



DECISION

**IN THE MATTER OF a Hearing to Review the
Distribution of Energy Imbalance Funds Collected
during the period October 1, 2003 to April 30, 2005 in
regards to a Complaint dated August 5, 2005 by WPS
Energy Services Inc. ("WPS")**

November 1, 2005

New Brunswick

Board of Commissioners of Public Utilities

Background

The New Brunswick Board of Commissioners of Public Utilities ("Board") convened a hearing on September 22, 2005 to hear a complaint dated August 5, 2005 filed with the Board by WPS Energy Services Inc. ("WPS"). The Northern Maine Independent System Administrator ("NMISA") joined in the complaint. In the complaint WPS and NMISA requested that the Board act pursuant to section 128 of the *Electricity Act* ("Act") to review the distribution of energy imbalance funds collected during the period October 1, 2003 to April 30, 2005.

There must be a balance between the supply and demand for electricity on the New Brunswick transmission system in order to maintain reliability. Customers are responsible for arranging for the necessary supply of electricity and for the transmission of that electricity. Each customer on the system submits a schedule for the amount of electricity that it expects will be required. The actual customer requirements are almost always different from the amounts that have been scheduled. Customers are paid when there is a surplus of electricity and are charged when there is a shortfall. The pricing structure is designed to discourage any attempt by customers to "game" the system by underestimating their requirements and relying on the system to make up the shortfall. The payments made by customers when there is a shortfall exceed the cost of supplying that shortfall. For any given month, the various payments related to energy imbalance produce a surplus for the administrator of the New Brunswick transmission system. This surplus will be referred to as "the net funds" in this decision. The New Brunswick Power Corporation ("NB Power") was the administrator of the transmission system until October 1,

2004. Since October 1, 2004 the New Brunswick System Operator (“NBSO”) has been the administrator.

WPS has, since March 1, 2004, been responsible for 100% of the energy supply in the NMISA area. The energy imbalance on the New Brunswick system that has been charged to the NMISA is a direct result of WPS load or generation deviations. The NMISA has been invoiced for energy imbalance and the NMISA has subsequently invoiced WPS for the same amount.

History of the Complaint

WPS wrote to the Board in a letter dated April 22, 2005 concerning “Energy Imbalance Over-Collection Return”. The letter stated: “The issue that is of concern to WPS Energy is that the dispersal of the funds accumulated in the energy imbalance collection account has resulted in an apparent windfall gain to either or both of New Brunswick Power Generation (“Genco”) and New Brunswick Power Distribution and Customer Service (“Disco”). Furthermore, this appears to have occurred without any specific legislative or regulatory authority”

WPS stated that it was not reimbursed any portion of the net funds through the reconciliation mechanism undertaken for the penalty dollars. WPS requested the Board to conduct an inquiry into the redistribution of the net funds in the energy imbalance account.

NMISA wrote to the Board on April 25, 2005 stating that they generally concurred with the WPS letter. In addition, NMISA stated that “the variance costs collected by the NBSO should be flowed back to customers based upon identical principles on which customers are

charged.” NMISA claimed that “the use of transmission billing determinants is not the proper method to pay back energy imbalance because they are market related costs rather than transmission costs”.

The Board wrote to WPS on April 26, 2005 directing WPS to follow the dispute resolution process contained in Section 12 of the Open Access Transmission Tariff (“OATT”).

WPS raised this matter with the New Brunswick System Operator (“NBSO”) by way of a letter dated May 11, 2005 and at a meeting on May 16, 2005. The NBSO responded to WPS in a letter dated June 15, 2005 stating that “We see no cause to pursue this issue further”.

WPS and NMISA jointly wrote to the Board on July 12, 2005 requesting the Board to formally undertake a review of the WPS complaint. The letter requested directions pursuant to Sub-section 128(2) of the Electricity Act regarding the process and procedure to be followed.

