
Nova Scotia Utility and Review Board

IN THE MATTER OF *The Public Utilities Act*, R.S.N.S., 1989
c. 380, as amended

- and -

IN THE MATTER OF an Application of Nova Scotia Power
Incorporated for approval of a Load Retention Rate

**POST-HEARING BRIEF
OF NOVA SCOTIA POWER INC.**

DATED: January 28, 2000

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NOVA SCOTIA UTILITY
AND REVIEW BOARD

LOAD RETENTION RATE POST-HEARING BRIEF

INTRODUCTION

Nova Scotia Power Inc. (“NSPI”) has applied for a generic Load Retention Rate. The proposed Load Retention Rate is to enable NSPI to attempt to retain customer load that would otherwise leave the system for an alternate supply by offering the customer a rate that would make the customer indifferent to the alternate supply option. The rate would only be offered where the impact on NSPI’s other customers can be mitigated by offering the customer in question a load retention rate.

As discussed in the evidence of Christopher Huskison¹, market globalization, technological change and resource availability are factors which are driving companies to cut costs to enhance competitiveness. Some of NSPI’s customers may choose to use an alternate supply for their electric energy needs where such is economically attractive. Other NSPI customers could be negatively impacted by the resulting loss of load.

NSPI’s objective is to keep rates stable for its customers and its preferred strategy is to be able to offer a load retention rate where retaining the customer in question is better for other NSPI customers than losing that customer.

As set out in the Availability section of the Application, the rate would be available only to an existing customer who is considering an alternate supply of at least 2,000 kva or 1,800 kw. The rate would be granted only in circumstances where it can be shown that:

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.

¹ Exhibit P-1

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 RATE

No witness appeared before the Board in opposition to the application for the Load Retention Rate.

Board witness J. Kumar indicated in his direct evidence that he did not oppose the rate².

Load retention rates are prevalent in other jurisdictions. Table A to Mr. Whalen's evidence in Exhibit P-1 shows a number of jurisdictions where load retention rates similar to NSPI's proposed rate have been adopted. In the Illinois Commerce Commission Study filed in response to UARB-IR-20 it is noted that of the utilities that responded, 41 had load retention rates. Mr. Kumar noted that some of the rates described by Mr. Whalen were terminating because of the advent of retail competition. He conceded however that rates approved in jurisdictions with a regulatory regime similar to Nova Scotia's prior to the advent of competition can serve as a precedent in Nova Scotia where retail competition has not yet occurred³.

Since there was no opposition to the granting of the rate expressed at the hearing, this post-hearing brief will deal with some of the issues raised, principally those raised by Mr. Kumar concerning terms and conditions to be included in the rate. Reference is also made to the pre-hearing brief dated January 10, 2000 filed by NSPI which sets out in some detail the legal basis for adoption of the rate.

² Exhibit P-14, Page 3

³ Transcript - Kumar #177

FLEXIBILITY

NSPI urges the Board not to impose additional conditions in the rate that would reduce its flexibility. Mr. Whalen in his supplemental evidence⁴ states:

“The purpose of the load retention rate is to retain customer load, subject to the fundamental principles of Availability Clause (1) and final approval of the UARB. The addition of other conditions reduces the flexibility of the rate. In the final analysis, if the rate cannot meet the specific needs and circumstances of individual customers, it will not be a successful rate.”

The Board will have the final say with respect to any and all applications for the rate.

COMMENCEMENT DATE FOR THE RATE

Mr. Kumar states in Condition (2) that: “The LR rate should be made available at the time a customer can possibly install its own generator”. It would appear however that Stora⁵, Mr. Kumar⁶ and Nova Scotia Power⁷ all agree 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.

CONFIDENTIALITY

Mr. Huskilson states in his evidence⁸:

“The big concern that customers have, however, relates to the implementation of this principle, particularly with respect to confidentiality of data. Establishing that the fundamental principle is satisfied requires the customer to share sensitive market

⁴ Exhibit P-6, Page 4

⁵ Transcript - Hussey #58 & #145

⁶ Transcript - Kumar #34

⁷ Transcript - NSPI #654

⁸ Exhibit P-1, Page 3

information and most customers have indicated a refusal to participate in a public process requiring public disclosure, preferring instead to simply go to the alternate supply route.”

