



## DECISION

IN THE MATTER OF the continuance of a hearing to Review the New Brunswick System Operator's (NBSO) 2009-2010 Revenue Requirement.

July 23, 2009

NEW BRUNSWICK ENERGY AND UTILITIES BOARD

**New Brunswick Energy and Utilities Board**

**IN THE MATTER OF** the continuance of a hearing to Review the New Brunswick System Operator's 2009-2010 Revenue Requirement

**PARTICIPANTS:**

**BOARD**

Chairman	Raymond Gorman, Q.C.
Vice-Chairman	Cyril Johnston
Member	Constance Morrison
Member	Yvon Normandeau

**BOARD COUNSEL**

Ellen Desmond

**APPLICANT**

New Brunswick System Operator	Kevin Roherty
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**INTERVENORS**

Hydro-Quebec	Hélène Cossette
Integrus Energy Services, Inc.	David MacDougall

NB Power Holding Corporation, New Brunswick Power Distribution and Customer Service Corporation, New Brunswick Power Generation Corporation and New Brunswick Power Transmission Corporation	John Furey
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**PUBLIC INTERVENOR**

Daniel Theriault, Q.C.

**INTERESTED PARTIES**

Department of Energy	Stephen Waycott
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## **BACKGROUND**

The New Brunswick System Operator (“NBSO”) filed an application with the New Brunswick Energy and Utilities Board (“the Board”) on January 26, 2009 for approval of its 2009/2010 revenue requirement. The Board held a public hearing on March 16 and 17 and rendered an interim decision on April 24, 2009.

In the decision, the Board found there was insufficient evidence to allow it to make a final decision on two matters. The first matter involved Schedule 1 costs relating to an unfunded pension liability for employees seconded from New Brunswick Power Transmission Corporation (“Transco”). The Board stated:

*“ It is not clear to the Board that the NBSO has, in fact, minimized the costs associated with the unfunded pension liability for the seconded employees. The Board has reviewed the Secondment Agreement. That agreement does not specifically address the issue of whose responsibility it is to pay for unfunded pension liability costs. As a result of the foregoing, the Board will deal with this matter on an interim basis. The Board:*

- Approves, on an interim basis, the amount of \$215,000 for the unfunded liability;*
- Orders the continuation of this hearing in order to fully investigate the NBSO’s responsibility to pay for the costs of the unfunded pension liability for seconded employees and;*
- Will require the NBSO and Transco to attend and to argue the merits of the Secondment Agreement, its ensuing liabilities and the basis for determining how the liability was determined.”*

The second matter related to the proposed price escalation of the cost to supply the NBSO with Schedule 2 Services. On that issue the Board stated:

*“The forecast revenue requirement for Schedule 2 is based on an*

*escalation of the price caps listed in the Attachments for Appendix 1 of the Ancillary Services Contract. Without any escalation of the price caps the amount for 2009-2010 would be \$5,241,000. The NBSO has proposed that the cost for 2009-2010 be adjusted to reflect the compounded effect of the annual increase in the New Brunswick consumer price index since 2005-2006. The amount proposed by the NBSO for 2009-2010 is \$511,000 more than it would be if no price escalation had occurred during the years since 2005-2006.*

*The Ancillary Services Contract, at Section 1.5 of Appendix 2 describes the escalation provision. Parts (a), (i) and ii state:*

*“(a) These price caps are to remain fixed until the implementation of Public Utilities Board (PUB) approved ancillary service rates for Transmission Customers that take into account:*

*(i) the implementation of Section 6.2.17 of the Market Rules, and  
(ii) the completion of a Request for Proposal (RFP) or other competitive procurement process in compliance with the PUB Decision of March 31, 2003.*

The NBSO confirmed that no RFP or other competitive process had been held for Schedule 2 Ancillary Services.”

The Board also found:

*“The revenue requirement, as approved by the Board, is charged to the market participants and it has a direct financial impact on them. A full examination of the contract, related documents or precedents did not occur during the hearing and the Board’s letter referenced by the NBSO was not in evidence. As such, the Board is not in a position to rule on the appropriateness of the escalation at this time.”*

In its decision the Board decided to allow the parties an opportunity to provide further evidence on these matters and ordered that a further hearing be held in respect to the unfunded pension liability under Schedule 1 and the escalation clause under Schedule 2 .

