

P-871.9  
(F1-3)

**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

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JAN 28 2000

NOVASCOTIAUTILITY  
ANDREVIEWBOARD

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**Final Written Argument On Behalf Of  
The Cape Breton Regional Municipality**

**January 28, 2000**

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NOVA SCOTIA UTILITY  
AND REVIEW BOARD

## Introduction

The Cape Breton Regional Municipality would not ordinarily become involved in an issue of this nature; however, the application before the Board is of significance far beyond Nova Scotia Power and a select group of its large industrial and commercial customers. The issue goes to the heart of efficiency in the use of Nova Scotia's natural resources, fairness in treatment of energy customers and regions within Nova Scotia, and the ability of industries and regions to compete in an increasingly open economic environment.

Nova Scotia Power Incorporated (NSPI) has submitted an application to the Nova Scotia Utility and Review Board seeking approval for a generic load retention rate to be offered to large industrial and commercial customers in circumstances where it can be shown that the customer's option to leave NSPI is technically and economically feasible and that retaining the customer through a load retention rate is in the best interest of all other customers.

While NSPI's system is province-wide and serves approximately 434,000 customers, this particular rate, if approved, would be offered only to those customers satisfying certain conditions. Specifically, the rate as proposed by NSPI would be available to customers considering an alternate supply of electricity of at least 2000 KVA or 1800 KW. Based upon NSPI's current

information there are 61 customers which satisfy this power-use threshold (Hearing Transcript, January 12, 2000, p. 76).

These 61 potential applicants for the proposed load retention rate would only be considered legitimate candidates for the rate if they could prove to NSPI that they had a technical and feasible alternate supply of power. The ability to access an alternate supply of power is largely based upon two factors: access to natural gas and access to the financial resources to construct a gas-fired, combined-cycle generation (co-generation) facility. At this time, NSPI suggests that there would be four firms in Nova Scotia that would likely satisfy this criteria (Hearing Transcript, January 12, 2000, pp. 76 - 78).

NSPI proposes that before a load retention rate would be offered to one of these existing customers, NSPI would have to be able to prove to the Board that retaining the customer's load, at the price offered through the load retention rate, is better for other electric customers than losing the respective customer load.

Once the relevant customer and NSPI satisfy these conditions, NSPI proposes that all relevant information would be presented in confidence to the NSUARB for approval of a specific rate. The actual rate, therefore, would be the result of individual negotiation and, in all likelihood, would vary from customer to customer.

With respect to the impact of some large industrial customers leaving the NSPI system, Mr. Huskilson on behalf of NSPI suggested that the four potential customers who could leave the system would represent approximately 10% of the entire system load, although "discreet forecasts" had not been made (Hearing Transcript, January 12, 2000, p. 78). This potential reduction in load would represent approximately forty-eight million dollars in revenue; however, Mr. Huskilson admitted that considering the estimated reduced expenditures of approximately twenty-nine million dollars that would accrue as a result of a reduced load, the net cost of losing 10% of the current load would be approximately nineteen million dollars (Hearing Transcript, January 12, 2000, pp. 82-83).

The goal of NSPI would be to maintain these customers on the NSPI system. The mechanism that is proposed as the best means of accomplishing this goal is the load retention rate. To the extent that these customers were retained and, thereby, made some contribution to the fixed costs of the NSPI system, the contention is that all NSPI customers would be better off than if the customers with the alternate supply option were to leave the system. NSPI proposes that because this is not a business decision of NSPI, the cost of offering the load retention rate should be distributed among the balance of the NSPI customers.

While NSPI's stated goal of providing competitive electricity rates is consistent with the public interest and with the relevant legislation with which NSPI must

comply, the Cape Breton Regional Municipality is of the opinion that the method of achieving this goal is discriminatory, predatory, anticompetitive and, therefore, inconsistent with both the public interest and the relevant legislation designed to protect the public interest.

### **The Necessity of a Load Retention Rate**

While it is clear in the evidence presented by both NSPI and Stora Enso that some large industrial customers may well leave the NSPI system because of the self-generation opportunities which are now emerging due to the availability of natural gas in some regions, it is less clear that either a remedy for this situation is required or that the application of a load retention rate is the best remedy for this "problem".