Dr. Rosenberg in his direct evidence⁹, confirms this point:

“Many CARs 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.”

On the issue of confidentiality Mr. Kumar states¹⁰:

“... I am not opposed to the confidentiality provision proposed by NSPI. However, I should emphasize that a customer requesting LR rate should be required to provide all the relevant data and information to NSPI which is needed for the LR rate. Further, all the data, information and analyses needed and used by NSPI’s acceptance of a customer’s request for LR rate should be made available to the UARB.”

An examination of Table A to Mr. Whalen’s evidence indicates that the prevailing practice is that terms and conditions of service to individual customers are kept confidential.

Dr. Rosenberg stressed that it is important for the utility vis-a-vis negotiations with other customers that the rate for an individual customer be kept confidential¹¹.

NSPI can understand the concerns of others in this regard, however, it is clear that for the rate to work in the interest of all customers the implementation plan must be kept confidential.

⁹ Exhibit P-13, Page 9

¹⁰ Exhibit P-14, Page 19

¹¹ Transcript - Rosenberg #89

FREEDOM OF INFORMATION ACT

During the course of the hearing, the Board raised the issue of an application under the *Freedom of Information and Protection of Privacy Act* for disclosure of confidential information exchanged between NSPI and a customer and subsequently disclosed to the Board on a confidential basis during the course of the approval process. It is NSPI's view that section 21 of the *Freedom of Information and Protection of Privacy Act* would apply in this situation and allow for disclosure to be refused¹². Section 21 of the *Act* provides as follows:

Confidential Information

21(1) The head of a public body shall refuse to disclose to an applicant information

- (a) that would reveal
 - (i) trade secrets of a third party, or
 - (ii) commercial, financial, labour relations, scientific or technical information of a third party;
- (b) that is supplied, implicitly or explicitly, in confidence; and
- (c) the disclosure of which could reasonably be expected to
 - (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
 - (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
 - (iii) result in undue financial loss or gain to any person or organization, or
 - (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other

¹² See *Atlantic Highways Corp.* (1998), 162 N.S.R. (2d) 27 (N.S.S.C.) for an examination of the application of s.21 of the *Freedom of Information and Protection of Privacy Act*.

person or body appointed to resolve or inquire into a labour-relations dispute.

It is quite clear that the information to be exchanged and disclosed during the course of negotiations and implementation of the proposed rate, as discussed in the hearing, would fall within the contemplation of section 21(1)(a), (b) and (c). Such information would include trade secrets, commercial, financial, scientific and technical information of a third party, all of which would be exchanged between NSPI and the customer *explicitly* in confidence and provided *explicitly* in confidence to the Board. There is obviously a reasonable expectation that the disclosure of such information would cause the injuries in paragraphs (c)(i), (ii) and (iii). It would therefore be incumbent upon the Board chair, as head¹³ of the public body, to refuse to disclose the information.

Further, it is NSPI's position that this issue would be of concern to all material filed on a confidential basis with the Board during the course of this hearing or any previous occasion.

TERM

Mr. Kumar in Condition 3 states that "The LR rate may not be made available after NSPI installs or acquires new long term capacity".

He conceded however on cross-examination that the term of an existing contract could be extended beyond the time NSP needs to install new capacity so long as the cost of that capacity is reflected in the rate design¹⁴. As long as this principle is recognized in the rate design there is no need to include the condition as drafted by Mr. Kumar. Proper application of the availability test requires that any capacity addition during the term be recognized and accounted for.

¹³ Section 3(c) of the *Freedom of Information and Protection of Privacy Act* states that "head", in relation to a public body, means ... "(iii) where the public body is a board ... the chair or presiding officer of the board ...".

¹⁴ Transcript - Kumar #44

However, the date of the capacity addition need not set a limit on the term of the rate. Mr. Whalen in his supplementary evidence¹⁵ states:

“While NSPI would accept this as a starting point in negotiation with a particular customer, it must be noted that a self-generation option can provide the customer with a long term option, and if the load retention rate cannot offer a similar alternative, it may not be attractive to the customer.”

