
ORIGINAL

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

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

DATED: January 10, 2000

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NOVA SCOTIA UTILITY
AND REVIEW BOARD

LOAD RETENTION RATE PRE-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.

It is NSPI's position that the proposed Load Retention Rate complies with the *Public Utilities Act*, RSNS, 1989, c. 380, as amended.

NSPI wishes to provide a pre-hearing brief in which it will outline:

1. a brief review of the design of and circumstances surrounding the rate;
2. a discussion of the legal basis for adoption of such a rate having reference to the issue of discrimination.

THE RATE

The proposed terms and conditions of the Load Retention Rate are set out in the Application filed December 6, 1999 and discussed further in the evidence of Christopher Huskilson and Melvin Whalen filed with the Application.

As discussed in the evidence of Christopher Huskilson, 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.

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.

A detailed evaluation procedure is proposed and set out as Attachment A to the Application to ensure that the viability of the customer alternative is tested and that maximum benefit is achieved for remaining customers by preserving the maximum revenue contribution in the circumstances.

DISCRIMINATION/LEGAL JUSTIFICATION

The Public Utilities Act

Section 67 of the *Public Utilities Act* states as follows:

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.

The issue of discrimination under s.67 of our Act in the context of promotional practices was canvassed in the 1996 hearing leading up to the approval of the Industrial Expansion Rate. This brief will more narrowly focus on issues surrounding the practice of load retention rates although the principles, in our submission, are the same. It is useful to first review the relevant basic principles.

Basic Principles

The first thing the Board must determine is whether or not the classification of potential load retention customers as eligible for a different rate is appropriate. The customer must not be taking service under "substantially similar circumstances and conditions in respect of services of the same description" in relation to other classes of customers. Once it is determined that a separate classification is appropriate, and that therefore a discrimination between a load retention customer and other customers is appropriate, the Board must then be satisfied that the proposed rate, in this case the customer price and the mechanism used to determine the price, is not unjust, unreasonable, insufficient or unjustly discriminatory.

Public utility boards consider a number of factors in determining the appropriateness of a classification, including quantity of electricity used, the nature of the use, the time of the use, pattern of use, differences in conditions of service and cost of service and the economic facts and circumstances which affect rates and services. Differences in rates can justifiably be accounted for by economies of scale and customer costs, and differences in generation, transmission and distribution costs. Since only that discrimination which is unreasonable is not permitted, discrimination based on justified differences in the cost of service or which is otherwise within the zone of reasonableness is permitted. Before a rate can be declared unduly preferential and therefore unlawful, there must be not only an advantage to one class but a resulting injury to another class. [*Jager v. Alaska* (1975), 537 P (2d) 1100 (Supreme Court of Alaska); and *People's Natural Gas Company v. Pennsylvania Public Utility Commission* (1979), 409 A. (2d) 446 (Commonwealth Court of Pennsylvania)].

In *Oregon Public Utility Commissioners: Re Incentive Rates for Electric Service* (1987), 82 PUR (4th) 624, the Commissioner, absent any specific rate application, discussed and outlined classification criteria and legal standards to be considered in setting discounted rates.

Under Oregon statutes the classification scheme could not result in unjust discrimination.

The proceedings before the Commission were brought about by energy surpluses, poor economic conditions in the region, federal regulatory changes that increased competition in the energy industry and improved customer ability to switch fuels which expanded the alternatives available to many users and improved the attractiveness of the alternatives. As a result, utilities had trouble making sales to some customers at full tariff rates.

The Commissioner's conclusions on permissible classification criteria were as follows:

- (a) Classes of customers must be based on reasonable considerations, so that customers receiving "like and contemporaneous service under substantially similar circumstances" are placed in the same class;
- (b) Classes of customers must be open-ended, so that any customer meeting the criteria for the class qualifies for the lower rate;
- (c) Special rates can be offered only for the purpose of providing just and reasonable rates to remaining customers.

