DECISION

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

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August 5, 2011

NEW BRUNSWICK ENERGY AND UTILITIES BOARD

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IN THE MATTER OF an Application by the New Brunswick System Operator for Approval of Changes to the Real Power Loss Factor Methodology in 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

APPLICANT:

NB System Operator	Richard Petrie Kevin Roherty

INTERVENORS:

Algonquin Energy Services Inc.	Matthew Hayes
HQ Energy Marketing Inc.	Hélène Cossette
New Brunswick Power Holding Corp	John Furey
Public Intervenor	Daniel Theriault, Q.C.

Introduction:

The New Brunswick System Operator (NBSO) has filed two applications with the New Brunswick Energy and Utilities Board (the Board) seeking changes to the Open Access Transmission Tariff (OATT). Both applications were brought pursuant to Section 111 of the *Electricity Act.*

The first application was filed on June 30, 2010, revised on December 3, 2010 and relates to the Real Power Loss Factor Methodology. The second application was filed on October 18, 2010 and proposes changes to the OATT in three areas:

(i) Changes arising from a goal of establishing compatibility with the United States Federal Energy Regulatory Commission (FERC) Order 890;

(ii) Changes that are intended to better align the content of the OATT with the Market Rules; and

(iii) Changes that are intended to offer clarification and are miscellaneous in nature.

The evidence filed by the NBSO states that they are not making any modifications to the rates for any of the services that are provided through the OATT.

In both Applications there are a number of parties that filed Notices of Intervention, including the Public Intervenor and two transmission companies (transmitters), namely New Brunswick Power Transmission Corporation (Transco) and Algonquin Energy Services Inc. (Algonquin).

On March 15, 2011, the Public Intervenor filed a motion stating that, given the nature of the NBSO's Applications and the request to amend the OATT as it relates to transmission services, it is necessary that Transco attend the hearing for the purpose of defending its revenue requirement. The Public Intervenor also noted that none of the evidence filed to date provided any defence to Transco's revenue requirement.

The Public Intervenor, in filing this motion, relied specifically on Section 111(3) of the *Electricity Act*, which states as follows:

> **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.

Issue:

The issue before the Board is whether Section 111(3) applies in the context of the Applications brought by the NBSO.

Analysis:

Legislative Provisions:

At the outset, the Board notes a number of definitions in the *Electricity Act* which provide guidance on this issue:

> "ancillary services" means services necessary to maintain the reliability of the SO-controlled grid, including frequency control, voltage control, reactive power and operating reserve services; *(services ancillaires)*
>
> "tariff" means a schedule of all charges, rates and tolls, terms and conditions, and classifications, including rules for calculation of tolls, established for the provision of either or both of the following:
> *(a)* a transmission service;
> *(b)* an ancillary service;*(tarif)*
>
> "transmission service" means the movement or transfer of electricity at voltages of 69 kilovolts or more over an interconnected group of lines and associated equipment between points of supply and points at which it is transformed for delivery to a consumer or is delivered to another electric system; *(service de transport)*
>
> "transmitter" means a person who owns or operates a transmission system; *(transporteur)*
>
> "revenue requirements" means the annual amount of revenue required to cover projected operation, maintenance and administrative expenses, amortization

expenses, taxes and payments in lieu of taxes, interest and other financing expenses and a reasonable return on equity; *(besoins en revenus)*

It is also useful to consider Section 111 of the *Electricity Act* in its entirety. This Section states 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.

