

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 a **Load Retention Rate**.

BEFORE:

John A. Morash, C.A., Chair
Margaret A. M. Shears, Vice-chair
John L. Harris, Q.C., Member

APPLICANT:

NOVA SCOTIA POWER INCORPORATED
Peter W. Gurnham, Q.C.
D. Kevin Burke

INTERVENORS:

CAPE BRETON REGIONAL MUNICIPALITY
John Whalley

ELECTRICITY CONSUMERS ALLIANCE OF NOVA SCOTIA
David Sawler
John Woods

INDUSTRIAL CAPE BRETON BOARD OF TRADE
Bob Pelley

IRVING OIL LIMITED
Robert G. Grant, Q.C.

**NOVA SCOTIA MUNICIPAL ELECTRIC UTILITIES
COOPERATIVE**
Donald Regan

SEMPRA ATLANTIC GAS INCORPORATED
James L. Connors, Q.C.
Stephen McGrath

STORA ENSO PORT HAWKESBURY LIMITED
George Cooper, Q.C.
Charles Keizer
Jennifer Healy

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

WITNESSES: **NOVA SCOTIA POWER INCORPORATED**
Christopher Huskilton, P. Eng.
Executive Vice President
Nova Scotia Power Inc.

Melvin E. Whalen, P.Eng.
Director, Regulatory Affairs, Load Research, Rates and Forecasting
Nova Scotia Power Inc.

STORA ENSO PORT HAWKESBURY LIMITED
Fred Hussey
Vice President, Engineering and Special Projects
Stora Enso Port Hawkesbury Limited.

Alan Rosenberg
Consultant
Brubaker & Associates. Inc.

NOVA SCOTIA UTILITY AND REVIEW BOARD
Jatinder Kumar
President
Economic & Technical Consultants, Inc.

HEARING DATES: January 12, 13, 14, 2000.

FINAL BRIEFS: January 28, 2000

REBUTTAL BRIEFS: February 4, 2000

DECISION DATE: **May 24, 2000**

DECISION: **Application granted with modifications**

INTRODUCTION AND BACKGROUND

This is an application by Nova Scotia Power Incorporated (NSPI, the Applicant) pursuant to **Section 64** of the **Public Utilities Act**, R.S.N.S. 1989, c.380. The Applicant seeks generic approval by the Board of the general terms and conditions of a load retention rate. NSPI has not previously offered such a rate.

NSPI is a regulated public utility and is the successor to the Nova Scotia Power Corporation, a crown corporation which was privatized in 1992. As of January 1, 1999, NSPI became the principal subsidiary of NS Power Holdings Incorporated.

NSPI generates, transmits and distributes electricity province-wide. Its 1998 revenues were \$759 million, its total assets at December 31, 1998 were \$2.9 billion and it served 434,000 customers including six municipal electric utilities.

The application was heard at the offices of the Board on January 12, 13 and 14, 2000. Two witnesses gave evidence at the hearing on behalf of the Applicant; two witnesses gave evidence on behalf of Stora Enso Port Hawkesbury Limited, one of the intervenors; and one witness was called by Board counsel.

NSPI states in its application that "the proposed rate is an appropriate approach to retaining existing customers who, in the absence of this rate, would reduce their purchases from the Company, to the detriment of all other customers". The rate would be available to customers "who are considering an alternate supply of at least 2000 KVA or 1800 KW". It would not be available for new load. The rate would only be available if the following conditions are satisfied:

1. *The customer's option to use a supply of power and energy (alternate supply) other than NSPI's is both technically and economically feasible.*
2. *Retaining the customer's load, at the price offered by this rate, is better for other electric customers than losing the customer load in question.*
3. *The price offered by this rate is not less than that necessary to make the customer in question indifferent with respect to alternate supply versus continuing to purchase the electric power and energy from NSPI.*

The "price, terms and conditions" offered under the rate would be determined on a customer by customer basis and, once agreed to by NSPI and the customer, would be submitted to the Board for approval. Upon application by a customer to take service under the rate, NSPI would conduct an initial screening to determine whether the customer could qualify for the rate. In the event of disagreement at this stage, the customer could apply to the Board to adjudicate. An applicant who passes the screening would then have to establish to NSPI's satisfaction that it is technically feasible for it to obtain its power and energy from an alternate source and to show what its cost would be to move to that alternate supply. The economic feasibility of the alternate source of supply would be established where

. . . it can be shown that under reasonable assumptions the cost of electricity to the customer from that option is expected to be lower than the cost to the customer of continuing to purchase electricity from NSPI.

NSPI would determine the impact on its other customers of losing the customer load in question. It would use its forecasting and planning models as appropriate to "compare scenarios that include the customer's move to an alternate supply with scenarios that assume the customer continues to be supplied by NSPI". Where the impact of the customer leaving the system could be mitigated by offering the customer a load retention rate, NSPI and the customer would negotiate an "appropriate" rate for the customer. The rate and the terms and conditions would then be

submitted to the Board for approval. While the data and analysis considered by NSPI and the customer would be made available to the Board, this information and the "results thereof, including the recommended price, terms and conditions", would not be "required to be publicly disclosed".

