DECISION

IN THE MATTER OF an application by the NBP Distribution & Customer Service Corporation (DISCO) for changes to its Charges, Rates and Tolls – Confidentiality Issues

July 27, 2005

NEW BRUNSWICK

Board of Commissioners of Public Utilities

INTRODUCTION

At the adjournment of the pre-hearing conference in Fredericton on June 24, 2005 the Board set July 11 and 12, 2005 in Saint John as the dates on which it would continue the pre-hearing conference. The Board said that on those days it would hear the New Brunswick Power Distribution and Customer Service Corporation's (Applicant) motion that certain information and documents requested by the Board and the intervenors be filed with the Board and classified as confidential, hear the intervenors on that motion and render a decision.

Prior to resuming the pre-hearing conference on July 11, 2005 the Board received a letter from David Coles, Esquire, representing the *Canadian Broadcasting Corporation* and the *Telegraph Journal* (Media) requesting he be given the opportunity to address the Board on several matters on July 11, 2005. In his letter Mr. Coles identified the following issues he wished to address:

(a) a request that the Media be granted full formal intervenor status,

(b) that the Media be authorized to speak in opposition to any claims for confidentiality,

(c) that the Media be given advance notice of all future interlocutory proceedings at which the Board intended to hear motions requesting information or documents be classified as confidential, and

(d) that the Media be permitted to attend all proceedings of the Board and record them by audio and video means and broadcast those recordings subject only to such restrictions respecting publication as may be properly imposed on any person generally and the print media.

At the opening of continuation of the pre-hearing conference on July 11, 2005 in Saint John the Board, with the consent of the Applicant and the intervenors, granted the Media formal intervenor status limited to appearances on motions to have information and documents classed as confidential and to requests to view information or documents at *in camera* hearings.

ISSUES

The Board has determined that it must render decisions on the following matters today:

1 The request made by the Applicant that the documents and information described in exhibit A-8 be filed with the Board pursuant to section 133 of the *Electricity Act* and held in confidence.

2 The motion by the Media that they and all media be given advance notice of all interlocutory proceedings at which the Board will hear motions requesting information or documents be classified as confidential or that information or documents be viewed only at *in camera* hearings.

3 The motion by the Media that they and all media be allowed to record by audio and visual means all proceedings of the Board and to broadcast same.

BACKGROUND

It is the Board's policy whenever possible that all hearings before it be open and transparent. The Board considers an open public hearing to be an extremely important adjunct to its process.

The Board is not limited to only considering evidence that has been presented in the hearing when rendering its decisions. Unlike a court, numerous cases recognize that the Board is a specialized tribunal and may bring to bear the expertise of its members in relation to the industry of the regulated utility when assessing the information brought before it and in rendering its decision.

The Board has authority to exercise its discretion to make orders in respect of confidentiality of information derived from its authority to make its own rules of practice and procedure in the conduct of its hearings. Pursuant to this authority the Board has adopted a Policy on Issues of Confidentiality. That policy document describes the rules by which information, that has protection from public disclosure pursuant to section 133 of the *Electricity Act,* may be placed on the public record or viewed at an *in camera* hearing.

The Board, in the past, has allowed information viewed at an *in camera* hearing to be aggregated, summarized and put on the public record in a manner that the underlying specific information is not disclosed and confidentiality agreements are honored.

In its role as an economic regulator the Board has an obligation in respect of the utility appearing before it. In the New Brunswick Court of Appeal case of *Re New Brunswick Telephone Company Limited*, (1977) 19 N.B.R. (2d) 681 Chief Justice Hughes stated at page 698 in paragraph 36 the following:

> "The Board of Commissioners of Public Utilities was established for the purpose of exercising regulatory authority powers over the operations of public utilities in the Province. Without such an

> authority presumably the public utility could charge whatever rates the traffic would bear and the public would have no recourse. *While the powers given to the Board are principally given for the purpose of protecting the public interest, the Board is also required to safeguard the financial position of the utility* when a complaint is made to the Board that rates are unreasonable, insufficient or unjustly discriminatory." [emphasis added]

The Board has a dual role when acting as an economic regulator. It must set rates that are just and reasonable to the ratepayers. It must also ensure that rates will allow the utility to earn a rate of return on its investment that will ensure the utility has the financial ability to continue to provide the regulated service.

The *Electricity Act* came into force on October 1, 2004 restructuring NB Power into several entities and creating for the first time a market for wholesale and large retail electricity. The former NB Power was a vertically integrated monopoly. The Applicant in the present case does not generate electricity and is not a vertically integrated monopoly. However, the Applicant, by virtue of the corporate restructuring provisions of the Act remains, as a practical matter, a monopoly for the supply of electricity to customers and is wholly dependent upon New Brunswick Power Generation Corporation (Genco) for its supply of electricity which its sells to its customers.

The Board notes that the Public Intervenor, the Conservation Council of New Brunswick (CCNB) and the Media formally objected to the claim for confidentiality put forth by the Applicant as required by the Board's Policy on Issues of Confidentiality.