With respect to the potential for self-generation by large commercial or industrial entities, this is really the first evidence of competition in the electrical sector within Nova Scotia. By comparison, based upon the evidence presented by Mr. Kumar, Dr. Rosenberg and Mr. Hussey, deregulation or unbundling of electrical generation, transmission, and distribution is occurring in many other jurisdictions in North America and in Europe. In fact, part of the competitive pressure upon Stora Enso is the result of deregulation in Europe which "...has made a tremendous change to energy prices there (Hearing Transcript, Response By Mr. Hussey, January 13, 2000, p. 56)."

The problem which NSPI has defined, the possibility that customers will start to leave the NSPI system, is essentially the initial stage in the development of a competitive electrical and energy market in Nova Scotia. Competition, however, is not a problem. In most sectors it is encouraged.

On the other hand, the problem which most if not all electrical customers in Nova Scotia would define, which is by definition also part of the public interest in this matter, is lack of access to the lowest possible price for electrical energy. This latter problem cannot be addressed unless and until NSPI and other entities are encouraged to find competitive alternatives to the current methods of producing, transmitting and distributing electricity to all energy customers within the province. In other words, the latter issue can only be addressed when NSPI no longer views competition as a problem to be remedied.

Mr. Huskilson testified on behalf of NSPI that no new generation capacity would be required until the latter part of this decade (Hearing Transcript, January 12, 2000, p. 40). This suggests that in the current regulated environment the best that Nova Scotia electricity consumers can expect in the foreseeable future are stable prices, not reduced prices. In fact, this objective is stated explicitly in the direct evidence of Mr. Huskilson. He states: "NSPI has considered what its strategy should be in light of these developments, and in light of our objective of

keeping rates stable for our customers (Exhibit P1, Direct Evidence of Christopher Huskison, December 6, 1999 p. 2)".

If energy costs are a significant component of a competitive environment, stable prices may not be sufficient to enable all Nova Scotia firms to compete internationally, particularly when deregulation is providing lower energy prices in other regions. For all interests in the province, this is a particularly important issue.

In this application, the problem defined by NSPI is one which reflects concern about the lack of protection in an emerging competitive market. This is a natural concern which has been experienced as a growing number of sectors are exposed to increasing competition. Certainly this concern has been well known in Cape Breton as the Federal Government has acted in recent months to withdraw from the coal mining business by privatizing the assets of the Cape Breton Development Corporation.

In the public interest, the fear of competition cannot be allowed to override the benefits which would accrue to the entire economy from a more competitive energy market. NSPI's objective in a competitive market would be to provide the lowest priced energy and the best quality of service to all customers. The stated objective of "stable prices" is significantly different. The question becomes what is the difference between NSPI's price and the best possible price for electricity in

Nova Scotia. If the marketplace is not opened to significant competition, this question cannot be answered and the vast majority of Nova Scotians, both individuals and firms, will remain captive to very high electricity rates.

Assuming there was a problem with the emerging competition, the public interest would demand that the full range of alternatives be examined before settling on the use of a load retention rate as the preferred remedy.

In this case, there has been virtually no discussion of the full range of alternatives available. On behalf of NSPI, Mr. Huskison states: "In the absence of this rate, Nova Scotia Power has no means of competing with the alternate energy sources that might exist for our customers and the opportunities that our customers might have... (Hearing Transcript, January 12, 2000, p. 159)."

Clearly, this is not accurate. NSPI has considerable flexibility. It is a profitable enterprise; it has leeway in the price paid for the primary energy sources used to produce electricity; it has flexibility in attracting new customer load within Nova Scotia; and it has flexibility in terms of seeking external markets for a greater share of power produced. As Mr. Huskison admits, "If a customer of that magnitude were lost, then yes, the utility would look to Maritime markets and other possibilities to offset some of those losses (Hearing Transcript, January 12, 2000, p. 83)."