NSPI seeks approval in the present proceeding of the general principles upon which the load retention rate will be offered and the process by which prices for specific customers will be established on a case by case basis.

NEED FOR A LOAD RETENTION RATE

With natural gas becoming available in Nova Scotia over the next several years and with the advances that have been taking place in gas-fired generation technology in recent years, it will become feasible to a degree never seen before in Nova Scotia for existing large NSPI customers to leave NSPI's system and generate their own electricity. These customers are particularly sensitive to global trends in commodity prices and they are under constant challenge to remain competitive within their industries. Energy costs are significant for many of them and they are virtually compelled to consider how they can use natural gas to lower their energy costs and improve their competitiveness. NSPI believes that the availability of a load retention rate could be beneficial both to the customer whose option to leave NSPI's system is technically and economically feasible, and to its other customers. It points out that there can be circumstances where its other customers will be better off even though in order to retain the customer having the option to leave it is necessary to offer it a substantially discounted rate.

Electric utilities have been offering discount rates to customers who have the ability and willingness to leave the utility's system for some years, both in Canada and the United States. The reason for offering the rate may vary. For example, some utilities offer the rate in order to retain a customer who otherwise would move its operation to another jurisdiction which has a lower rate structure. Frequently, the rate has been offered, as is the case here, to discourage the customer from resorting to self-generation. What such rates have in common is a recognition that it can be to the benefit of the utility's other customers to retain that customer rather than lose it. There was widespread agreement on this point among the intervenors in this proceeding. There was also a recognition that with the introduction of retail competition the need for a regulator-approved load retention rate disappears. The Board is satisfied that NSPI has justified the need for the addition of a load retention rate to its tariff. The remainder of this decision will deal with specific issues relating to the terms of the rate which arose in the course of this proceeding.

LEGAL BASIS FOR LOAD RETENTION RATE

Before approving a new rate the Board must be satisfied that the proposed rate is permissible under the **Public Utilities Act**. The following provisions must be considered:

s. 67(1) All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions.

s. 87(1) If upon any investigation the rates, tolls, charges or schedules are found to be unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of this Act, the Board shall have power to cancel such rates, tolls, charges or schedules. . . .

s. 109(1) If any public utility shall knowingly or wilfully make or give an undue or unreasonable preference or advantage to any particular person, firm or corporation, or shall subject any particular person, firm or corporation to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such public utility shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful.

NSPI submits that the proposed load retention rate is fully compliant with the above sections. It points out that the purpose of the rate is to retain customer load that would otherwise leave the system and detrimentally affect the remaining customers. The rate classification is predicated upon the ability of the customer receiving the load retention rate to obtain power and electricity from an alternate source. All customers benefit if this customer stays on the system. It is true that the actual rate paid by any one load retention rate customer is likely to vary from the rate paid by another load retention rate customer, given the technical and economic differences inherent to each customer. However, the "unequal price would not flow from any arbitrary or unfair characteristic of the proposed rate; rather, differences in price flow from differences in ability to economically leave the system and use an alternate form of supply for their electric needs. In other words, different circumstances and conditions". NSPI concludes that the rate is not unjustly discriminatory and complies with **s. 67** of the **Act**.

The legality of incentive rates, of which the load retention rate is an example, does not as yet appear to have been considered by the courts in Canada. The New Brunswick Board of Commissioners of Public Utilities pointed out in a 1993 application by New Brunswick Power for approval of an incentive rate designed to promote economic growth in New Brunswick that:

As a general rule, customers who receive "a like and contemporaneous service" under similar circumstances should be charged the same rate for this service. It is rate discrimination to do otherwise. However, there has always been some discrimination between customers in public utility rate setting. The test, both at common law and in public utility statutes, is whether or not it is "undue", "unjust", or "unlawful" discrimination.

Most regulatory statutes in Canada bar unjust discrimination in rate setting. However, there have been no reported reviews by the Courts of regulatory decisions in Canada, as to what constitutes unjust discrimination in public utilities' rate setting. However, in the United States, the courts have dealt with this question many times.

The New Brunswick Board approved the incentive rate which offered a 50% discount on the demand charge component of any new or additional loads of 2,000 KW or greater. It noted that the rate would recover all of the incremental costs of producing the additional electricity and make a contribution to help pay for existing excess generating capacity.

In its decision in *Re Gulf States Utilities Company* (1987), 92 PUR 4th 250, the Texas Public Utility Commission approved a tariff rider offering rate discounts to large-volume electric customers with the ability to cogenerate. In approving the rate, the Commission held that the proposed rider discriminated among industrial customers but such discrimination was reasonable and worked no "unreasonable prejudice or disadvantage" to other industrial customers who did not have the ability to cogenerate. The Commission referred to a previous finding in a decision on a proposed economic recovery rider where it had found that such a rider does not unreasonably discriminate if the evidence demonstrates:

(1) that the utility system and the general body of ratepayers are benefitted by maintaining the existing industrial load; (2) that such load is in serious danger of substantially shrinking or disappearing altogether; (3) that unusually high industrial electric rates are a

major economic factor which elevates this possibility of serious load loss; (4) that approval of the ERR would increase the probability that needed industrial load will continue operating on the utility's system.

