse has proposed an escalator with a component tied to the Consumer Price Index for Nova Scotia (all items) excluding energy and a portion tied to a diesel fuel index. The Alliance, on the other hand, proposed a more formal fuel adjustment mechanism (set out in detail in its response to [Undertaking U-11](#)).
31. NSDOE supports the notion that biomass fuel prices should be subject to future price adjustment. However, NSDOE does not believe that it is appropriate to develop a fuel adjustment mechanism such as the one proposed in the response to Undertaking U-11 at this time. There are several reasons for this.
32. First, it is submitted that the purposed fuel adjustment mechanism would be difficult to administer. The mechanism outlined in the response to Undertaking U-11 suggests that each approved CHP plant would supply specific information regarding market biomass purchased on a monthly basis. How the Board would enforce compliance with this is unclear.
33. The board has jurisdiction to set the tariff rate, but does not have jurisdiction over COMFIT generators in the same way that it has to compel the production of information from regulated utilities, such as Nova Scotia Power Inc. There would, similarly, be limited scope

for actually auditing the costs reported by these approved CHP plants and, and was apparent through the course of this proceeding, there is considerable secrecy around this information in this industry.³

34. Additionally, NSDOE is also concerned that the proposed fuel adjustment mechanism put forward by the Alliance is based solely on a market price for biomass that is not clearly open and transparent. NSDOE also believes that some component of a CHP facilities fuel supply would be self supplied, and it may not be appropriate to include the fuel that is self supplied at the proposed market rate. If not, the valuation of the any portion of the fuel supply that is self-supplied would make it even more difficult to administer such a formalized fuel adjustment mechanism.

EVIDENCE OF E3 ANALYTICS

35. Mr. Toby Couture, Director of Energy Analysis with E3 Analytics filed evidence on behalf of the Ecology Action Centre ("EAC") and the Nova Scotia Sustainable Electricity Alliance ("NovaSEA"). In this evidence, Mr. Couture raised a number of concerns which have been noted by NSDOE, but two in particular that NSDOE would like to address in these submissions.

³ For example, see page 746 of the transcript (April 6, 2011) where Mr. Travis indicated in response to board member Deveau's question that it was not easy to determine the difference between the three markets in Nova Scotia because there was no sharing of data.

36. The first relates to Mr. Couture's suggestion that "it may be advisable to introduce tariff digression to both track, and encourage, technological change in the tidal sector." ([Exhibit B-14, p11](#)) Although NSDOE recognizes the concern raised by Mr. Couture, it does not believe that tariff digression is the most appropriate response to this issue.
37. "Small-scale in-stream tidal" is defined in s.3(1) of the **Regulations** as a generation device for the capacity of .5 MW or less, and NSDOE believes that electricity generation from this class of facility will be a small component of the overall COMFIT program, despite not having a cap on generation like the 5MW cap on small wind contained in s.28(2) of the Regulations. As such, NSDOE submits that this issue could be considered and in government's 2012 review or subsequent reviews, and addressed as needed.
38. The other issue raised by Mr. Couture that NSDOE wishes to discuss relates to the significant difference between the proposed tariffs for large and small wind. Mr. Couture submits that the disparity between these rates create undesirable incentives. To address this problem, Mr. Couture proposes a tariff that is either tiered, fully differentiated, or that provides for a variety of rates that are mathematically derived from the tariff rates proposed for large and small wind.
39. With respect, NSDOE submits that the mechanisms proposed by Mr. Couture to address this issue are outside of the scope of the regulations which require the board to set "a tariff" for each of the designated classes of electricity generation facilities (s.18). NSDOE submits that, properly interpreted, the current regulations require one rate for each class.

40. The starting point for interpreting legislation in Canada is Dreidger's, *The Construction of Statutes* (2nd ed., 1983) where, at p. 87, the author states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

41. This has been frequently cited with approval by the Supreme Court of Canada (for example see [*Rizzo & Rizzo Shoes Ltd. \(Re\)*](#) [1998] 1 S.C.R. 27, (paras. 20 to 22) and [*Canada Trustco Mortgage Co. v. Canada*](#), 2005 S.C.J. 54)

42. In *Canada Trustco Mortgage Co. v. Canada*, 2005 S.C.J. 54, the Supreme Court of Canada discussed the differing weights that might be placed on ordinary meaning, context and purpose in any particular case:

10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see 65302 British Columbia Ltd. v. Canada, 1999 CanLII 639 (S.C.C.), [1999] 3 S.C.R. 804, at para.50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

43. This general approach to statutory interpretation is also well established in Nova Scotia:

A starting point for interpreting the legislation [the Municipal Government Act] is found in *Bishop-Beckwith Marsh Body et al. v. Wolfville (Town)* 1996, 151 N.S.R. (2d) 333 (N.S.C.A.). At page 336 the court states:

[13] In the foreword to *Driedger on the Construction of Statutes* (3rd Ed., 1994), by Ruth Sullivan, the author states:

"I share Driedger's conviction that statutory interpretation is not a rule-governed activity, but rather an activity in which rules are used either effectively or ineffectively."