NSPI AFFILIATE

Mr. Kumar's Condition 4 states the rate will not be offered to any entity in which NSPI has a financial interest of more than 25%. At present there is no such entity owned by Nova Scotia Power. There seems to be no specific rationale from Mr. Kumar for this wording other than in the context of the rate being offered on a non-discriminatory basis. In questioning Mr. Kumar suggested that in offering the rate there should be no preference given to an affiliate of NSPI¹⁶. NSPI agrees that the rate should be offered on a non-discriminatory basis and that no favour can be shown to an affiliate of NSPI. Condition 4 as written, however, seems unnecessary.

IMPLEMENTATION OF RETAIL COMPETITION

Condition 5 states NSPI will allow retail access and retail choice to all LR customers who may become eligible under the UARB's rules whenever such choice becomes available.

Neither the Board nor NSPI knows when or how retail competition will come to Nova Scotia. Decisions with respect to exiting from the load retention rate as well as a transition from all other NSPI rates should be made by the legislature and/or the Board as part of the

¹⁵ Exhibit P-6, Page 3

¹⁶ Transcript - Kumar #191

deregulation process when it is known. Those decisions should not be made now in Nova Scotia Power's submission in isolation of other issues related to competition.

PRICE FLOOR

Mr. Kumar in his direct evidence, Condition 6, stated that the rate should be 10% higher than the short or long term marginal cost of NSPI. In cross-examination, however, he conceded he was not insisting on the 10% number so long as there is a positive contribution or significant positive contribution to fixed costs¹⁷. All parties agree that there has to be a recovery of incremental cost and some contribution to fixed costs before a customer can qualify for the rate. NSPI believes the Availability Clause (1) makes that clear. If there is any doubt with respect to the requirement of a positive contribution that can be clarified. There is, however, no need to impose an arbitrary 10% threshold. In a given circumstance, contribution by the customer of 109% of incremental cost may be quite desirable. That customer should not be disqualified.

SHAREHOLDER vs RATEPAYER COST

Several parties including Mr. Kumar suggested that NSPI should not be assured it will be able to recover all losses associated with offering the rate. Board questions during the hearing raise the possibility that the Board may defer any issue of cost recovery to the next rate application. That would be consistent with the manner in which it has been handled by the majority of other regulatory jurisdictions¹⁸.

NSPI's position on this issue is best summarized in response to Sempra IR-13(5):

“Response IR-13(5) 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

¹⁷ Transcript - Kumar #76

¹⁸ NSUARB IR #20 Illinois Commerce Commission Report Page 12, Question 7

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 alternate 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.

NSPI could, of course, take no action to seek a load retention rate and avoid this issue of shareholder risk - yet a customer like Stora could be lost. It seems ironic that by taking an initiative for the benefit of other customers some say that the shareholders should be at additional risk. The purpose of the rate is to retain the departing customer's contribution for the benefit of all other customers.

It was suggested that if shareholders are not at risk NSPI won't drive the best deal. Mr. Huskisson dealt with this issue as follows¹⁹:

"Well, I guess the incentive that's on the table for Nova Scotia Power as it's been put forward is simply the fact that -- or is the same incentive that we have all the time to drive our costs down and to hold rates stable in Nova Scotia, and that is that if we do not have stable rates or reasonable rates in Nova Scotia, then we will lose customers to the kinds of competition that we face today. We have competition in many many areas, not specifically for electricity but certainly our electric heat customers have competitive options, our commercial customers have competitive options. All of our -- the majority of our customers have options for big portions of their energy consumption, and so if we don't keep prices stable and reasonable, then those customers will take those other options. And so that's always the incentive that Nova Scotia Power has."

¹⁹ Transcript - Huskisson #642

As noted by Dr. Rosenberg the shareholders are at risk until the next rate case. Lost revenues before the rate case cannot be made up retroactively²⁰. In addition, if a discount is found to have been unreasonable, the Board in applying the test of prudence has the ability to disallow costs.

As noted, the purpose of the rate is to make all other customers better off. Subject to the Board's right to disallow costs imprudently incurred, there is no need to single out for different or special treatment costs related to this rate.

CONCLUSION

NSPI respectfully requests that the Board approve the load retention rate to enable NSPI to attempt to retain the load of customers with viable supply alternative where doing so would benefit remaining customers.

DATED this 28th day of January, 2000.



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²⁰ Transcript - Rosenberg #54