As a result the revenue requirement hearing was continued on June 15 and 16, 2009.

## **COSTS FOR THE UNFUNDED PENSION LIABILITY**

Some background information is necessary to understand the pension liability issue. The NBSO operates with some of its own employees and also retains the services of a number of Transco employees under a Secondment Agreement to assist with the operations of the Energy Control Center. Pensions for all employees of the NBSO and Transco, including seconded employees, are provided from the New Brunswick Public Service Superannuation Plan (“PSSP”), which currently has an unfunded pension liability.

Transco had written the NBSO on October 17, 2008 seeking payment for the share of the unfunded pension liability that relates to the seconded employees and advised that for 2009/2010 it had calculated the amount to be \$214,775.

The Board found in its April 24 decision that the Secondment Agreement did not appear to specifically address the matter of special payments and therefore NBSO’s liability for such costs was not clear. The Board believed that additional evidence might be available that could assist it in clarifying this issue. The NBSO and Transco were ordered to attend a continuation hearing to argue the merits of the agreement and the ensuing liabilities.

Whether or not the NBSO is liable to pay Transco for a portion of the unfunded pension liability involves an interpretation of Article 4.1 (a) of the Secondment Agreement which states in part

*“The SO agrees to reimburse NB Power Transmission for 100% of the wages, salaries, overtime, any applicable bonuses or incentives, employer contribution to Canada Pension Plan and Employment Insurance, Workers’ Compensation premiums, employer contribution*

*to benefit plans, and any overhead fees or charges incurred by NB Power Transmission in respect of the Seconded Employees, including the costs described in Article 3.2 above.”*

No benefit plans are specifically described in the Secondment Agreement. Benefit plans typically would include such things as group life insurance, health and dental insurance, disability insurance, defined benefit pension plans, etc. The words “employer contribution to benefit plans” and the words “any overhead charges” are broad enough to cover the statutory liability payments required to deal with the unfunded pension liability. The question for the Board to determine is whether the parties contemplated the NBSO paying the assessments for the unfunded pension liability when they crystallized their Secondment Agreement on April 1, 2005.

The following facts support the position that the agreement contemplates payment of these costs:

- NB Power Holding Corporation (Holdco) received an invoice for payment related to the pension plan unfunded liability in accordance with Regulation 92-152.
- Holdco allocated the liability for this payment to its family of companies, including Transco, on the basis of employee contributions to the pension plan.
- Transco allocated its liability between itself and the NBSO on the basis of employee contributions to the pension plan i.e. in the same fashion as it received its assessment.
- The Secondment Agreement states that the NBSO is responsible for the employer contribution to benefit plans of the seconded employees. The Secondment Agreement does not state that any

responsibility under this section is dependent upon the length of service that the seconded employees have with the NBSO.

- The allocation of the unfunded pension liability based on employee contributions to the pension plan is one reasonable way of allocating the liability according to Mr. Plourde, an actuary who testified on behalf of the Public Intervenor.

Transco did not invoice the NBSO for the unfunded pension liability until 2008. This presented an inference that the parties did not intend the Secondment Agreement to cover the extraordinary pension liability. At the continuation hearing Angela Leaman testified that the failure to bill for the unfunded pension liability assessment until 2008 was an oversight and that the change occurred when she assumed the responsibility for these billings at Transco. Her evidence was credible.

It should also be noted that the seconded employees are exclusive to NBSO and are now performing the same function as they always did. The NBSO earns the revenue from the service provided by the seconded employees. It is reasonable that, for an agreement that is based on cost reimbursement, that all costs should be included, including the extraordinary pension plan costs related to those employees.

As a result of the foregoing, the Board finds that the wording of Article 4.1 (a) of the Secondment Agreement is broad enough to cover the costs related to the unfunded pension liability and therefore that amount is allowed.

The issue of the NBSO's responsibility to pay a share of the Unfunded Pension Liability was complex and unclear. The amount at issue was significant. In such cases, an extra level of scrutiny and analysis is

necessary before authorizing payment. Retaining legal and/or other expert assistance, prior to payment, may well be prudent in such circumstances. It was only with the benefit of such an analysis that the Board was able to conclude that payment was appropriate in this circumstance.

