



THE BRETON LAW GROUP

James R. Gogan

Direct Dial: (902) 563-5920

E-Mail: jim@bretonlawgroup.com

File No. 41736-18

July 9, 2015

Nova Scotia Utility & Review Board
PO Box 1692, Unit "M"
Halifax, Nova Scotia
B3J 3S3

Attention: Doreen Friis, Regulatory Affairs Officer / Clerk

Dear Ms. Friis:

Re: M06733 --Nova Scotia Power Incorporated – Closing Submissions

EfficiencyOne wishes to raise a procedural matter with this Board relating to the Closing Submissions filed by Nova Scotia Power Incorporated (NS Power). In particular, EfficiencyOne objects to the inclusion of a Memorandum prepared by ICF International (ICF) dated July 6, 2015, authored by Mr. David Pickles, entitled "Review of E1 Undertaking U-4" (the "Memorandum").

It is EfficiencyOne's position that this Memorandum is an attempt to introduce entirely new expert evidence in this proceeding. The potential inclusion of this evidence, at this stage of the proceeding, is highly prejudicial to the position of EfficiencyOne as Applicant.

EfficiencyOne Position

At the conclusion of the Hearing, the Board directed that written closing arguments be filed by those parties wishing to do so on July 8, 2015, with the right of further reply on July 15, 2015. In addition, EfficiencyOne was directed to file various undertakings, including undertaking U-4, which is the subject of this objection. Undertaking 4 directed EfficiencyOne to provide an assessment of its incentive levels. This document was filed with the Board on June 24, 2015, well in advance of the closing submissions date of July 8, 2015.

Through the ICF Memorandum, NS Power now seeks to introduce direct evidence with respect to the manner in which incentive levels were established by EfficiencyOne. The Memorandum goes on to make various assessments of processes, comparisons to other jurisdictions, and ultimately conclusions which are clearly in the nature of evidence as opposed to legal argument. EfficiencyOne submits that it would be highly prejudicial to allow this Memorandum to be considered and included in the record of this Proceeding. EfficiencyOne objects to a number of the statements made by Mr. Pickles in this

Memorandum, and ultimately to the conclusions which he reaches. However, by attempting to introduce evidence in this fashion, EfficiencyOne is estopped from challenging the veracity of the comments through a cross-examination of Mr. Pickles. It should be noted that these statements are fundamentally at odds with the positions advanced by EfficiencyOne.

This Board in *Halifax Regional Municipality Charter and Clarke et al., 2013 NSUARB 163*, considered a similar fact situation where a party sought to introduce new evidence in its closing submissions. In that matter, Board Member Clarke refused to consider this "new evidence" stating the following:

[316] Before the Board proceeds with its analysis of the evidence and its findings, it turns to two issues raised in the various submissions. First, Ms. Tracy objected to Powder Mills attempt to introduce new evidence in its Closing Submission relating to Third Lake, to Google Map information and photographs of the property of one of the Individual Appellants. The Board agrees that this new evidence, which of course cannot be introduced at this stage of the Appeal. Accordingly, the Board has not considered this material. *[emphasis added]*

Similarly, the Board in *Harris Studio Incorporated, 2012 NSUARB 36*, also considered the issue of an attempt to introduce evidence through a closing submission. Commenting on this matter, the Board states:

[20] The Board is mindful that the introduction of new evidence in closing submissions can be deemed to be prejudicial to opposing parties if it has not been subjected to examination in a hearing. The Board in its deliberations has ignored the information contained in the Appellant's closing submission that it considered to be new evidence. *[emphasis added]*

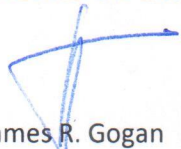
It is the respectful submission of EfficiencyOne that this Board should not accept and consider the Memorandum filed by ICF and attached to the NSPI closing submissions. To do otherwise would permit the introduction of new expert testimony that has not been subject to any measure of cross-examination whatsoever.

Certainly, it is open to NS Power to make any legal arguments it wishes with regard to the contents of Undertaking U-4. However, it is respectfully submitted that it is not appropriate to now attempt to introduce what constitutes rebuttal evidence.

All of which is respectfully submitted.

Yours very truly,

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c.c. Participants
Clients