New Brunswick Power was awarded an incentive rate by the New Brunswick Board of Commissioners of the Public Utilities in *Re New Brunswick Power Corporation Incentive Rate Application*, New Brunswick Board of Commissioners of Public Utilities, (May 28, 1993). That rate provides a 50 percent discount on the demand charge component of any new or additional loads of 2000 KW or greater. In awarding that rate, the Board stated at pages 2-4:

The proposed rate would recover all of the incremental costs of producing the additional electrical energy. It would also provide a contribution to help pay for the excess generating capacity present

on NB Power's system. This would mean that less revenue would be required from other sources. Therefore, the incentive rate would be of benefit to all of NB Power's customers.

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. ...

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 Texas Court of Appeals discussed the subject of discrimination as follows:

'The antidiscriminatory principle is not only statutory, it is a common law principle as well... But the principle includes a permissible range of unequal treatment which, while literally discriminatory, is not unlawfully so. The dividing line is generally that drawn by the rule of reasonableness, for mere inequality is not itself unlawful discrimination. That is to say, the different treatment practised by the public utility must be founded upon a substantial and reasonable ground of distinction between the favoured and disfavoured classes or individuals.' (*Amtel Communications, Inc et al v. Texas Public Utility Commission* (1985), 66 PUR 4th 140, at 146.)

American regulatory boards have dealt with many applications for the approval of incentive rates similar to that proposed in this application. They have generally approved incentive rates. The reasons for approval have varied from decision to decision but a common reason is that the rates will be of benefit to all of the customers of the utility.

Load Retention Rates

In a report of the Illinois Commerce Commission entitled "**Survey of State Economic Development Utility Rates and Policies**", dated July, 1994, the Commission found that the use of incentive rates, including Load Retention Rates, was wide-spread in the United States.

Utilities in 41 of the 49 states responding to the survey offered load retention rates. This survey is attached as part of the response to UARB-IR-20. Table 4 (p. 14) of the survey provides a summary of the results.

An earlier 1989 survey of investor-owned utilities by the **Edison Electric Institute** also confirmed that such rates are widely available. See also the more recent information gathered by NSPI which was filed as part of the evidence submitted by Melvin Whalen.

There are a number of other jurisdictions with express statutory provisions related to the issue of discrimination in rate making. We propose to review several cases having analysis and discussion in which load retention rates were approved under similar statutory language as that found in S. 67 of the *Act*.

In *Re Gulf States Utilities Company* (1987), 92 PUR 4th 250 (Texas) the Texas Public Utility Commission approved an experimental tariff rider offering rate discounts to large-volume electric customers with capacity of cogeneration facilities. Texas statute required that rates not be unreasonably preferential, prejudicial or discriminatory.

The scheduled rates were not cost based rates. Rather, they were based upon the economics of installing a gas turbine driven electric generator with a heat recovery steam generator and in some instances, the further installation of an extraction turbine. The rates would vary among customers because each customer would have different levels of electric demand and different ratios of electric to steam demand, which would necessitate installation of different sizes and types of cogeneration equipment with different cost characteristics, were each customer actually to opt to cogenerate. The rates were designed to account for this as well as other cost variables.

In approving the proposal, the Commission stated as follows (p. 257-258):

The proposed rider clearly discriminates among industrial customers, given that a preferential rate is provided to those customers which meet the minimum thermal load requirement specified in the rider. The question is whether the discrimination among LPS and LIS customers inherent in the SUS rider falls within a permissible range of unequal treatment. Whether or not the discrimination falls within that range hinges upon whether the ability of the targeted customers to utilize cogeneration as an alternative means of meeting their electrical energy requirements constitutes a substantial and reasonable ground of distinction among industrial customers.

In the examiner's opinion, use of cogeneration potential as a basis for distinguishing among LIS and LPS customers is reasonable and works no unreasonable prejudice or disadvantage to LIS or LPS customers. As noted by GSU witness James Thornton, any

economic advantage to customers who qualify for service under schedule SUS does not result because of the proposed tariff, but rather from the cogeneration alternative that is presently available to those customers, regardless of whether Schedule SUS is approved or disapproved. To the extent that the proposed SUS rider is viewed as conferring upon certain industrial customers an economic advantage, it is not an unreasonable advantage since, in the event the incentive rate is not approved, the record reflects that some industrial customers will likely avail themselves of an advantage equivalent to that afforded by Schedule SUS through resort to cogeneration. So long as cogeneration is in fact a viable option for industrial customers taking service under Schedule SUS, and so long as the Schedule SUS rate reasonably approximates the cost of cogenerating electricity, the examiner believes that any preference or advantage conferred by Schedule SUS is justifiable.

