

July 14, 2015

VIA EMAIL

Doreen Friis
Regulatory Affairs Officer/Clerk
Nova Scotia Utility and Review Board
3rd Floor, Summit Place
1601 Lower Water Street
Halifax, Nova Scotia B3J 3P6

Dear Ms. Friis:

Re: M06733 – Nova Scotia Power Incorporated – Reply Submissions

This correspondence is further to your letter of July 13, 2015 and Mr. Gogan's letter of July 9, 2015, objecting to the inclusion of a memorandum prepared by ICF International with NS Power's final submission. NS Power takes issue with the content of Mr. Gogan's correspondence and maintains that E1's objection is without merit 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.

Colin J. Clarke, Q.C. | Partner

Direct 902 491 4215 Main 902 421 6262 Fax 902 421 3130 Email cclarke@coxandpalmer.com

Purdy's Wharf Tower I 1100-1959 Upper Water Street Halifax NS

Correspondence PO Box 2380 Central Halifax NS B3J 3E5

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Mr. Pickles' memorandum assessing U-4 is appropriate and should be considered by the Board.

1. E1 failed to provide the rationale and supporting analysis regarding incentive levels when requested and it cannot now complain that it is prejudiced

NS Power asked E1 for the rationale and supporting analysis regarding incentive levels in IR-12(g)(iv):

12(g) Please identify/provide for each program:

[...]

(iv) The incentive to be paid for that measure, along with the rationale, and supporting analysis with respect to the chosen incentive level;

E1 replied:

Please refer to EfficiencyOne's response to NSPI IR-10 Attachment 1, filed electronically, for measure-level incentives modelled in the EL-RAM, which are provided in column BK. The modelled incentive dollars provided reflect actual 2014 incentives; actual incentives may vary each year as new research and evaluation results are completed.

NS Power assumed E1's reply was responsive to the IR. As E1 is now relying on the contents of U-4 to justify its incentive levels, it is clear the E1's initial reply to IR-12(g)(iv) was not responsive to the request. Attachment 1 provides no rational or supporting analysis regarding the chosen incentive level. It states the dollar amount of the incentive.

Section 16(2)(a) of the *Board Regulatory Rules* requires a response to an information request to "provide a full and adequate response to each question". The main purpose of IRs is to assist a party asking questions to make its case before the Board: *Affordable Energy Coalition*, 2007 NSUARB 133 at paragraph 15.

E1 cannot now complain that NS Power is offside by filing Mr. Pickles' memorandum with its closing submission. Had E1 fully and adequately responded to IR-12(g)(iv), the undertaking would not have been necessary and the documentation would have been adduced well in advance of the hearing. NS Power could have responded to E1's documentation in its evidence. NS Power will be prejudiced if it is not permitted to respond and provide commentary on U-4. Any prejudice to E1 is entirely of its own making.

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The cases cited by E1 in its correspondence of July 9, 2015 are distinguishable from the present situation. Neither case concerned submissions in response to answers to undertakings provided after the oral hearing. Neither case concerned a party that provided unresponsive answers to IRs.

Wolfson, 2008 NSUARB 9 is instructive in the present matter. The Board described its jurisdiction to direct its procedure. At paragraph 54 the Board considered the procedure concerning undertakings:

If the person has not pre-filed, or does not have the relevant documents or information with them at the hearing, undertakings to have them filed after the hearing may be requested. The other parties are given an opportunity to respond to the undertakings. If these undertakings raise information which requires further examination of a witness, the Board may order the hearing to be reconvened.

[Emphasis added]

Although this statement summarized the process in planning matters, the same procedure is appropriate in the present matter. A party should be given an opportunity to respond to another party's undertakings.

Not to permit NS Power to respond to U-4 is prejudicial, especially when the undertaking concerns information previously requested in an IR.

2. E1 offers commentary based on U-4; Mr. Pickles should be permitted to offer commentary as well

In its closing submission, E1 argues that the evidence concerning the appropriateness of its incentive levels is uncontradicted (pages 53 to 55). **E1 relies on new commentary based on its U-4 document production (pages 53 to 55) – provided after the oral hearing – and then asks the Board to disallow any contrary commentary.**

By offering comment based on U-4 document production in its closing submission, E1 is doing exactly what it criticizes NS Power for doing. The document production in response to U-4 has been submitted. E1 offers new and additional commentary based on these documents (pages 53 to 55). It is entirely fair and appropriate for NS Power to comment on these documents.

3. Mr. Pickles' memorandum is not new evidence

In his memorandum, Mr. Pickles sets out his review of U-4 and states whether the documentation provided supports E1's position that its incentive levels are appropriate. Mr. Pickles' comments on the documentation provided in response to U-4 and the evidence

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provided earlier in the application process. He concludes that the evidence provided by E1 does not establish that its incentive levels are set rigorously and comprehensively.

E1 is incorrect in its claim that Mr. Pickles inappropriately makes comparisons to other jurisdictions in his memorandum. The only reference to other jurisdictions is found on page 2 of the memorandum where Mr. Pickles comments on the E1 process and the jurisdictions to which E1 compares itself (high cost states such as Rhode Island, Vermont and Massachusetts). Mr. Pickles does not cite new evidence. He does not shoehorn in a table of statistics that E1 has not had the opportunity to address. He comments on E1's process and the jurisdictions to which E1 compared itself.

Mr. Pickles goes on to comment on the research E1 cited to support its process. He comments on various attachments to U-4 and why they do not provide the information necessary to properly support a timely and rigorous incentive setting process and why they are not evidence that the proposed E1 incentive levels are appropriate.

The memorandum is not new evidence that prejudices E1. It is two and a half pages of commentary on the documentation filed in response to U-4. Mr. Pickles has not set out new facts, figures, or statistics. He has not adduced new evidence. He has appropriately commented on E1's documentation that was provided after the oral hearing.

Furthermore, hearings before the Board need not follow strict rules of practice and procedure required in a court. If Mr. Pickles' memorandum does contain evidence – which NS Power submits it does not – the Board has broad discretion to admit evidence: *Board Regulatory Rules*, section 22(1) and (5). In NS Power's submission, the rules of evidence are more relaxed and the Board is not required to maintain a strict separation between evidence (facts) and argument.

Conclusion

Mr. Pickles' memorandum is appropriate and should be considered by the Board. It is commentary on the documentation E1 provided in response to U-4.

The documentation in question was requested well in advance of the hearing by NS Power in an IR. Although E1 had the documents, its answer to that IR was unresponsive, leading to the undertaking given at the hearing. E1 cannot now complain when NS Power offers comment on the documentation in its closing submission, especially when E1 relies on the very same documentation to offer additional comment in its closing submission.

If, however, the Board determines that Mr. Pickles memorandum should not be considered, then NS Power respectfully submits that E1's response to U-4 (and any related commentary in

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E1's Closing Submission) should also not be considered by the Board on the basis that it would be prejudicial to NS Power for the reasons stated above.

Yours very truly,

A handwritten signature in blue ink, appearing to read 'Colin J. Clarke', is positioned above the printed name.

Colin J. Clarke

CJC/rb

cc: David Landrigan
S. Bruce Outhouse, Q.C., Board Counsel
Interested Parties M06733