[14] At p.131, Professor Sullivan sets out the modern rule of interpretation which, in my opinion, is applicable as it implicitly recognizes the ordinary meaning rule as well as the purposive approach to statutory interpretation. She states at p.131:

"There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is its compliance with the legislative text; (b) its efficacy, that is its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just."

[\(Myers v. Mannette \(2003\), 216 N.S.R. \(2d\) 106 \(C.A.\) \(para. 24\)\)](#)

44. Additionally, Nova Scotia's [Interpretation Act](#), R.S.N.S. 1989, c.235 (as amended) provides (s.9(5)):

Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to be attained;

- (e) the former law, including other enactments upon the same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

45. In the case at hand, s.18(2) of the Regulations states:

Subject to subsections (3) and (4) the Board must set *a tariff* for all of the following classes of electricity generation facility...

46. Although the term "tariff" is not defined in the regulations, s.18(2) refers to it in the singular rather than the plural (ie: "a tariff" v. "tariffs"). Furthermore, s.18(2) generally permits the setting of "a tariff" for a "class" of electricity generation facility not for a "size" of generation facility.

47. Indeed, the only distinction based on size set out in the regulations is in s.18(3), which directs the board to set "separate tariffs for wind power with a capacity greater than 50kW and wind power with a capacity of 50kW or less." The fact that the distinction in the wind power tariff based on size is set out specifically is significant, and suggests that the only size differentiation intended by the Regulations was with wind power tariff, and that this distinction was to be made at 50kW. If the language in s.18(2) requiring "a tariff" for a "class" of generation facility were broad enough to include a tariff of variable rates based upon the size of generation facilities, then the directive in s.18(3) would not be set up as an exception to the Board's general duty in s.18(2) (ie: the duty in s.18(2) is "subject to" the requirement imposed upon the board by s.18(3)).

48. The interpretation offered by NSDOE in these submissions is also consistent with the January 27, 2011 letter from Deputy Minister of Energy to Synapse clarifying the "policy intent of the government with regard to the draft community feed-in tariff rate for wind technology at the 50 kilowatt level." That letter indicated that it was the intent to have the "Board establish a feed-in-tariff at the 50kw level to distinguish the cost of a 50kw wind turbine generator from larger scale wind projects" and not to "incentivize power generation using less cost effective technologies that may exist below the 50kw level."
49. There is an additional concern as well with the development of a tariff under s.18(2) that contains more than one rate. If the interpretation offered by NSDOE in these submissions is not accepted, and the language of s.18(2) is broad enough to permit more than one rate (or if the interpolation method is determined to constitute a rate or "a tariff" because it is mathematically derived, it stands to reason that such an approach to setting "a tariff" would be open to be applied to all of the other classes of electricity generation facility noted in s.18(2) because the language in s.18(2) does not distinguish between the setting of "a tariff" for wind power from any of the other classes of electricity generation facilities that are identified.
50. Based upon the foregoing, NSDOE respectfully submits that the term "a tariff" in s.18(2), in the context of the Regulations, is synonymous with "a rate". A tariff that includes more than one rate would not be permitted by the Regulations. All three of the remedies proposed by E3 Analytics to address the difference between the small and large wind rates proposed by Synapse results in more than one rate for a class of generation facility.

51. Although NSDOE does not believe that the wording of the Regulations permits the proposed relief suggested by Mr. Couture, he raises a legitimate concern. The concern is one that might not necessarily arise, but has the potential to do so, and NSDOE recognizes that there may well be economic technologies that could fill in somewhere between 50 kw and the economic scale for larger wind in the 1-2 MW range.
52. To the extent that there is a concern arising from the potential issue identified by Mr. Couture, it is respectfully submitted that the issue is somewhat tempered by the 5MW cap on small wind contained in s.28(2) of the Regulations. It is further submitted that if this threatens to become a significant issue, it would be better addressed in the Regulations or in policies or directives, than in the design of the rates. The Province set the 50 kw band to perform certain specific policy objectives and will review the outcome as part of the general review. Whether there are other appropriate technologies and opportunities to meet policy objectives somewhere in between, will be the subject of the general policy review beginning in 2012.

CONCLUSION

53. In closing, both NSDOE and NSE would like to note its appreciation to the Board for convening a hearing to deal with the establishment of COMFIT rates, the independent consultants who worked diligently to develop proposed rates, based upon their own

experience and research and consultations with stakeholders, and to the parties in this proceeding who added tremendous value to the process through the information, issues and concerns that they brought forward. Through efforts like these, the promise held in the Plan will become reality.

All of which is respectfully submitted this 29th day of April, 2011.

Stephen T. McGrath
Nova Scotia Department of Justice
4th Floor, 5151 Terminal Road
PO Box 7
Halifax, NS B3J 2L6
Tel: (902) 424-6288
Fax: (902) 424-1730