The Commission recently addressed the issue of the reasonableness of discrimination inherent in incentive rates in *Re El Paso Electric Co.*, Docket No. 6350, Jan. 31, 1986 (Tex.P.U.C.). In the final Order in that docket, the Commission found that a proposed economic recovery rider (ERR) available only to certain industrial classes 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 elevate this possibility of serious load loss; and (4) that approval of the ERR would increase the probability that needed industrial load will continue operating on the utility's system. While the Commission's holding pertained to discrimination among classes, it appears fully analogous to discrimination among customers within the same class as well, especially where there exists a relevant distinguishing characteristic among class members.

In *Re Iowa Public Service Company* (1988), 92 PUR 4th 530 (Iowa), the Iowa Utilities Board granted an electric rate discount to a customer engaged in farm equipment manufacturing in order to have the customer forego the installation of cogeneration or self generation facilities. Under Iowa code, the applicant utility had to demonstrate that the proposed rate did not grant an unreasonable preference or subject anyone to an unreasonable prejudice or disadvantage. Iowa code stated in part:

No public utility subject to rate regulation shall directly or indirectly charge a greater or less compensation for its services than that prescribed in its tariffs, and no such public utility shall make or grant any unreasonable preferences or advantages as to rates or services to any person or subject any person to any unreasonable prejudice or disadvantage.

In approving the proposed rate, the Board stated as follows (p. 532):

The proposed rate does not grant an unreasonable preference or advantage to Deere. The record is clear that the proposed rate matches Deere's self-generation alternative. The proposed rate does not offer Deere anything in excess of the cost to Deere to self-generate. Any advantage to Deere is not unreasonable.

Whether the proposed rate unreasonably disadvantages other IPS customers is another question. The cost-of-service study offered as evidence in this proceeding reveals there is some subsidization occurring with the current rate and the proposed rate. The critical consideration, however, is the certain adverse impact on IPS's other customers if Deere reduces its reliance on the IPS system. Deere has demonstrated that it has the ability to self-generate and will self-generate if the proposed rate is not approved. If Deere reduces its electric purchases from IPS, there will be a projected reduced recovery of fixed costs from \$250,000 to \$400,000. Pursuant to previous Board rulings, this amount of lost revenue would, in turn, be recouped from IPS's other customers. If the proposed rate does create a disadvantage to IPS's other customers, it is not an unreasonable disadvantage since they will not have to pay this additional revenue.

In *Re Northern Indiana Public Service Company* (1988), 89 PUR 4th 385 (Indiana), the Indiana Utility Regulatory Commission approved a rider that would permit an electric utility to sell power at negotiated discount rates to certain customers that agreed to defer on-site generation.

Of particular significance is the fact that statutory provisions of the Indiana Code with respect to unjust discrimination are markedly similar to Sections 67 and 87 of the *Nova Scotia Public Utilities Act*.

It was argued that the rider unlawfully discriminated between those customers having high thermal load factors and those who did not. In addressing this issue, the Commission stated as follows (p.393-395):

The classic inquiry as to whether a circumstance constitutes discrimination involves a consideration of whether the act or practice under scrutiny would proposit (sic) to treat those similarly situated in a similar fashion. If those similarly situated are treated in a dissimilar fashion, the act or practice may then be discriminatory. This consideration is often before the Commission in the area of utility ratemaking and rate design. Certainly the physical and technological capabilities of a customer for electricity are taken into account when determining rate classifications. The energy user whose business and facilities require a 10 MW load with a high load factor is treated differently and will pay a different amount per Kwh than that customer whose requirements amount to only 10,000 Kwh per month. Further, customers who have the ability to utilize off-peak and interruptible service are treated differently and pay a different amount for their electricity from those customers whose physical requirements and technology do not allow for such load characteristics. We do not consider these differentiations to be discriminatory in nature because these rate classifications are open to all such similarly situated customers. The inquiry at hand as to whether the proposed Rate GA constitutes discriminatory treatment of customers without thermal load characteristics is similar in nature to the type of inquiries outlined above. NIPSCO has defined the requirements for its Rate GA to make that rate available only to those customers whose physical and technological characteristics are such that their existing thermal load would make economically feasible self-generation. Rate GA would be available to any such customers similarly situated.