In *Re Northern Indiana Public Service Company*, (1988), 89 PUR 4th 385, the Indiana Utility Regulatory Commission approved a rider that would permit an electric utility to sell power at negotiated rates to certain customers that agreed to defer on-site generation. The Commission noted that the rate could only be utilized by those customers whose physical and technological characteristics would make self-generation feasible. The Commission found that such a rider would not offend the principle that similarly situated customers should not be treated in a dissimilar fashion, because the rate would be available to any such similarly situated customer. Furthermore, the fact that the rate was negotiable so that qualifying customers would not necessarily each receive the same rate did not render the rate unduly discriminatory. The Commission made the following findings:

While it is acknowledged that Mr. Rudden is correct in noting that this is a discriminatory pricing scheme, the Commission observes that it is responsive to the specific facts which each unique customer may be able to present and hence not unreasonably discriminatory...

While each customer would presumably receive a different rate, the Commission finds that those differing rates would result from reasonable considerations based upon the unique circumstances of service provided to each large industrial customer considering the economies of on-site generation. The resulting rates negotiated under Rider GA differ from each other in a manner which benefits all of the parties concerned by balancing the interest of the customer, the ratepayers as a whole, and NIPSCO's shareholders We therefore find that the proposed Rider GA is not unreasonably discriminatory as between members of the proposed customer class.

Cape Breton Regional Municipality submits in its final argument that NSPI would be engaging in price discrimination if this application is approved:

The price offered to large firms with the potential to leave the system because of access to natural gas would not be related to the cost of service and it would be different from the rates being offered to firms receiving the same type of service in a region without access to natural gas.

Mr. Kumar, the expert witness called by Board Counsel to comment on the proposed load retention rate, testified that regulators must be vigilant to ensure that utilities do not seek to strengthen their monopoly positions by giving preferences to their affiliates or favoured customers. The rate must be made available to all customers on a non-discriminatory basis. He recommended that the rate should not be made available to any entity in which NSPI has a financial interest of more than 25%.

Based on its review of the terms of the proposed rate, the provisions of the **Public Utilities Act** and decisions in other jurisdictions, the Board is satisfied that the rate complies with s. 67 of the **Act** and is not unjustly discriminatory. Customers taking service under the rate will form a distinct class which will have characteristics that set it apart from other rate classes. While customers in the class will pay different rates, the rates will be based on the special circumstances of each customer. The Board would note that NSPI does not have an affiliate which could qualify for service under the proposed rate but it agrees with the general point made by Mr. Kumar that there should be no preference given to any affiliate of NSPI, should there ever be such an affiliate, and that the rate must be offered by NSPI on a non-discriminatory basis. The rate must always be available to any customer meeting the criteria for the rate. The Board is satisfied that the implementation procedures outlined in the rate together with the complaint provisions of the **Act**

provide a sufficient avenue for redress should potential customers consider they are being discriminated against by NSPI. At the same time, the Board will be vigilant at the time a proposed rate comes before the Board for approval to satisfy itself that NSPI has negotiated vigorously to ensure that the rate is no more favourable to the prospective customer than necessary.

The Board agrees with Cape Breton Regional Municipality that natural gas will not be available in all areas of Nova Scotia for some years and that the usefulness of this rate is likely limited to customers who have the ability to use natural gas as their principal fuel. Nonetheless, the Board does not consider that the inability of customers in all parts of Nova Scotia to take advantage of the rate at this time constitutes unjust discrimination against such customers.

PRICE FLOOR

The load retention rate as proposed by NSPI does not expressly specify any minimum rate level. What the Availability section of the rate does state is that "retaining the customer's load, at the price offered by this rate, is better for other electric customers than losing the customer load in question". Mr. Kumar recommended that the Availability section should stipulate that the rate be at least 10% above the higher of NSPI's short term or long term marginal cost.

In response to a Sempra Atlantic Gas information request seeking NSPI's views with regard to the desirability of establishing a floor price, NSPI replied as follows:

In order for other electric customers to be better off by offering a particular load retention rate to a customer, the revenue received

under this rate must recover all incremental costs of serving the customer as well as a contribution to fixed costs. This will be demonstrated to the UARB upon seeking final approval.

Dr. Alan Rosenberg, an expert witness called by Stora Enso, said this in his pre-filed evidence with respect to "competitive alternative rates (CARs)", the load retention rate being one such example:

Q. Are there any features that are common to all CARs?

A. Yes, there is one feature that, to the best of my knowledge, is universal. Regulators require that other customers be better off as a consequence of the CAR than they would have been absent the special rate. Sometimes this is stated explicitly. Other times it is expressed as a condition that the rate be greater than the incremental cost of providing the service. Occasionally the regulators will stipulate a minimum amount by which the rate must exceed that incremental (or marginal) cost. Sometimes the rate requires that the customer make a positive contribution to the utility's fixed cost. These are all different ways of saying the same thing.

Also, more often than not, the rate gives the utility the ability to negotiate an individual rate, including broadly flexible price and terms arrived at on a case-by-case basis, rather than impose a one-size fits-all formula.