The Board responded, by letter dated August 5, 2005, stating that upon receipt of a formal complaint pursuant to Sub-section 128(1) and supporting evidence it would establish a procedure for the conduct of an inquiry into this matter.

WPS and MNISA, by letter dated August 5, 2005, filed a formal complaint pursuant to Sub-section 128(1) and evidence in support of the complaint.

The Board, in a letter of August 19, 2005 established the following procedure for the inquiry:

WPS is to serve all parties, who were registered intervenors for the two OATT hearings before this Board, with a copy of their formal complaint and the associated evidence by August 25, 2005. WPS is to inform those parties of the following:

- (a) Parties will be able to provide written comments to the Board by September 8, 2005,
- (b) WPS will be able to respond to any comments by September 15, 2005, and
- (c) A hearing will be held at 10am on September 22, 2005 at the Board's premises.

Written comments were provided by the NBSO and jointly by New Brunswick Power Holding Corporation ("Holdco"), New Brunswick Power Distribution and Customer Service Corporation, New Brunswick Power Generation Corporation and New Brunswick Power Transmission Corporation (collectively "NR Power Group"). Holdco is the former NB Power following a name change during the restructuring of it effective October 1, 2004. The other listed companies were created the same date as a part of the restructuring. WPS and NMISA replied to the comments. As mentioned at the outset, the Board conducted a public hearing on September 22, 2005. WPS, NMISA, NBSO and the NB Power Group, appeared at the hearing and made submissions and responded to questions put to them by the Board.

Issues

There were two material issues raised that required a decision of the Board. First is the matter of the Board's jurisdiction to hear the complaint. Second, is the distribution of the net funds as addressed in the complaint.

Jurisdiction of the Board

WPS and NMISA filed the complaint citing section 128 of the *Electricity Act* ("Act") as authority pursuant to which the Board could proceed to hear the complaint and provide the remedy requested.

The relevant portions of section 128 of the Act read as follows:

Powers of inquiry

128(1) The Board may, on its own motion or on a complaint made by any person, inquire into, hear and determine any matter where it appears to the Board

(a) that any person has failed to do any act, matter or thing required to be done under this Part or rule, order or direction made by the Board, or that any person has done or is doing any act, matter or thing contrary to or in contravention of this Part, or any rule, order or direction,

(b) that the circumstances may require it, in the public interest, to make any order or give any direction, leave or approval that by law it is authorized to make or give, or concerning any matter, act or thing that by this Part or rule, order or direction is prohibited or required to be done, or

(c) that there is an abuse or potential abuse of market power by a market participant.

NB Power took the position that Section 128 does not apply to the circumstances of the complaint because, it said, the energy imbalance issue raised in the complaint does not fall within paragraphs 128(1)(a), (b) or (c). NB Power did accept that the Board has jurisdiction over

the OATT including the complaint procedure set out in the OATT. NB Power did not see a public interest issue in the complaint.

WPS and NMISA stated that the public interest arises because of a need to get the market correct and to assist in opening the market. They claimed that there was a fundamental issue in respect of NB Power's and the NBSO's authority to disburse the net funds collected by them. WPS and NMISA stated that they had followed the dispute resolution procedures in the OATT and, failing to achieve resolution of the complaint following those procedures, they filed their complaint with the Board pursuant to section 128 of the Act.

The Board considers that WPS made good faith efforts to resolve this matter with the NBSO and was unable to do so.

The OATT was first approved by an order of the Board effective September 30, 2003 and revisions were approved effective May 1, 2005. The complaint raises the matter of whether any actions were taken, initially by NB Power or by the NBSO subsequently, contrary to the provisions of the Board approved OATT.

Section 128 speaks in terms of "any person" filing a complaint. It is not necessary for the "person" to be a Transmission Customer as defined in the OATT or to have any particular status. Both WPS and NMISA were entitled to file the complaint.

The Board has concluded therefor that it has jurisdiction to hear the complaint. The Board considers that it is in the public interest to resolve the complaint and make an order in respect thereto.