(i) CCNB objected to the Applicant's request in respect of EGNB IE-37 and EGNB IR-39.

(ii) The Public Intervenor objected to the Applicant's request in respect of all information for which that claim is made by the Applicant in Exhibit A-8 and A-10.

(iii) The Media have advised that they would object to any information provided by the Applicant being declared confidential.

It should also be noted that there are no orders of the Board that ban the publication of any information obtained during the proceeding to date or which bar access of any person to the proceeding. As well, there are no orders declaring any information provided by the Applicant as confidential.

APPLICABLE LAW

Section 133 of the *Electricity Act* reads as follows:

> **133** Where information obtained by the Board concerning the costs of a person in relation to operations of the person that are regulated under this Part, or other information that is by its nature confidential, is obtained from such person by the Board in the course of performing its duties under this Act, or is made the subject of an inquiry by any party to any proceeding held

> pursuant to the provisions of this Act, such information shall not be published or revealed in such a manner as to be available for the use of any person unless in the opinion of the Board such publication or revelation is necessary in the public interest.

The protection afforded the information filed with the Board occurs, not because of an order of the Board, but due to the information being of the kind described in the section and thereby captured by its provisions.

During the course of the pre-hearing conference on July 11, 2005 the Board was referred to a series of cases which address the exercise of discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. The Board has reviewed these cases.

The most recent expression of the principles by the Supreme Court of Canada is found in *Toronto Star Newspapers Ltd. v Ontario*, [2005] S.C.J. No. 41, 2005 SCC 41. Justice Fish for the Court summarized the current state of the law in Canada at the opening of the decision at paragraphs 1 to 5 and at paragraphs 7 and 8:

> "1 In any constitutional climate, the administration of justice thrives on exposure to light -- and withers under a cloud of secrecy.
>
> 2 That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(b) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.
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> 3 The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.
>
> 4 Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice* or *would unduly impair its proper administration*. (emphasis added)
>
> 5 This criterion has come to be known as the *Dagenais/Mentuck* test, after the decisions of this Court in which the governing principles were established and refined."

At this point Justice Fish outlined the issues before the Court in the *Toronto Star* case. In paragraph 7 of the decision she states how the Court intends to dispose of the appeal in that case noting that the principles just described would be applied. She continued in paragraph 7 as follows:

> "7 ... In my view, the *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s.2(b) of the *Charter*.

> 8 The *Dagenais/Mentuck* test, though applicable at every stage of the judicial process, *was from the outset meant to be applied in a flexible and contextual manner. ...* " (emphasis added)

The line of cases leading to the *Toronto Star* case, for the most part, dealt with the exercise of judicial discretion in the context of criminal law matters or in the context of the exercise of legislated judicial discretion as in the case of *Sierra Club of Canada v. Canada (Minister of Finance),* [2002] 2 S.C.R. 522. The issue in that case was the effect of an order of confidentiality made by a judge pursuant to Federal Court Rule 151 in respect of an important commercial interest relevant to the proceedings before the Court. The Court stated that, in certain circumstances, giving due consideration to a series of tests and balancing of interests and rights, a confidentiality order may be issued. The other significant aspect of the case is that the *Dagenais/Mentuck* test was applied in a flexible and contextual manner in a civil rather than a criminal matter.

There are some material differences between the *Sierra Club* case and the circumstances in the present matter. In that case the issue was the exercise of a statutory discretion to issue a confidentiality order. In the present situation the Board would be exercising its general authority to establish its own practice and procedure in the context of legislation which provides for the Board approving just and reasonable rates to be charged by the utility. The need for the information by the Board in the present situation is somewhat different than that of the Court in the *Sierra Club* case.

The Board examined the cases to determine if the open court and freedom of expression principles referred to in the *Toronto Star* case would have application to a board or tribunal such as ours. That is a Board, which exercises a quasi-judicial function in the administration of justice as authorized by statute and exercising discretionary powers in respect of its practice and procedure. Upon review of cases including *Travers v Canada (Chief of Defence Staff),*[1993] 3 F.C. 528 (FC Trial Division), affirmed on appeal to the Federal Court of Appeal, *Canadian Broadcasting Corporation v. Summerside (City),*[1999] P.E.I.J. No. 3, and *Pacific Press Ltd. v. Canada (Minister of Employment and Immigration),* [1991] 2 F.C. 327 (FCA) and the tests and principles cited therein the Board is satisfied that this Board is bound by those principles.

The Board considers it appropriate in the present case to apply the *Dagenais/Mentuck* test in a flexible and contextual manner to the legislative, legal and regulatory framework in which the Board finds itself.

REVIEW OF APPLICANT'S REQUESTS

The Board has reviewed the information requests listed in exhibit A-8 and described in exhibit A-10 for which the Applicant has requested that the responses be filed pursuant to section 133 of the *Electricity Act.* The following information requests have been resolved:

(a) Disco EGNB IR-1, and

(b) the Power Purchase Agreements respecting New Brunswick Power Nuclear Corporation (Nuclearco) and New Brunswick Power Coleson Cove Corporation (Colesonco).