The Board accepts the methodology used by Transco in allocating the unfunded liability **and approves the NBSO's Schedule 1 Revenue Requirement of \$10, 234,000 on a final basis.**

## **PRICE ESCALATION FOR SCHEDULE 2 SERVICES**

Schedule 2 Service is a mandatory service under which the NBSO provides Reactive Supply and Voltage Control to transmission system customers. The New Brunswick Power Generation Corporation (“Genco”) and New Brunswick Power Nuclear Corporation (“Nuclearco”) supply these services to the NBSO under the terms of Ancillary Services contracts dated October 1, 2004. These contracts established price caps for the Schedule 2 Services and included a provision that allowed escalation of the price if specific conditions were met.

The Ancillary Services contracts, as identified on page 2 of this decision, identify the escalation conditions. The issue in question at this hearing related to the completion of the request for proposal or other competitive procurement process in compliance with the PUB decision of March 31, 2003.

At the hearing in March the NBSO confirmed that no competitive procurement process had been held for the supply of Reactive Supply and Voltage Control. It also stated that it could not see how such a process could be held.

The Board had, in a letter dated October 7, 2004, directed the NBSO to file the particulars of an RFP for capacity based ancillary services with the Board and interested parties. On February 28, 2005 the NBSO filed the particulars of its proposed RFP. The proposal was based on a two-step process. The first step included distributing a questionnaire to potential suppliers to determine the quantity of each service that was available in the marketplace. This step also permitted interested parties to provide comments on the process to the Board by March 21, 2005. A draft RFP was also distributed. The NBSO indicated that the formal RFP

document would be substantially in that form but was subject to any modifications required by the Board. The second step was to issue the formal RFP.

The Board did not receive any comments from interested parties in regards to the RFP proposal. On April 26, 2005 the Board wrote to the NBSO. In that letter the Board stated that it understood that the NBSO was not seeking Reactive Support and Voltage Control through the RFP and directed the NBSO to remove reference to those services from the RFP.

The Board has carefully reviewed the evidence, interrogatory responses and the comments from the parties. The additional evidence filed for this continuation hearing was beneficial to the Board. It notes that no party provided any comment regarding the particulars of the RFP proposal in 2005. Also, no party demonstrated whether an RFP for the supply of Reactive Supply and Voltage Control had been successfully held in North America. It is also unknown whether there are any interested parties who may wish to bid on the supply of such services. In addition the NBSO clearly believed that the RFP process held in 2005 satisfied the conditions for price escalation as set by the Board. It is noted that the original price caps were based on proxy prices and that due to the *time value of money* it is reasonable for prices to increase to recover costs that increased over time

The Board expects that the NBSO will always seek the lowest prices for ancillary services and use RFP's whenever possible. In the present circumstances the NBSO, Genco and Nuclearco are entitled to rely on the RFP process that was conducted in 2005 to satisfy the contract provision for price escalation in that the Board's letter of April 26,2005 relieved the

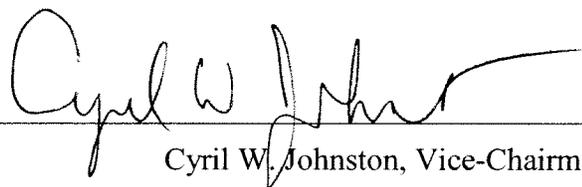
NBSO from the obligation to conduct an RFP for schedule 2 services. **For the 2009/2010 year the Board will approve the use of the escalated prices and approves the Schedule 2 Revenue Requirement of \$5,703,000 on a final basis.**

Dated at the City of Saint John, New Brunswick this 23<sup>rd</sup> day of July, 2009.



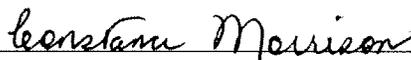
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Raymond Gorman, Q.C., Chairman



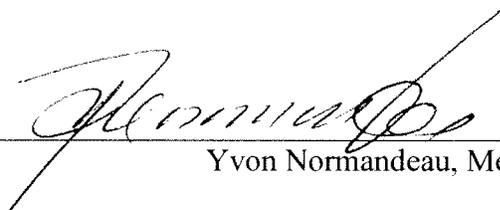
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Cyril W. Johnston, Vice-Chairman



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Constance Morrison, Member



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Yvon Normandeau, Member