Distribution of the net funds

The primary issue raised in the complaint revolves around the disbursement by NB Power and the NBSO of the net funds that arose from administering energy imbalances in the NMISA area.

In particular, the WPS and NMISA complaint covers the period from October 1, 2003 to April 30, 2005 (“the Relevant Period”). WPS and NMISA do not dispute that there was a requirement to make the energy imbalance payments. However, they do not believe that the regulatory regime that existed during the Relevant Period supported the disbursement of the net funds arising from the operation of the NMISA area. WPS and NMISA are of the view that those net funds should be returned to the NMISA.

The NBSO submitted that its disbursement of the net funds in question was done in accordance with the applicable OATT and market rules. The NBSO stated that the methodology employed was consistent with the evidence presented and reviewed at the original OATT

hearing. The NBSO questioned the logic of returning the penalty portion of the energy imbalance charges to the very parties who caused the imbalance. The NBSO requested that the Board dismiss the complaint.

The NB Power Group said that NB Power disbursed the net funds accumulated by it on September 30, 2004 in the manner described by it during the OATT hearing in December, 2002. The NB Power Group claimed that the issue of energy imbalance payments was clearly before the Board in that hearing. Further, the NB Power Group stated that the Board, in its April 26, 2005 OATT decision that approved certain changes to the original OATT, endorsed a methodology for redistribution that was the same as that used during the relevant period. The NB Power Group also stated that if no authority existed for the redistribution that occurred, then there was no authority to remit the net funds to the NMISA. The NB Power Group claimed that returning the money to the NMISA would also fly in the face of the Board's statement in the March 13, 2003 OATT decision that customers must have an "incentive to stay in balance". The NB Power Group submitted that the WPS complaint is out of time and that it would be unfair to require parties to return monies that they had received in good faith.

The Relevant Period consists of two separate periods of time: October 1, 2003 to September 30, 2004 ("Period One") and October 1, 2004 to April 30, 2005 ("Period Two").

During Period One, the OATT was administered by NB Power as a vertically integrated utility company. The market rules were not in effect and the OATT did not contain any specific section that dealt with the disbursement of the net funds.

In Period Two, the OATT was administered by the NBSO and still did not contain any sections dealing with the disbursement of the net funds. At the commencement of this period a set of market rules came into effect, but there was no specific market rule that authorized or required the NBSO to disburse the net funds.

The NB Power Group's position is that the market rules pertaining to the net funds and disbursement of them were deferred until May 1, 2005. The NB Power Group stated that during Period One NB Power as a vertically integrated utility was entitled to retain the net funds.

Board Decision

The Board has determined that during the entire Relevant Period neither the OATT nor the market rules provided any authority for the disbursement of the net funds.

In Period One, the net funds were accrued by NB Power. NB Power charged rates as contained in the Board approved OATT and paid for the costs associated with providing the related services. There were no provisions in the OATT requiring NB Power to disburse the net funds. NB Power, during Period One, was governed by the Electric Power Act. Section 20 of that act described the purposes of the rates to be charged by NB Power and, in particular, paragraph 20 (d) states:

20 The charges, rates and tolls to be charged by the Corporation shall be such as will enable it, in addition to paying all operating charges and expenses, overhead and amortization charges,

(d) to maintain such reserve, depreciation and surplus accounts as are maintained by a properly managed corporation.

The surplus from the provision of energy imbalance services was no different from the surplus provided by the provision of any other service. Any surplus that arose flowed to the bottom line and belonged to NB Power. This is the standard and traditional approach for normal regulated companies that are able to retain a surplus. The Board is not aware of any legal requirement to pay the net funds to anyone and therefore, considers that NB Power was entitled to the net funds in Period One and free to do with them as it saw fit.