Sempra noted in its closing submission that many of the examples of load retention rates placed in evidence contain explicit price floors and it recommended that NSPI's availability section be strengthened by the inclusion of a price floor in accordance with Mr. Kumar's suggestion. As to whether long or short-run marginal costs should be used, ECANS made the point in its final submission that

Long-run marginal costing gives the consumer better energy price signalling for any future, long term capital expansion commitments while at the same time better reflecting the Utility's IRP [Integrated Resource Plan] and considerations such as Demand Side Management (DSM), generation capacity development to meet both

operating and strategic reserve requirements and intertie capacity outside NSPI's service territory.

At the 1995-96 NSPI general rate hearing, Dr. John H. Chamberlin said the following at p. 17 of his pre-filed testimony:

I indicated that for utility rates to be considered efficient they must reflect marginal cost. Marginal costs can be measured either over the short run or long run. For rate design purposes, the choice depends on the length of the contract or "compact" a utility has with its customers. For example, if a utility sells power on the spot market, short-run marginal costs are appropriate because there is no obligation to serve and no need to make resource investments on a customer's behalf. If the utility expects to continue supplying the customer far into the future, then long-run marginal costs are appropriate.

The terms "marginal costs" and "incremental costs" are sometimes used interchangeably. Mr. Whalen, NSPI's Director of Regulatory Affairs, Load Research, Rates and Forecasting, testified that incremental costs are the added costs of increasing output by a large amount while marginal costs are the added costs of increasing output by one unit. If one were to determine the added costs of increasing load by 20 megawatts one would be speaking of incremental costs. If one were determining the cost of increasing output by one kilowatt hour one would be speaking of marginal costs. The Board considers that incremental costs are the appropriate costs for purposes of the load retention rate. As to whether long or short run incremental costs should be utilized, the Board will make that determination at the time the rate is submitted for approval based upon the term of the proposed rate and NSPI's planning model. The Board anticipates that in most circumstances long run incremental costs are likely to be appropriate.

The question remains as to whether the Board should set a minimum contribution to fixed costs at some prescribed level above incremental cost as suggested by Mr. Kumar. In cross-examination he agreed that it is not necessary to specify in advance a percentage by which the rate must exceed incremental cost but that any guidelines should specify that there must be a "significant positive contribution" to fixed costs. The Board agrees with this approach and will add the following "bullet" to clause (1) of the Availability section of the rate:

The revenue from service to a customer under this rate shall be greater than the applicable incremental cost to serve such customer and shall make a significant positive contribution to fixed costs.

The third bullet in clause (1) of the Availability section of the rate as proposed by NSPI reads as follows:

The price offered by this rate is not less than that necessary to make the customer in question indifferent with respect to alternate supply versus continuing to purchase the electric power and energy from NSPI

Stora Enso submits that this condition seems to assume that the customer's rate will be set equal to the cost of the potential alternative. It points out that for a variety of reasons the customer's "indifference rate" may not coincide with the actual cost to the customer of self-generating. The customer's indifference point is subjective and is something which only it can truly determine. The Board agrees with Stora Enso that the condition is burdensome to administer and unnecessary within a competitive negotiation process. It will delete this condition. The requirement that the revenue from the rate must make a significant contribution to fixed costs is adequate to protect NSPI's other customers. The Board will, of course, expect to receive full information from NSPI

at the time it is asked to approve a rate, respecting the cost to the customer of an alternative supply.

LOAD REQUIRED TO QUALIFY FOR RATE

NSPI proposes that the load retention rate be made available only to customers who are considering an alternate supply of at least 2000 kVA or 1800 kW. As indicated in clause (4) of the Availability section, the rate is only available to existing load. These minimum demand levels also apply to the Large General and Large Industrial rates. Information filed at the hearing indicates that there are 61 commercial and industrial customers who have demands of 2000 kVA or higher. In addition, there are four municipal utilities whose load satisfies the proposed condition.

For the present, the Board accepts the proposed minimum power requirement as being reasonable. Ongoing technological advances and declines in the costs of installing small energy sources such as fuel cells and microturbines may well increase the number of smaller customers who in the future will have the ability to avail themselves of a load retention rate. As these customers begin to contemplate self-generation, the Board will be receptive to considering a reduction in the qualifying load level.

COMMENCEMENT OF RATE AVAILABILITY

The question arose at the hearing as to whether a customer should be able to start taking service under the load retention rate prior to the time that its own generating facilities could be brought into service. Mr. Kumar originally recommended that the rate "should be made available at the time that a customer can possibly install its own generator". In his oral testimony

he agreed that the rate could commence prior to the date the customer could have his own generation up and running, provided that the net present value of commencing service at the earlier date is the same as it would be if service commenced at the later date. Mr. Whalen made the point that as long as the ultimate overall benefits to remaining customers do not change, there should be no objection to advancing the date from which the load retention customer begins to be served at the reduced rate. NSPI submitted in its post-hearing brief that "so long as the overall net present value benefit does not change, the parties should have the flexibility to spread the benefits to a period prior to the time a customer is able to install his own generator". At the time that the Board is asked to approve a rate it is prepared to consider a scenario which contemplates the commencement of service under the rate prior to the time the customer could install its own generation provided there is no change in the net present value benefit.