Intent of Section 111(3):

The Board is faced with a question of statutory interpretation as it relates to Section 111(3). The Board is guided by the decision of *Imperial Tobacco Canada Limited et al. v. Her Majesty the Queen in Right of the Province of New Brunswick, 2010 NBCA 35 (CanLII)* wherein the New Brunswick Court of Appeal stated, starting at para 22:

> That assessment of the CFA's effect and interpretation of the statutory provisions mentioned above fully respects the modern principle of statutory interpretation famously articulated by Professor Driedger in *The Construction of Statutes* (Toronto: Butterworths, 1974), at p. 67, and described as the preferred interpretative approach in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (S.C.C.) 1.S.C.R. 27, [1998] S.C.J. No 2 (QL):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament [or the Legislature]. [p. 41]
>
> Moreover, this interpretation of statutory provisions is in synch with s. 17 of the *Interpretation Act*, R.S.N.B. 1973, c. I-13 which reads as follows:
>
> > 17 Every Act and regulation and every provision thereof shall be deemed remedial, and shall receive such fair, large and liberal construction and interpretation as best ensures the attainment of the object of the Act, regulation or provision.

A review of the *Electricity Act* is of significant importance in interpreting the words of Section 111 and in particular Section 111(3). There are a number of entities, including Transco and the NBSO, who participate in a competitive electricity market and who are subject to regulation by the Board. The obligations and duties of these entities are provided in the *Electricity Act* and provide direction to the Board when ascertaining the object of this legislative Section.

In what might be considered a "traditional" regulatory proceeding, a rate regulated entity will apply for a change in a tariff for its own charges, rates and tolls. The rate regulated entity will present and defend its revenue requirement and the regulator will set rates which allow the rate regulated entity an opportunity to obtain the revenue it requires.

The *Electricity Act* sets up a curious situation in the case of an application for a change to a tariff for transmission services, particularly if such an application relates to rates. The Applicant in such an application is the NBSO, yet the NBSO is not the entity which eventually receives the revenue flowing from the rates for transmission services. More importantly, the NBSO does not possess the evidence related to revenue requirements necessary to support an application for a change in rates for transmission services. It is the transmitters who will receive the revenue and who possess the necessary evidence.

The Board concludes that the object of Section 111(3) is to provide a remedy to deal with the anomaly that it is the NBSO, and not a transmitter, who is the applicant. This Section ensures that all necessary evidence is before the Board.

As indicated above, Section 111 specifically refers to two types of applications: (i) for a change to the tariff pertaining to transmission services and (ii) for a change to the tariff pertaining to ancillary services.

While Section 111 contemplates two types of applications, the OATT is, in fact, a large and complex document. In addition to providing a description of the various services provided by both the NBSO and transmitters, there are numerous attachments including service agreements, methodologies and policies. Many parts of it do not fall neatly

within the definition of a tariff found in the *Electricity Act*. It is not an easy task to categorize the OATT's contents squarely as pertaining to transmission services, ancillary services or both.

When changes to the OATT are related to rates, Section 111(3) and 111(4) are of obvious benefit to the process. When changes to the OATT are not related to rates, it is not clear how an analysis of the revenue requirements would be useful. Section 111 however, does not distinguish between applications for changes to rates and other types of applications for changes to the transmission tariff.

In this case, the changes proposed to the OATT are voluminous and wide-ranging. As indicated, the NBSO does not propose to modify any of the rates for services provided under the OATT and it is not clear whether the proposed changes have any relationship to the revenue requirements or revenues of the transmitters. While Algonquin submitted that the proposed changes would have an impact on their revenue, the Board has not yet had the benefit of *viva voce* evidence to fully consider this issue and Algonquin did not pre-file any evidence to support this position.

During the hearing the NBSO and Transco argued that not every application for a change to the OATT for transmission services should require an examination of the transmitters' revenue requirements. The example was given of a very minor change to wording or punctuation.

The Board agrees that not every minor change should trigger an examination of the transmitter's revenue requirements. In some instances, an alternative process may be appropriate. For example, Section 43 of the *Energy and Utilities Board Act (EUB Act)* provides that the Board may review, rescind or vary a previous order. Perhaps a minor change to the OATT may be dealt with using this provision.

The applications before the Board, however, are not minor in nature. There are many proposed changes that pertain, in some fashion, to transmission services.

