DECISION

IN THE MATTER OF an application by the New Brunswick System Operator ("NBSO") for approval of changes to the Open Access Transmission Tariff.

May 13, 2011

NEW BRUNSWICK ENERGY AND UTILITIES BOARD

NEW BRUNSWICK ENERGY AND UTILITIES BOARD

IN THE MATTER OF an Application by the New Brunswick System Operator for Approval of Changes to the Open Access Transmission Tariff

NEW BRUNSWICK ENERGY AND UTILITIES BOARD:

CHAIRMAN:	Raymond Gorman, Q.C.
VICE-CHAIRMAN:	Cyril Johnston
MEMBER:	Constance Morrison
SECRETARY:	Lorraine Légère
COUNSEL:	Ellen Desmond, Counsel

APPLICANT:

NB System Operator	Richard Petrie Kevin Roherty

INTERVENORS:

Public Intervenor	Daniel Theriault, Q.C.
Algonquin Energy Services	Matthew Hayes
Department of Energy	Stephen Waycott
Emera Energy	Rebecca Gasek
HQ Energy Marketing Inc.	Hélène Cossette
NB Power Holding Corp.	John Furey
Nova Scotia Power Inc.	Nicole Godbout

Introduction

On March 17, 2011 the New Brunswick System Operator (NBSO or SO) advised the New Brunswick Energy and Utilities Board (Board) that it was withdrawing an application that was scheduled to be heard the week of March 21, 2011.

This decision will deal with the issue as to whether the NBSO has the right, given the existing facts, to unilaterally withdraw this application.

Background:

The Open Access Transmission Tariff (OATT or Tariff) is a comprehensive document in excess of 300 pages and, *inter alia*, states the terms, conditions and rates for using the electricity transmission system in New Brunswick.

The NBSO applied to the Board on October 18, 2010 (Application) for approval to change the Tariff in its role as Tariff Administrator and in keeping with its legislative object to facilitate a competitive market.

The proposed changes were categorized into three topic areas as follows: (i) changes arising from a goal of establishing compatibility with the Federal Regulatory Commission (FERC) Order 890 *pro forma* standard; (ii) changes intended to better align the contents of the Tariff and the Market Rules; and (iii) changes for clarification as well as some miscellaneous changes.

The NBSO submitted that the proposed changes would not result in any modification to the rates for any of the services that are provided in the OATT.

The Application was filed pursuant to section 111 of the *Electricity Act*, which provides as follows:

> **Application for approval of tariff**
>
> **111**(1) The SO may make application to the Board for approval of a tariff pertaining to the provision of transmission services or ancillary services, or both.
>
> **111**(2) The Board shall, on receipt of an application from the SO for approval of a tariff pertaining to transmission services or ancillary services, or both, proceed under section 123.
>
> **111**(3) When an application is made under this section for approval of a tariff pertaining to transmission services, a transmitter shall attend the hearing under section 123 for the purposes of defending its revenue requirements, and is deemed to be a party in the proceedings before the Board.
>
> **111**(4) The Board shall, when considering an application by the SO in respect of an approval of a tariff pertaining to transmission services, base its order or decision respecting the tariff on all of the projected revenue requirements of the SO and the transmitters for transmission services and the allocation of such revenue requirements between the SO and the transmitters.
>
> **111**(5) The Board shall, when considering an application by the SO in respect of an approval of a tariff pertaining to ancillary services, allow in its order or decision for mechanisms to recover the reasonable costs incurred by the SO in the acquisition and provision of ancillary services, or base its order or decision

respecting the tariff on all of the projected revenues from the sale of ancillary services and all of the projected costs to be incurred by the SO in the acquisition or provision of ancillary services.

111(6) The Board at the conclusion of the hearing shall

(a) approve the tariff, if it is satisfied that the tariff applied for is just and reasonable or, if not so satisfied, fix such other tariff as it finds to be just and reasonable, and

(b) set the time at which any change in the tariff is to take effect.

As indicated above, when an application of this nature is filed, the Board is required to proceed according to section 123 of the *Electricity Act.* This section states as follows:

Hearing respecting change in rates

123(1) Notice of the hearing of an application for the approval of charges, rates or tolls under Division B, or the approval of tariffs under Division C, shall, unless otherwise ordered by the Board, be given by advertisement for a period of not less than 20 days, in one or more newspapers as directed by the Board and by such other means as the Board may direct.

123(2) Where an application has been made and notice given, the Board shall hold a hearing.

123(3) On receipt of an application to the Board, the Board shall notify the Attorney General of such application.

> **123**(4) The Board shall, on the request of the Attorney General, forward to the Attorney General a copy of all materials filed with the Board with respect to an application.
>
> **123**(5) The Attorney General may intervene and make such representations as the Attorney General considers to be in the public interest.