RATEPAYER RISK AND REVENUE LOSS

In his pre-filed testimony Mr. Whalen gave a hypothetical, numerical example of the effect on NSPI if it should lose a significant part of its industrial load to self-generation. If 20% of its industrial load were to leave the system the contribution these customers make to NSPI's fixed costs would decline by \$13.5 million. This contribution loss would have to be absorbed by other customers. If these customers with an alternate supply option could be persuaded to stay on the system by a price reduction (discount) of 10%, the decline in contribution would be only \$3.4 million and thus other customers would be \$10.1 million better off with the load retention rate than without it. It is because of this saving that NSPI and Stora argue that the rate should not be viewed as a discount, but rather as a benefit to NSPI's other customers. Stora points out in its rebuttal brief that "The whole premise of the Load Retention Rate is that, without

it, the customer can and will remove its load from the system". Stora submits that other customers will be worse off if this happens and that it is better to give up some of the revenue rather than all of the revenue that NSPI has been receiving from the customer under the existing rate.

The Board has indicated above that it will expect the load retention rate negotiated between the parties to make a significant positive contribution to NSPI's fixed costs. The question remains, however, as to whether the loss of revenue sustained by NSPI should be borne entirely by the other customers, as contemplated by Mr. Whalen and NSPI, or should be shared to some degree by the shareholders. When asked in Sempra Information Request 13(5) why the shareholders should not bear the risk of the business decision on the part of NSPI to offer a load retention rate, NSPI replied as follows:

The risk to be managed is the risk that significant load will be lost to the system as a result of a large customer switching to an alternate supply. This loss of load to the system may be to the detriment of all other customers given that the loss of contribution to fixed costs would have to be absorbed by remaining customers. The risk to be managed is therefore not a function of the business decision of NSPI to seek a load retention rate; rather, the decision to seek a load retention rate is a remedial response to outside competitive forces. The rate would allow NSPI to have the ability to mitigate this potential harm to the remaining customers in cases where retaining a customer with a viable alternative, at a reduced rate, is better than losing the customer in question. It is the remaining customers that ultimately bear the risk when others choose to use an alternative source of energy. NSPI's business decision to seek the proposed rate is meant to allow it to reduce this real risk to its customers. It is not taking a risk for potential shareholder benefit.

Mr. Kumar recommended that NSPI "should not be assured it will be able to recover all losses caused by the load retention rate". He referred to several regulatory decisions

involving incentive rates for the guidance they may provide the Board. The New Hampshire Public Utilities Commission held in *Generic Discounted Rates Docket*, 77 NH PUC 650 , (DR 91-172), 1992, as follows:

We believe that the element of risk of revenue loss is critical in any special contract request. We do not believe it is appropriate to establish a risk sharing formula at this time, but may consider development of such a formula through the rulemaking or legislative process in the future. Under no circumstances, however, will we approve any special contract which puts the State as a whole or other ratepayers at substantial risk. We may, on a case by case basis, approve special contracts subject to the risk of revenue loss being shared between ratepayers and shareholders, or borne by shareholders in their entirety. Further, we shall consider disallowance of any lost revenue in future rate cases if we find that evidence shows that a utility's representations regarding the need for a discount were inaccurate or that the utility otherwise acted imprudently in seeking approval for such a discount.

In a decision entitled *Re Guidelines for Special Rates, Contracts or Incentives*, 185 PUR 4th 201 (1998), the Virginia State Corporation Commission said this at p. 206:

Second, we are concerned that the language contained therein [proposed Guidelines] may be construed as implicitly assuring utilities that any revenues that may be "lost" as the result of a customer no longer taking power from the utility or purchasing electricity pursuant to a special rate . . . will be automatically recovered from the remaining customers. We emphasize that we do not make any such finding in this order. Utilities historically have borne the risk of losing customers as a result of, for example, a customer's decision to self generate or to locate to a different state. The Commission does not guarantee that a utility is entitled to recover from the remaining ratepayers any revenue it would have received under a rate or tariff approved by the Commission if one or more customers leave the system.

NSPI agreed in cross-examination that there is a risk that NSPI will set a price that is lower than necessary because of faulty projections, for example, with respect to the customer's cost of self-generation or with respect to NSPI's own future costs.

Sempra submitted that since the load retention rate is being proposed as a response to a competitive threat, it is inconsistent with a competitive marketplace for the burden of the discount to be placed on ratepayers and to allow the shareholders to escape the consequences of the lost revenue. Furthermore, in the long-term it is as much to the benefit of the shareholders as to the customers that NSPI retain as many of its customers and as much load as possible. Sempra also submits that the absence of customer involvement in the price-setting process is in itself an argument for having the shareholders bear the revenue loss. The Electricity Consumers Alliance of Nova Scotia (ECANS) submitted that NSPI's remaining customers should not be expected to "carry the full burden of any revenue shortfall". It urged the Board to "ensure a balanced transference of any financial burden to all stakeholders" and in any event, "there should be no *guaranteed* recovery of revenue shortfalls as a result of any individual customer or customer class making a strategic business decision to significantly reduce energy purchases from NSPI". The Nova Scotia Municipal Electric Utilities Cooperative submitted that NSPI would not request a load retention rate if it were not in the interests of its shareholders. They, and not captive ratepayers, should bear the risk of revenue loss. Irving Oil also submitted that the shareholders should absorb any revenue shortfalls resulting from customers taking service under the load retention rate.