Section 111(3) directs that, in an application of this nature, a transmitter "shall" attend and defend its revenue requirement. Similarly, Section 111(4) directs that the Board "shall" base its order or decision on the projected revenue requirements of the SO and the transmitters. The word "shall" provides the Board with little discretion. The leading text, Sullivan and Driedger on the *Construction of Statutes,* states as follows at page 60:

> ...When "shall" and "must are used in legislation to impose an obligation or create a prohibition or requirement, they are always imperative. A person who "shall" or "must" do something has no discretion to decide whether or not to do it.

Given the clear and concise use of the word "shall" and given the number of proposed revisions to the OATT, many of which relate to transmission services, the transmitters are obligated to appear and defend their revenue requirements.

Defending the revenue requirement:

The Board must now determine what it means for transmitters 'to attend the hearing for the purposes of defending their revenue requirements'.

In the interpretation of this phrase, the Board is guided by the principle of statutory interpretation cited earlier. The Board has concluded that the object of Section 111(3) is to provide a remedy to deal with the anomaly that it is the NBSO, and not a transmitter, who is the applicant. This Section ensures that all necessary evidence is before the Board.

The Board must determine what evidence of the transmitters is necessary for its consideration of the proposed changes. In this case, no changes are being proposed to charges, rates or tolls. The changes proposed pertain to terms and conditions of the tariff which are not clearly related to the transmitters' revenues or revenue requirements.

The Board concludes that the evidence which is required from the transmitters pursuant to Section 111(3) is that evidence which would permit the Board to consider the financial impact, if any, of the proposed changes on the transmitters.

Accordingly, the Board will require the transmitters and the NBSO to file evidence outlining any changes to their projected revenues or revenue requirements should the Board approve the changes proposed to the OATT.

This will allow the Board to consider all relevant evidence in each of the two applications before it, while avoiding the production of unnecessary evidence unrelated to the applications.

Review of the Transmitters Revenue Requirements and Rates:

Finally, it should be noted that, during the course of this motion, it became clear that there is no direct legislative mechanism in place to deal with a transmitter who wishes to have its entire revenue requirement considered by the Board. Indeed this is the exact situation which has arisen.

Counsel for Algonquin wrote as follows in a submission to the Board dated June 3, 2011:

> Algonquin has not had it revenue requirement considered by the Board since a decision of the Board (formerly The Board of Commissioners of Public Utilities) of October 24, 2004. Since that time, the fundamentals underlying the revenue requirement have changed. Specifically, Algonquin expects significant capital investment will be required to maintain the transmission capacity.
>
> Conceptually, the *Electricity Act* contemplated the transmitters being present to defend its revenue requirement. Algonquin wishes to appear before the Board to defend the revenue requirement and to allow for new capital expenditures.

Counsel for Transco also indicated that they would not object to appearing before the Board, given the passage of time since they had last done so. Mr. Furey stated as follows at page 335 of the transcript:

> ...It might be entirely appropriate for this Board to bring both Algonquin and New Brunswick Power Transmission in for a revenue requirement hearing simply because of a lapse of time...
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>
> Now it is in the Board's discretion as to whether it feels, just by mere passage of time, that it is appropriate for Transco to come to defend its revenue requirement. And if the Board orders us to do so, it goes without saying that we will do that.

It is not unusual for the Board to review the revenue requirements of the organizations it regulates. The NBSO, for example, appears before the Board on an annual basis for this very purpose. Such a review provides assurance both to the public and to the regulated entity that its rates continue to be just and reasonable. Similarly, it would be appropriate for Transco and Algonquin to have this assurance, particularly since a review has not been conducted in several years and particularly where such a review has been requested.

The Board directs that a review of the transmitters' revenue requirements take place. This review will be conducted in a separate proceeding following the conclusion of the current applications.

The Board will schedule a pre-hearing conference to deal with scheduling, filing requirements and other related matters with respect to the two applications before it. The issue of coordinating the procedures in the two applications will also be determined.

Further direction with respect to the review of the transmitter's revenue requirements will follow in due course.

Dated at the City of Saint John, New Brunswick this 5th day of August, 2011.

Raymond Gorman, Q.C., Chairman

Cyril Johnston, Vice-Chairman

Constance Morrison, Member