In Period Two, the NBSO disbursed the net funds to its transmission customers on a pro rata basis. There were no provisions in the OATT or in the market rules that authorized such a disbursement during Period Two. The Board does not consider that a description by NB Power, in the hearing to review the application for approval of the original OATT, of how such funds would be disbursed, provides any authority to the NBSO for an actual disbursement during Period Two. The intention expressed by NB Power during that hearing was not incorporated into the OATT approved by the Board. The Board also does not consider that the approval by the Board of a process for disbursement of these funds going forward from May 1, 2005 provides any authority to the NBSO for disbursement during Period Two.

The Act establishes the NBSO as a not for profit body corporate. Section 43 of the Act states:

43 The business and affairs of the SO shall be carried on without the purpose of gain and any revenues shall be used by the SO for the purposes of carrying out its objects.

The Board does not consider that the disbursement of the net funds in Period Two was for the purpose of carrying out the objects of the NBSO as described in the Act. The NBSO, if it desired to disburse the net funds in Period Two, should have applied to the Board for approval to do so.

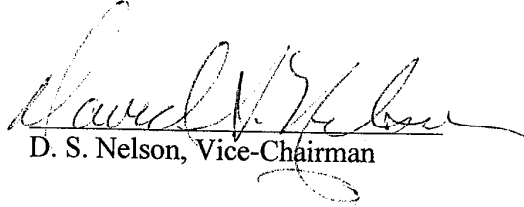
However, the NBSO did not do so and the Board is of the view that the NBSO distributed the net funds during Period Two without any express authority to do so and in contravention of Section 43 of the Act.

The Board believes that it is in the public interest for the NBSO to always conduct itself in accordance with the then currently existing rules. The Board considers that, in Period Two, the NBSO did not do so and therefore orders the NBSO to recover the net funds that were distributed in Period Two from those parties who received such payments. If there is any disagreement as to the amount of the net funds that were disbursed and who received them the participants are directed to refer such disagreement to the Board for resolution.

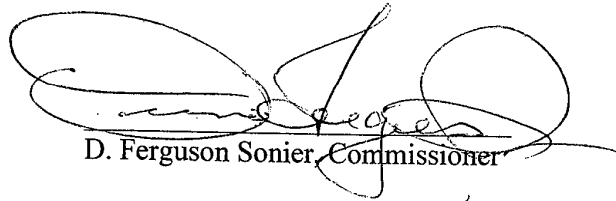
The recovery of the net funds raises the issue of what is to be done with them. The Board considers that it does not have the authority to retroactively establish a rule that would describe how these funds should have been dealt with. Once recovered by the NBSO, they will become an asset on the books of the NBSO. The recovery of the net funds may result in a surplus on the books of the NBSO in excess of \$300,000. This is the maximum amount that the Board approved, in its April 26, 2005 decision, for use in covering unforeseen events. If this is the case, the Board orders the NBSO to develop a proposal for what to do with the surplus in excess of \$300,000 and to submit the proposal to the Board for its review.

The Board will comment on a separate matter that was raised at the public hearing. There was a question of whether or not WPS can access the generation facility schedules of New Brunswick Power Generation Corporation (“Genco”). This was related to whether or not WPS is able to obtain unbundled energy supply service from Genco. The parties agreed that the matter was not germane to the relevant time period. The Board reminds the parties that it has a responsibility under section 127 of the *Electricity Act* to monitor the electricity sector. This includes the conduct of market participants under the market rules. The Board expects that, should any party have concerns in this area, they will bring such concerns to the attention of the Board.

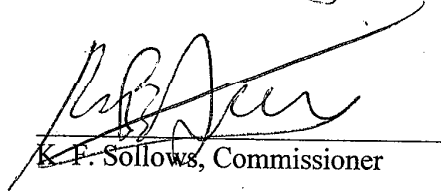
DATED AT THE CITY OF FREDERICTON, NB THIS 1st Day of November, 2005.



D. S. Nelson, Vice-Chairman



D. Ferguson Sonier, Commissioner



K. P. Sollows, Commissioner