A 1994 survey by the staff of the Illinois Commerce Commission filed in evidence in response to an information request [UARB 22], found that utilities in 41 states were allowed to offer load retention rates. Of the states which responded to the question, three require stockholders to bear the responsibility for any revenue shortfall due to such rates; three require the ratepayers in general to bear the responsibility; three require the responsibility to be shared between stockholders and ratepayers; and 26 answered that no decision would be made until a rate case.

The Board agrees with Mr. Kumar that it would not be in the public interest for it to offer NSPI any guarantee at this time that it will be able to recover all of its revenue losses from the rest of its customers. The Board does not believe there is any advantage in deciding this question prior to a general rate hearing. The Board would observe that the force of any argument that NSPI will be motivated to negotiate harder if it knows in advance that the shareholders will bear some or all of the loss is lessened by the fact that the rate will be subject to rigorous advance scrutiny by the Board. It should be pointed out that NSPI will not be able to pass on any revenue loss associated with this rate to its other customers until such time as NSPI seeks a rate increase. The shareholders bear the loss in the meantime and this loss is not recoverable in future rates. That fact in itself gives NSPI an incentive to negotiate diligently with the prospective customer.

Accordingly, the Board will leave open the question as to the extent to which shareholders should bear the revenue losses to NSPI by reason of the approval of a load retention rate.

THE LOAD RETENTION RATE AND RETAIL COMPETITION

Mr. Kumar recommended that at such time as the electric utility industry is restructured in Nova Scotia to allow for competition in power generation and retail choice, customers under the load retention rate should not be prevented from taking advantage of the new competitive environment by reason of their being locked into a long-term commitment under the rate. The fact that major power users may be shut out from participating could inhibit the development of a competitive electricity market in Nova Scotia. The utility itself could be adversely affected if its flexibility to compete is impeded by its continuing supply obligations under a load retention rate.

Irving Oil and Semptra endorsed Mr. Kumar's views. Irving Oil submitted that the Board should ensure that the length of the term of any rate negotiated with a customer will not become an impediment to the implementation of competition in Nova Scotia. Semptra submitted that competition in electricity supply is inevitable in Nova Scotia and it would be reasonable to limit the maximum length of the availability of the rate to a customer to four or five years.

NSPI points out that neither the Board nor NSPI knows when or how retail competition will come to Nova Scotia. It says that decisions with respect to exiting from the load retention rate, as well as decisions with respect to NSPI's other rates, should be made by the Legislature or the Board as part of the deregulation process whenever it occurs. Decisions should not be made now in isolation from all the other issues which will have to be dealt with in any restructuring of the electricity industry in Nova Scotia.

The Board agrees with Mr. Kumar that there is some potential for load retention rates to impede the growth of competition in a restructured electricity industry. At the same time, the Board considers that any customers likely to take service under the rate, as well as NSPI, will have the foresight to consider the ramifications of a long term commitment to the rate and will do what they perceive to be in their best interests. Given the uncertainty as to the form any industry restructuring will take and when it will occur, the Board does not think that it is appropriate in this decision to prescribe a maximum term that a customer may be served under the rate. The Board will be considering the duration of load retention rates on a case by case basis and will have the opportunity to assess the impact, if any, of the length of the contracts being proposed on the evolving electric utility industry at the time applications are being considered.

CONFIDENTIALITY

NSPI proposes that item 6 of the procedures set forth under Attachment A to the Load Retention Rate would read as follows:

(6) To protect confidential NSPI and customer data, none of the data or analysis used in the implementation of these procedures, nor any results thereof, including the recommended price, terms and conditions, shall be required to be publicly disclosed.

Mr. Huskison indicated in his pre-filed testimony that customers who had indicated an interest in taking service under this rate had advised NSPI that they were fearful that information that they considered private, commercially sensitive information, might become public. NSPI is satisfied that they are unlikely to apply to take service under the rate if they are forced to publicly disclose what they consider to be market sensitive information. Accordingly, NSPI submits that the approval process to be followed by the Board should be closed to the public and should involve only NSPI, the customer, and the UARB, and that all data, analysis and results should remain confidential.

Stora Enso strongly supported the inclusion of item 6 and submitted that the "negotiating details, the name of the customer and the amount of the rates" should be considered "proprietary" and not be made public by the Board. Dr. Rosenberg stated in his pre-filed testimony that

Many CARs [competitive alternative rates] allow the price and other terms of the contract to remain confidential. (Of course, this confidentiality extends to the cost of the customer's potential alternative.) This is an advantage to both the utility and the customer. It is an advantage to the utility because it does not want other applicants to use the price extended to one customer as a bargaining point for its negotiations. Also, many customers would refuse to negotiate an anti-bypass rate if they knew that their data could become public. Instead they would simply proceed to install their own supply. The corresponding benefit of confidentiality to

the customer is, of course, the maintenance of its competitive position.

ECANS argues in its final submission that once a load retention rate is approved by the Board the rate itself should be made public and that only the supporting documentation and the negotiations leading up to the approval of the rate should remain confidential. ECANS submits that "non-published, customer specific rates would likely introduce a significant level of mistrust and apprehension on the part of other consumers" and that "For the regulatory process to be seen and perceived as being fair and equitable, there must be final disclosure of the approved rate".

