



Nova Scotia Utility and Review Board

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July 21, 2015

To Interested Parties

M06733 - EfficiencyOne -- Application for Approval of a Supply Agreement for Electricity Efficiency and Conservation Activities between EfficiencyOne and Nova Scotia Power Inc., the establishment of a final agreement between the parties and approval of a 2016-2018 Demand Side Management ("DSM") Plan (E-ENSC-R-15)

In its submission dated July 6, 2015, NSPI attached a Memorandum prepared by David Pickles, of ICF International, commenting on the contents of Undertaking U-4 filed by E1 after the conclusion of the hearing. Counsel for E1 objected to the filing of this Memorandum as "direct evidence with respect to the manner in which incentive levels were established by E1".

Counsel indicated that E1 objected to certain of the statements Mr. Pickles made but did not have the opportunity to challenge the veracity of the comments through cross-examination of Mr. Pickles. E1 cited two decisions of the UARB (2013 NSUARB 163 and 2012 NSUARB 36). Both include circumstances where the Board declined to allow new evidence in closing submissions.

Counsel for NSPI took the position the Memorandum is admissible for three reasons:

1. E1 failed to provide the rationale and supporting analysis regarding incentive levels in response to IRs. This failure prejudiced NS Power's ability to lead evidence concerning the appropriateness of E1's incentives. E1 cannot now complain that it is prejudiced by commentary on information that should have been provided months ago in response to an IR.
2. In its closing submission, E1 offers new commentary based on U-4 document production – E1 maintains that its incentive levels are appropriate. E1 cannot criticize NS Power for offering comment on U-4 document production while arguing that such documentation is determinative. The documentation has been filed. E1 offered comment. It is appropriate for NS Power to be given the same right of comment.
3. Mr. Pickles' memorandum compares the evidence E1 adduced (or failed to adduce) in the course of the application with the documentation submitted in response to U-4. The foundation for Mr. Pickles' memorandum is the evidence offered by E1 in the course of the application. The memorandum does not include new expert evidence.

Finding

In the Board's view, what NSPI did was highly unusual and could easily lead to prolongation of the hearing process and delayed decisions if it were to become accepted practice. Having said that, for the following reasons, the Board is going to permit the Memorandum to remain as part of the record. The Board's finding is based on unique facts of this case and should not serve as a precedent in future matters.

The Board observes, as parties are aware, that there is a problem with the undertaking process in that undertakings often are filed after the witness is off the stand and without reconvening the hearing, therefore not offering an opportunity to cross-examine. For this reason, in certain hearings, the Board has limited what it considered to be abuse of undertakings and tries to have the undertakings filed before the conclusion of the evidentiary portion of the hearing. That did not happen here.

The Board disagrees with NSPI that the Memorandum does not constitute new expert evidence; however, the Board observes that the Memorandum is largely argument that, in part, was incorporated within NSPI's brief. Were that all that happened here the Board suspects there may have been no objection.

While NSPI had ample time to follow up the response to IR-12(g)(iv) seeking a more responsive answer, the Board is sympathetic to the argument that the question was asked and the answer was not responsive.

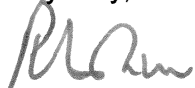
With respect to the cases cited by E1, the Board agrees with NSPI that they can be distinguished because they were not dealing with an undertaking situation. Nevertheless, the undertaking was filed with the consent of the Board and without objection by any party.

The Board also notes that because of the evidence of the Industrial Group, E1 had notice that the rigor with which it determines incentives was an issue in the proceeding yet chose not to deal with it in their reply evidence in a manner similar to the response to Undertaking U-4. Perhaps as a result of Board questioning during the hearing the issue of incentives took on increased significance in the view of the parties.

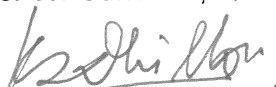
Finally, the Board notes that E1 was able to respond to the Memorandum in its reply argument.

For all of the foregoing reasons the Board will permit the Memorandum to be included in NSPI's submission (while discouraging the practice) on the basis that it is confined to the limited facts of this case and shall not serve as a precedent for similar attempts to introduce expert evidence this way in future proceedings.

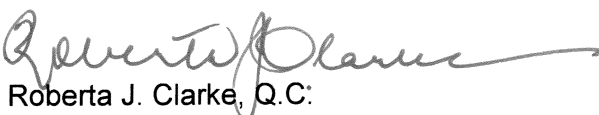
Yours very truly,



Peter W. Gurnham, Q.C.



Kulvinder S. Dhillon, P.Eng.



Roberta J. Clarke, Q.C.

c. Parties to M06733