Upon receipt of the Application, the Board issued an Order dated October 20, 2010 directing the NBSO to publish notice of the Application in various provincial newspapers. In addition, by correspondence dated October 20, 2010, the Board notified the Attorney General of this proceeding and in turn, Mr. Daniel Theriault was appointed as Public Intervenor with authority to make representations to the Board in accordance with section 123(5) of the *Electricity Act.*

A number of additional parties registered as intervenors in this proceeding and a pre-hearing conference was set for November 16, 2010. At that time, intervenors had the opportunity to make representations as to the date of the public hearing of the Application; the procedure to be followed prior to the public hearing; and any other matter with respect to the Application. Following submissions from the parties, a procedure was established and a hearing date of March 21, 2011 was scheduled.

In the normal course, the evidence for hearings before the Board is pre-filed. Interrogatories and responses to the interrogatories are exchanged well in advance of the hearing. Motion Days are pre-scheduled, in the event the same are required. In keeping with this practice, the evidence in this Application was pre-filed.

A motion was heard on December 20, 2010. One of the intervenors, Mr. Michael Wong of Insight Energy Economics, Inc. (who subsequently withdrew from the proceeding) filed a motion requesting, *inter alia,* that the Application be immediately dismissed or otherwise adjourned. At that time, the NBSO submitted that it had the right, and perhaps the obligation, to bring forward the necessary changes to the OATT. Moreover, the NBSO submitted it was in the public interest to bring this Application forward and have the necessary debate with respect to the proposed amendments. The Board accepted the NBSO's submission and the motion to adjourn the hearing was dismissed.

On March 17, 2011, the NBSO forwarded a letter to the Board advising that the NBSO was withdrawing its Application which was scheduled to be heard on March 21. No reason or explanation was provided.

Two intervenors immediately objected to the sudden withdrawal of the proceeding immediately prior to the hearing. Both parties requested, at a minimum, an explanation as to why the matter was being withdrawn. The Public Intervenor, in his correspondence, alleged that that the NBSO was making "an inappropriate attempt to escape Board oversight of the OATT".

By correspondence dated March 18, 2011 the Board ordered the NBSO to appear before the Board on March 21, as previously scheduled, and show cause as to why it should be permitted to withdraw its Application. The Board noted that the correspondence from Mr. Theriault was considered to be a complaint and that the Board

has authority to deal with such complaints under section 128 of the *Electricity Act*. In addition, the Board noted that it had the obligation of monitoring the electricity sector pursuant to section 127 of the *Electricity Act*.

On March 21, 2011, at the commencement of the hearing, the NBSO requested the opportunity to argue the preliminary question as to whether it had a *unilateral right* to withdraw the proceeding, without providing reasons. The Board agreed to consider this question as a preliminary matter. All parties were provided with the opportunity to make submissions on this preliminary issue.

Rights and Obligations of the NBSO

The NBSO is a not-for-profit corporation, created by statute. Its primary responsibility is to maintain and ensure the adequacy and reliability of the integrated electricity system and to facilitate the operation of a competitive electricity market in New Brunswick.

The objects of the NBSO are specifically enumerated in section 42 of the *Electricity Act* and include as follows:

> **Objects**
>
> 42 The objects of the SO are
>
> *(a)* to exercise and perform the powers, duties and functions assigned to the SO under this Act, the market rules and its licence,

(b) to enter into agreements with transmitters giving the SO the authority to direct the operations of their transmission systems,

(c) to direct the operation and maintain the adequacy and reliability of the SO-controlled grid,

(d) to procure and provide ancillary services,

(e) to maintain the adequacy and reliability of the integrated electricity system,

(f) to enter into interconnection agreements with transmitters,

(g) to work with responsible authorities outside New Brunswick to coordinate the SO's activities with their activities,

(h) to participate with any standards authority in the development of standards and criteria relating to the reliability of transmission systems,

(i) to undertake and coordinate power system planning and development responsibilities to maintain and ensure the adequacy and reliability of the integrated electricity system for present and future needs and for the efficient operation of a competitive market, and

(j) to facilitate the operation of a competitive electricity market.

The NBSO also has the ability, pursuant to section 58 of the *Electricity Act*, to make "market rules", which are rules that govern the NBSO-controlled electricity grid and govern the relationship between the NBSO, transmitters and market participants with respect to the supply of electricity.

In its evidence of October 18, 2010, the NBSO notes that the proposed changes to the OATT are in keeping with their role as “tariff administrator” and in keeping with its legislative objective to facilitate a competitive market. In addition, at page 4 of the same evidence, the NBSO notes that the proposed changes “have been reviewed in consultation with stakeholders”.