The Nova Scotia Municipal Electric Utilities Cooperative submits that "for other customers to successfully represent their interests at future rate hearings, the rates and terms negotiated, and the volumes sold under discounted rates must be known to other customers". Sempra Atlantic does not oppose the non-disclosure of individual load retention rates, but it does submit that NSPI should be required to periodically file summary reports which disclose the names of all load retention rate customers, and average rates and volume of energy sold under the rate. It submits that if this information is not provided "there is no way for other market participants and ratepayers to evaluate whether NSPI's conduct is truly benefiting all of its customers". It noted that the largest potential customer likely to take advantage of the rate, Stora Enso, voluntarily participated actively at the hearing in support of NSPI's application and indicated that it was very interested in taking advantage of a load retention rate.

In his pre-filed evidence, Mr. Kumar, stated that he was not opposed to the confidentiality provision proposed by NSPI provided that the Board ensures that all relevant information is provided to it by NSPI and the customer seeking service under the rate. He noted

that the United States Federal Energy Regulatory Commission treats all contract rates filed with it to be within the public domain.

The Board has always considered that public confidence in utility regulation is enhanced by the open process which the Board has traditionally followed in setting rates and in dealing with other regulatory issues which come before it. That process has been followed here with respect to the generic consideration of the general terms of a load retention rate. The Board recognizes, however, that there is merit in the arguments put forward by NSPI and Stora Enso that the load retention rate is first and foremost a market-based rate which is predicated on competitive energy supply sources being available to the customer and that such customers will wish to protect the confidentiality of what they consider to be proprietary, commercially sensitive information. The Board does not consider that customers are being unreasonable in this regard. The Board would note that NSPI submitted in its final brief that the commercial information exchanged between NSPI and a customer and then submitted in confidence to the Board during the course of the approval process would be protected from public disclosure under the privacy protection provisions of the **Freedom of Information and Protection of Privacy Act**. The Board agrees that it is unlikely that the disclosure of such information would be required under this **Act**. The Board considers that clause 6 proposed by NSPI for inclusion in the Attachment to the rate schedule is not unreasonable and it is, accordingly, approved.

NSPI points out that as a matter of policy it does not reveal the names of customers on particular rates and that the Board has not required the disclosure of such information at past rate hearings. While the Board agrees that NSPI's concern for the protecting the privacy of its customers is appropriate in most circumstances, it believes an exception should be made with respect to the load retention rate. This rate has the potential to reduce NSPI's revenues very

substantially and correspondingly confer a substantial benefit upon the customers who qualify for service under the rate. The Board would note in passing that it is no great secret that the only customer qualifying for the "Mersey System Rate" contained in the NSPI Schedule of Rates and Regulations is the Bowater Mersey Paper Company. The prevailing practice in most, if not all of the US jurisdictions, certainly seems to be that the names of customers on special "contract" rates are in the public domain. The Board will make available to persons, upon request, the names of all customers who have applied for the rate and the names of all customers who have been approved for service under the rate.

The Board believes there is some merit in the argument that NSPI may be placed at a disadvantage in negotiating subsequent load retention rates if rates previously approved by the Board are made public. The Board will not require rates charged to individual customers, or the specific terms of those rates, to be disclosed. At the same time, for the reasons suggested above, the Board believes that it serves the public interest to have basic information with respect to the impact of the load retention rate available to the public. In the Board's opinion, an appropriate balance will be achieved if NSPI is required to provide to the Board, on an annual basis, the total revenue obtained from customers on the rate and the energy sold annually by NSPI to customers on the rate. This information will only be placed on the public record at such time as there are at least two customers taking service under the rate.

CONCLUDING COMMENTS

The Board approves the load retention rate as submitted subject to the amendments to clause (1) of the Availability section discussed above. In agreeing to undertake the onerous task of approving individual prices, terms and conditions pursuant to which service will be offered to

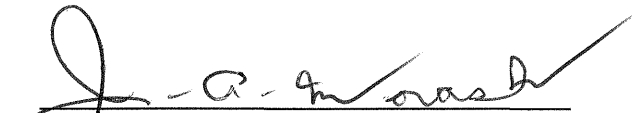
individual customers under the load retention rate, the Board would make the following observations. It should go without saying that in assessing the technical and economic feasibility of a customer's option to supply some or all of its own load, the Board will have to be satisfied not only that feasibility has been established but that the customer actually intends to withdraw its load from NSPI unless it is permitted to take service under the load retention rate. In assessing the customer's ability to leave the system and the merits of the price and terms agreed to by the customer and NSPI, the Board anticipates that it will retain outside consultants to advise it with respect to all aspects of the proposal. The assessment process by the Board will be thorough and will take such time as is necessary for the Board to satisfy itself that it is in the public interest to approve the proposed rate.

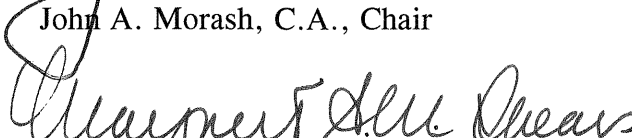
The Board would also state at this time that, subject to its findings on confidentiality, at any future rate hearing it may require NSPI to treat service under the load retention rate as a separate rate class for purposes of cost allocation studies.