The Commission specifically noted that the proposed rider was negotiable so that customers qualifying would not necessarily each receive the same rate. It was argued that such discrimination between customers within the proposed class rendered the rate unduly discriminatory. In finding against this argument, the Commission stated (p.394-395):

On the other hand, the economies of each individual cogeneration or other on-site generation project will dictate the market power which each respective industrial customer may bring to bear in negotiations. A set rate would thus attract certain of NIPSCO's industrial customers, while others would leave the system. By creating a margin within which a rate may be negotiated, more customers would stay on the system, while providing NIPSCO with an opportunity to reduce the loss to its shareholders to the extent practicable given the relative economies of the proposed

cogeneration or other on-site generation system. 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 in a manner consistent with the provisions of I.C. 8-1-2-24, 25 and 46. We therefore find that the proposed Rider GA is not unreasonably discriminatory as between members of the proposed customer class.

In *Re Arkansas Power and Light Company* (1988), 96 PUR 4th 429 (Arkansas), the Arkansas Public Service Commission authorized an electric utility to reduce its rates for service to a large-load industrial customer in return for the customer's grant of an option to install utility-owned cogeneration facilities and an agreement to defer the operation of on-site electric generation.

The Commission found that the discount electric rates offered were not unduly discriminatory where the rates would produce a savings to the customer of less than the amount it could have saved by implementing self-generation and maintaining a contribution to the fixed costs of utility.

A review of these cases seems to establish that incentive rates, such as the proposed Load Retention Rate, will not be unreasonable or unjustly discriminatory if three tests are satisfied.

1. Any difference in rates between various customers of the public utility is predicated upon a difference in fact so that there will be no unjust discrimination in rates between customers similarly situated or generally referred to as being in the same class. The distinction between customers with different load volume and those with an economic alternate supply is found to be a difference, in fact, justifying the creation of different classes for the purpose of offering an incentive.
2. The incentive rate benefits other customers of the utility in addition to being desirable for the purpose of retaining business.

3. The rate is at least equal to incremental costs of generation so as not to result in an undue burden on remaining classes.

Discussion

There are two main criteria considered in the proposed load retention classification:

1. *Customer Alternative* - the customer must have the technical and economic capability to switch to an alternate supply; and
2. *Volume of Use* - the proposed switch to alternative supply must be in relation to at least 2,000 kva or 1,800 kw.

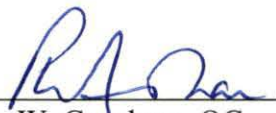
The purpose of the rate is to retain, for the benefit of all customers, those customers whose load would otherwise leave the system. The rate classification is predicated upon the customers verifiable ability to leave the NSPI system for an alternate supply. Any customer meeting the criteria would qualify for a discounted rate to be determined on a case by case basis depending on the particular circumstances of the customer.

The procedure to determine the customer specific rate is designed to achieve a price only low enough to make the customer indifferent to switching to an alternate supply of energy. By necessity, given the technical and economic differences inherent to each customer, the price required to meet this objective will likely be different for each customer. However, it is important to keep in mind that 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. The rate will only be granted in circumstances where all customers are better off and the rate price is equal to or greater than an incremental cost. This is a reasonable approach as it allows maximum benefit to be achieved for all customers in the face of verifiable risk of loss of significant load to the system.

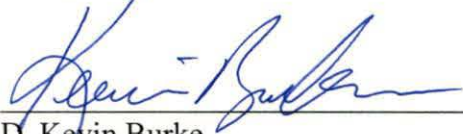
CONCLUSION

The purpose of the Load Retention Rate is to retain customer load that would otherwise leave the system and detrimentally affect remaining customers. The rate provides a benefit to all customers remaining on the system. It is not unjustly discriminatory and complies with the provisions of s. 67 of the *Public Utilities Act*. It is our submission that the Load Retention Rate should be approved.

DATED this 10th day of January, 2000.



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