It is clear, both from the legislation and the evidence that has been filed, that the NBSO has an obligation to administer the OATT and market rules in a transparent and equitable fashion. The obligation of the NBSO to act in the best interest of the public was acknowledged by counsel for the NBSO during the motion heard on December 20, 2010. This public interest component is significant as we consider the preliminary question that has been placed before the Board.

Does the Applicant have the right to unilaterally withdraw this application?

The NBSO submits that it has the absolute right to withdraw its Application. This Application was made on a voluntary basis and the NBSO believes that section 111 of the *Electricity Act* is permissive. In the NBSO’s view, any procedural power the Board may have is only applicable when there is a “live” application before the Board. Further, the NBSO submits that there is no statutory provision, regulation or Board rule that would require the NBSO to continue with its Application.

Neither the *Energy and Utilities Board Act (EUB Act)* nor the *Electricity Act* explicitly deals with “unilateral withdrawal”. Moreover, there are few authorities that have dealt

with the right to “unilaterally withdraw” from a proceeding. The Applicant did provide some authorities during the course of the hearing, but these decisions were distinguishable from the issue at hand and not particularly relevant.

The Board is guided however, by the decision of *Re Uniroyal Chemical Ltd, 1992 CarswellOnt 220, 9 C.E.L.R. (N.S.) 151* which provides as follows, starting at paragraph 35:

> 35 The Board has not been directed to any case that appears to determine the issues before it, nor can the Board find any specific provision in the Environmental Protection Act or the Statutory Powers Procedure Act that appears to clearly and unequivocally determine the issues. There are, however, certain principles that emerge from the cases that are helpful:
>
> > 1. Where a regulatory regime is intended to protect the broad public interest, courts and boards are concerned about any act of the initiator of proceedings that puts an end to the proceedings without taking into account the public interest (Ackers v. Lyons (1981), 32 O.R. (2d) 633 (Co. Ct.)).
> >
> > 2. Courts and tribunals are concerned about the possibility that a unilateral withdrawal or settlement of proceedings by a party initiating the process may prejudice other parties or potential parties to the proceedings (*Carfrae Estates Ltd. v. Stavert* (1976), 13 O.R. (2d) 537 (Div. Ct.); *Ackers v. Lyons; Re Oxford Holbrook Waste Disposal Site Expansion* (1983), 15 O.M.B.R. 68 (Environmental Assessment Bd.); see also *Carrier-Sekani Tribal Council v. Canada (Minister of the Environment)* (1991), 6 C.E.L.R. (N.S.) 265, 5 Admin. L.R. (2d) 1, 44 F.T.R. 273 (T.D.)).
> >
> > 3. A tribunal’s power to refuse to allow a unilateral withdrawal of an appeal or other proceedings does not depend on an express authority to do so. Such a power may be found in a board’s inherent power to control its own process or in a contextual approach to interpretation of the tribunal’s powers; that is, it is necessary to look at the entire statute, consider its objectives, and

> consider the surrounding provisions as well as the provision under discussion (*Edgeley Farms Ltd. v. Uniyork Investments Ltd.,* [1970] 3 O.R. 131, 12 D.L.R. (3d) 459 (C.A.); *Carfrae Estates,* at p. 545; *Godfrey v. Ontario (Police Commission)* (1991), 83 D.L.R. (4th) 501, 5 O.R. (3d) 163, 7 Admin. L.R. (2d) 9, 53 O.A.C. 338 (Div. Ct.)).

Using these guiding principles, the following observations may be made in this case:

(i) Public Interest:

The NBSO is a creature of statute whose objectives are broad and intended to protect the public.

As indicated above, the Attorney General intervened to make representations that are in the public interest and Notice of this Application was published to allow members of the public to intervene and make appropriate submissions.

It is clear that when the applicable sections of the *Electricity Act* and the *EUB Act* are taken as a whole, the overriding rationale of the legislation is to protect the public interest. Any decision of the Board is not merely a deliberation on the rights between private parties. Rather, the Board has a duty to make orders and decisions that are in the public interest.

(ii) Possible prejudice:

As indicated in *Re Uniroyal (supra*), the Board must be concerned about the possibility of prejudice to other parties.

In this case, various intervenors were added to the proceeding with the consent of the Board. These intervenors have spent considerable time and energy preparing for this hearing. The Public Intevenor has retained an expert and has filed evidence offering a contrasting view on proposed changes to the OATT. It is difficult to suggest that there would be no prejudice should the entire hearing be withdrawn, without explanation, simply because the NBSO has decided not to proceed.

Mr. Hayes, counsel for Algonquin Energy Services Inc., notes that if the NBSO is permitted to withdraw its application without providing any reasons, it is almost impossible to say how they might be prejudiced. The NBSO has provided no indication of how the proposed changes to the OATT will now be dealt with.