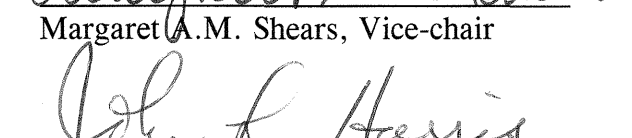
The approved load retention rate is attached hereto as Schedule "A".

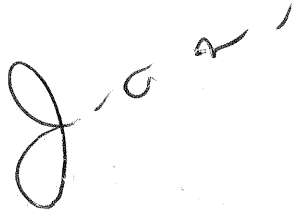
An Order will issue accordingly.

Dated at Halifax, Nova Scotia, this 24th day of May, 2000.


John A. Morash, C.A., Chair


Margaret A.M. Shears, Vice-chair


John L. Harris, Q.C., Member



SCHEDULE "A"
LOAD RETENTION RATE

DEMAND CHANGE

To be determined as specified in Special Condition (1).

ENERGY CHARGE

To be determined as specified in Special Condition (1)

AVAILABILITY

- (1) This rate shall be granted only in circumstances where it can be shown that:
 - The customer's option to use a supply of power and energy (alternate supply) other than NSPI's is both technically and economically feasible.
 - Retaining the customer's load, at the price offered by this rate, is better for other electric customers than losing the customer load in question.
 - The revenue from service to a customer under this rate shall be greater than the applicable incremental cost to serve such customer and shall make a significant positive contribution to fixed costs.

The procedure for establishing that this test is satisfied is outlined in Attachment A.

- (2) The rate shall be available only to customers who are considering an alternate supply of at least 2000 kVA or 1800 kW.
- (3) The customer shall apply in writing to take service under this rate.
- (4) This rate shall be available only to customers whose electricity needs, at the date of application, are being supplied by NSPI. It is not available for new load.

SPECIAL CONDITIONS

- (1) The price, terms and conditions (including any modification in special conditions associated with the rate (s) under which the customer purchased power and energy prior to taking

service under this rate) shall be established jointly by NSPI and the customer, following the procedure outlined in Attachment A.

- (2) The price, terms and conditions offered under this rate shall be determined on a customer by customer basis.
- (3) The price, terms and conditions offered under this rate shall be submitted by NSPI to the UARB for approval.

ATTACHMENT "A"

This attachment outlines procedures by which the requirements of Availability Clause (1) and Special Condition (1) are to be satisfied.

- (1) The customer shall apply in writing to take service under this rate, outlining the available alternate supply option and the rationale for seeking service under the load retention rate.
- (2) Upon written application by a customer to take service under this rate, NSPI shall conduct an initial screening to determine whether the implementation of these procedures is warranted.
- (3) Subject to (2), NSPI and the customer shall proceed to implement these procedures and establish a load retention price, with appropriate terms and conditions.
- (4) Should there be disagreement between NSPI and the customer with respect to the decision to proceed, the customer may ask the UARB to adjudicate.
- (5) These procedures shall be applied on a customer by customer basis.
- (6) To protect confidential information, NSPI and customer data, none of the data or analysis used in the implementation of these procedures, nor any results thereof, including the recommended price, terms and conditions, shall be required to be publicly disclosed.
- (7) The economic feasibility of the customer's option to supply some or all of its own load shall be established where it can be shown that under reasonable assumptions the cost of electricity to the customer from that option is expected to be lower than the cost to the customer of continuing to purchase electricity from NSPI.
- (8) The cost to the customer of the alternate supply shall reflect all appropriate factors, including but not limited to:
 - Capital costs
 - Fixed and Variable Operating costs
 - Fuel costs (short and long term, contracts, etc.)
 - Ancillary Services costs (electric)
 - Steam production and steam backup costs (where appropriate)
 - Contributions-in-aid of construction (where NSPI's system must be modified to accommodate the customer's generator)
 - Expected Service Life
 - Salvage Value
 - Electric sales/purchases (where the customer's generator output does not match customer requirements)

- Depreciation and/or Capital Cost Allowance
 - Taxes
 - Appropriate return
- (9) The technical feasibility of the customer's alternate supply shall reflect all appropriate factors, including but not limited to:
- Technology maturity and proven performance level
 - Site specific considerations (space requirements, availability of cooling water, fuel handling, etc.)
 - Environmental acceptability (air emissions, solid waste management, etc.)
 - Modifications to NSPI's transmission and/or distribution system to accommodate the new generation and/or supply ancillary services.
 - Metering systems
 - Where cogen is involved, compatibility of steam versus electric requirements.
- (10) The impact on NSPI's other customers of losing the customer load in question shall be determined using NSPI's forecasting and planning models (as appropriate) to compare scenarios that include the customer's move to an alternate supply with scenarios that assume the customer continues to be supplied by NSPI.
- (11) Where the impact on NSPI's other customers can be mitigated by offering the customer in question a load retention rate, NSPI and the customer shall determine an appropriate rate for the customer. This shall include the price (which may be formula-driven), and any other terms and conditions, including (where relevant) a suggested term and any appropriate renewal guidelines.