In addition, the unregulated parent company of NSPI, Nova Scotia Power Holdings Incorporated, owns a 12.5% share in the Maritimes and Northeast Pipeline Project. This ownership suggests that the parent company will enjoy the benefits of increased usage of natural gas in Nova Scotia. Therefore, while NSPI may be threatened because of its lack of diversity, the parent company is well positioned to reap the benefits of a more competitive environment. Nova Scotia Power Holdings Incorporated is a diversified company with interests in many areas of the energy sector. To the extent that NSPI may experience some loss of electrical load during the development of a more competitive environment, some (perhaps most) of this loss will provide benefits to its parent company. Therefore, this is another form of flexibility which NSPI and its unregulated parent company have that other electrical utilities in other jurisdictions do not enjoy.

### **Precedents and Unjust Discrimination**

To the extent that competition is not per se a problem and there is little proof that NSPI lacks the flexibility to meet competition by providing more competitive electricity rates for all customers, NSPI must rely heavily upon the precedents set in other jurisdictions. In other words, if other jurisdictions have allowed the application of load retention rates, then surely these rates are acceptable remedies for a significant problem.

NSPI's position has been that the matter of deregulation is something for the Government of Nova Scotia and the Board to decide. Until that decision is taken, NSPI requires the flexibility offered by a load retention rate to meet the competition which is now possible because of natural gas. As Mr. Kumar's evidence shows, however, most jurisdictions in the United States which have employed some form of load retention rate have now made the transition to a competitive market and, as a result, load retention rates become unnecessary.

Mr. Kumar states: "A detailed analysis of the rates offered by utilities listed in Table A of Mr. Whalen's Direct Evidence indicates that the load retention rates similar to the one proposed by NSPI are not prevalent and will be phased out with the implementation of retail choice or retail wheeling (Direct Evidence of Jatinder Kumar, Exhibit P14, p. 12)." Presumably these rates are being phased out because they are not consistent with a competitive environment. In other words, they produce an allocation of resources which is less efficient than the allocation that would occur in a competitive market. With this knowledge, it is not clear why Nova Scotia would adopt a load retention rate.

In other jurisdictions, including the Province of Quebec in Canada, load retention rates are provided to enable a utility to retain significant industrial or commercial loads threatened by economic hardship. This is not the case in the current application. Thus, NSPI has made a distinction between the types of large load it

wants to retain. For the utility, why a large load is leaving the system is irrelevant. NSPI's response in a competitive market would be to provide the lowest possible prices to retain all customers. In many ways, for example, it should be as important to retain a company like SYSCO as it is to retain Stora Enso's load.

Clearly, through this current application, NSPI is more concerned about losing load to large industrial and commercial customers who have the ability to generate their own electricity by using natural gas in a combined cycle generating facility. This suggests that NSPI is concerned about competition and not simply about losing load. Mr. Whalen, on behalf of NSPI, confirms this when he states: "What's required is somehow to be able to meet the competition, and certainly price is the biggest part of that. This is a direct way to be able to meet the price. It all comes down to, one way or the other, being a price negotiation (Hearing Transcript, January 12, 2000, p. 162)."

Therefore, 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. Huskison defends the application by stating: "The rate is not discriminatory in itself. It is fair in that it is offered to all customers who find themselves in the

same circumstance, and certainly from the remaining customers' perspective, to retain this customer is - causes all customers to be better off (Hearing Transcript, January 12, 2000, p. 138)."

Unfortunately, the only circumstance which would distinguish firms receiving the load retention rate and the other rates offered by NSPI is the privilege of having ready access to natural gas. Two paper mills in Nova Scotia, producing the same type of product, with the same electricity requirement, receiving the same type of service from NSPI would potentially receive significantly different electricity rates as a result of the introduction of a load retention rate simply because one mill would be close to the main natural gas pipeline while the other mill was not.

As in all cases of discrimination, this measure is justified as being advantageous to those who are not eligible. A far worse fate awaits them if this measure is not adopted. This is unacceptable.

Section 67 of the Public Utilities Act states:

"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."