(iii) Statutory provisions:

Finally, a review of the statutory provisions as it relates to the Board's powers is useful in determining this question.

As indicated above, there is no specific provision in the *EUB Act*, the *Electricity Act*, the applicable regulations or Board policies that unequivocally determines this issue. There are no words in either statute that refer to the "withdrawal" of an application. Similarly, there is no provision in either statute for notifying other parties of a unilateral withdrawal, prior to a hearing.

In contrast, section 123 of the *Electricity Act* contemplates that an application shall proceed to a hearing, once it has been filed with the Board. In other words, this section suggests that once an application has been initiated, it is taken out of the hands of the initiating party and that the Board has acquired an interest in the matter.

Similarly, section 111(6) of the *Electricity Act* provides that if, the Board is not satisfied that the OATT is just and reasonable, it may "fix such other tariff as it finds to be just and reasonable". As a result, the Board has broad discretion to deal with the subject matter entrusted to it.

As indicated in *Re Uniroyal (supra)*, the Board's power to refuse the NBSO to allow to unilaterally withdraw from the proceeding does not depend on an express authority to do so. Such a power may be found in the Board's inherent power to control its own process or in a contextual approach to interpretation of the Board's powers.

The following sections of the *EUB Act inter alia*, provides guidance:

> **Powers of Board and members**
>
> **28**(1) The Board has all the powers, rights and privileges as are vested in The Court of Queen's Bench of New Brunswick in relation to the attendance, swearing and examination of witnesses, the production and inspection of records or documents, the enforcement of its orders, the entry on and inspection of property and other matters necessary or proper for the due exercise of its jurisdiction.

28(2) The Chairperson, Vice-Chairperson or any person designated by the Chairperson may administer oaths or affirmations, certify as to the official acts of the Board and issue summons to witness to compel the attendance of witnesses and the production of records and documents.

28(3) On application to The Court of Queen's Bench of New Brunswick by the Board or by any person acting under subsection (2), the failure or refusal of a person to attend, to take an oath, to participate in a hearing, to answer questions or to produce records or documents or any other thing in the custody, possession or control of the person, to permit entry upon and inspection of property under the possession or control of the person or to obey an order of the Board, as the case may be, makes the person liable to be committed for contempt as if in breach of an order or judgment of The Court of Queen's Bench of New Brunswick.

Board may act on own motion

32. The Board may of its own motion inquire into, hear and determine any matter or thing that under this Act or any other Act it may inquire into, hear and determine.

Procedure

38. The Board may inquire into, hear or determine any application, matter or thing that under this or any other Act it may inquire into, hear or determine and in doing so, the Board

(a) is the master of its own procedure and may give directions about process and procedure that it considers appropriate in the circumstances,

(b) may request from anyone, and require anyone to gather, evidence or require anyone to prepare studies relevant and incidental to the matter over which it is exercising its jurisdiction, and

(*c*) shall ensure procedural fairness to all affected persons.

These sections of the legislation demonstrate that the Board has broad statutory authority to control its own process. It would be reasonable to conclude that, in controlling its own process, the Board had the discretion to refuse a party to withdraw from a proceeding, once the matter had been commenced.

Conclusion:

The Board finds that, in the given circumstances, a decision to withdraw this Application is not within the sole purview of the NBSO. The Board has an interest in this matter, has a regulatory obligation to oversee the changes to the OATT, and must ensure procedural fairness to all parties.

The Board is not required to accept a withdrawal of this Application without further orders or consequences. In this case, the Board has not been provided with any evidence that, withdrawing this Application, is “just and reasonable”. The request to withdraw must be considered in accordance with the principles of natural justice and a duty of fairness is owed to all parties.

Having determined the preliminary question, the Board directs as follows:

- The NBSO is to provide written reasons to the Board no later than May 27, 2011, as to why the withdrawal of this matter should be allowed;
- The NBSO is to provide a copy of the written reasons to all parties on the same date it is provided to the Board;
- Interested intervenors are to provide their written responses to the Board no later than June 3, 2011 indicating whether they agree with or oppose the NBSO's withdrawal of this matter, together with reasons.
- Interested intervenors who respond are to provide a copy of their response to the NBSO and other parties on the same date it is provided to the Board.

In the event the Board concludes that the issue of withdrawal cannot be determined on the basis of the above-mentioned correspondence, a hearing will be held at the Board's premises on June 15, 2011 at 9:30 a.m.

Dated at the City of Saint John, New Brunswick this 13th day of May, 2011.

Raymond Gorman, Q.C., Chairman

Cyril Johnston, Vice-Chairman

Constance Morrison, Member