The key is that similar circumstances and conditions are defined "in respect of service of the same description." Similar circumstances are not defined by what a

customer might look like or what they might be considering or whether they might become a competitor at some future date or where they might live in Nova Scotia.

Nova Scotia Power's rates must be based upon the type of service provided. If access to natural gas meant that a different type of service could be provided to customers, then a differential rate would be consistent with the Public Utilities Act. With respect to the current application, however, it contravenes Section 67 of the Public Utilities Act because it allows discrimination on the basis of factors which have no relation to NSPI's current cost of service.

### **Predatory Pricing**

NSPI's actions are designed to forestall the entry of new generation capacity. Although the large industrial customers would not be competing with NSPI for electricity customers, by virtue of the fact that they would be supplying their own power needs, they represent a competitive threat. In order to address this competitive threat, NSPI is hoping to have the flexibility to offer electricity rates which would make "... the customer in question indifferent with respect to alternate supply versus continuing to purchase the electric power and energy from NSPI (Exhibit P1, Availability Conditions, Item 1)."

Economic theory maintains that predatory pricing occurs when firms reduce price, sometimes below cost, in order to drive out a rival in a specific geographic area. "The reductions in price by the large firm are engaged in solely for the purpose of driving competitors out of business; they are not reflections of economies of scale or cost differences (Clarkson, K.W. and Miller, R.L., "Industrial Organization: Theory, Evidence And Public Policy," New York: McGraw-Hill Book Company, 1982, p.255)." Predatory pricing can occur in various circumstances, including when entry costs are high and existing firms want to discourage entry (Ibid., p. 256). This is precisely the circumstance in this case.

If the load retention rate application is approved, predatory pricing is being used to enable NSPI to discriminate against the vast majority of its customers in the attempt to discourage entry of a few large industrial firms into the electrical energy business in Nova Scotia. While the four firms in question would benefit, this proposed rate would negatively impact the relative competitiveness of firms which cannot access this special rate and, to the extent that this action delays a competitive energy market, it negatively impacts all captive customers of NSPI who must pay higher rates for electricity. The current application, therefore, contravenes Section 50 (1) of the Canadian Competition Act. Section 50 (1) states:

50. (1) Everyone engaged in a business who

(a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity,

(b) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in that part of Canada, or designed to have that effect, or

(c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."

## **Confidentiality**

For the Cape Breton Regional Municipality the issue of confidentiality is very much secondary to the other issues discussed heretofore. Nevertheless, the importance of the request for confidentiality made by NSPI in this current application is that it provides a veil that will be used to disguise the true nature and extent of the discrimination.

Confidential terms and conditions represent the only way in which this form of price discrimination can be accepted by other industries and by the balance of the 434,000 customers of NSPI. If these customers are unaware of the terms and

conditions of the agreement, it is difficult for them to object. Furthermore, if the Board is unaware of the concerns of other customers because the other customers are unaware of the details, it is difficult for the Board to reflect the true public interest in this matter.

## **Conclusion**

Sometimes the reasons why something is being done actually obscures what is being done.

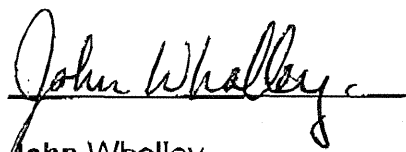
It is not wrong for Nova Scotia Power Incorporated to want to retain customers. It is wrong, however, to create a privileged class of customers, based upon access to natural gas (similar circumstances), even when the service provided to these customers by NSPI will not be altered. It is wrong to retain some customers by discriminating against other customers.

Undermining competition is not the appropriate response to a situation in which energy customers are experiencing the emergence of new opportunities. NSPI has sufficient flexibility to offer all customers competitive power rates. It does not need to erect another artificial barrier or another protective shield.

It is the opinion of the Cape Breton Regional Municipality that this measure is inconsistent with the public interest and inconsistent with the legislation

governing the operations of Nova Scotia Power Incorporated. Therefore, the application by Nova Scotia Power Incorporated for a generic load retention rate should not be approved.

Respectfully submitted,

  
John Whalley

On Behalf Of The Cape Breton Regional Municipality

January 28, 2000