The Applicant does not have possession of all the information requested in the remaining information requests. A portion of the information that it does not possess is the non utility generator (NUG) contracts which will be referred to as the "NUG Information". The information requested in the remaining information requests, excluding the NUG Information, will be referred to as the "Requested Documents".

ANALYSIS

When any information is filed with the Board, section 133 of the *Electricity Act* will apply to it to the extent it is information described in section 133. Such information is to be held by the Board and not released for the use of any person unless in the opinion of the Board its release is necessary in the public interest. The application of section 133 of the Act to such information occurs by operation of section 133 and not by order or direction of the Board. There is no exercise of discretion by the Board that brings such information within the section. As long as the Board does not make a public interest determination in respect of that information it continues to attract protection from public release provided by the section. Information filed with the Board and provided to participants is on the public record and does not require a public interest determination by the Board to be used by the public.

Upon reviewing filed information which has not been provided to the participants on the public record, the Board may determine that it is necessary in the public interest that such information be released from the protection of section 133 so that it may be put on the public record.

At the Pre-Hearing Conference on July 11 and 12, 2005 the Board heard submissions from the Applicant as to why the Requested Documents should be filed pursuant to section 133 of the *Electricity Act* and declared confidential. The Board also heard from the Applicant why it should not order the NUG Information be filed with the Board.

The Applicant has not filed the Requested Documents or the NUG Information with the Board. The result is that section 133 does not yet apply to the Requested Documents or the NUG Information.

Some confusion arose during those hearing days. Several intervenors requested that the Board not declare the Requested Documents to be classified as confidential and requested the Board direct the Applicant to file them and the NUG Information on the public record. The intervenors provided reasons why they needed the Requested Documents and the NUG Information and made submissions on why they should not be classified "confidential". The Media submitted that the Board would offend the open court and

freedom of expression principles enunciated in the *Toronto Star* case should the Board classify the Requested Documents and NUG Information as confidential.

The Board has expressed on a number of occasions the importance of the Requested Documents and NUG Information for the purpose of setting fair and equitable rates. The Board also considers it important that the intervenors be granted access to the Requested Documents and NUG Information, if and when filed with the Board, so that they may properly test the assertions of the Applicant.

As mentioned, the Board must make a determination if it is necessary in the public interest that the Requested Information and the NUG Information, if and when filed, be made available for public use. Such determination is made following a hearing where submissions are made for and against the Board exercising its public interest discretion to release the information from the protection of section 133 of the Act. The Board considers that hearing to have occurred on July 11 and 12, 2005. The Board has been able to bring to bear its expertise when assessing the import and kind of information that underlies the summary descriptions in exhibit A-8. Section 133 of the Act stipulates that the release of the Requested Documents and NUG Information to the public, if and when filed, must be necessary in the public interest. The Board does not have an open discretion on the matter.

The Board has determined that the public interest is best served by striking a balance between its role as an economic regulator approving just and reasonable rates and its obligation to ensure that the open court and freedom of expression principles enunciated in the *Toronto Star* case are applied. This balance is required because of the particular duties and obligations imposed on the Board by the *Electricity Act* and the Board's obligations to the Applicant utility.

Exhibit A-8 indicates that the Applicant does not have in its possession certain portions of the Information requested. That information is only available from the NB Power group of generation companies or through the cooperation of third parties.

With respect to the NUG Information requested in Disco (PI) IR-17, the Board arranged for each of the parties to the described contracts be given notice that the Board may order that the contracts be filed with the Board in this hearing. On July 11, 2005 the Board heard submissions from counsel for Bayside, St. George, Grandview and Fraser Papers. In addition, counsel for the Applicant made a submission in respect of the Bitor contract. The thrust of their submissions was that the Board did not have jurisdiction to order the production of the contracts and that the information in them is not relevant to the present application. They also declined to provide the contracts voluntarily.

The Board is concerned that should proprietary or commercially sensitive information relating to the generation companies or to the Applicant forming a part of the Requested Documents and NUG Information be put on the public record that they will be placed at a competitive disadvantage in the newly created market. Such disclosure may result in the risk of significant financial harm to those companies, and if this were to happen it would

cause the rates for electricity to rise. The Board is mindful of its obligation in respect of the continued financial stability of the Applicant so that it continues to be capable of providing its monopoly service. At the same time the Board needs access to certain information to properly arrive at just and reasonable rates.

It is critical at this stage to understand that the Applicant does not wish to use the Requested Documents and NUG Information to support its case. If the Board does not direct that the Requested Documents and NUG Information be filed with the Board it would not be available to the Board.

ORDERS

1 Request made by the Applicant that the Information be filed with the Board and held in confidence

The Board orders the Applicant to file the Requested Documents that it has in its possession with the Board in unredacted form. Section 133 of the *Electricity Act* will apply to the portion of that information that the Applicant has requested be protected by section 133 as described in exhibit A-8. In addition, the Board orders the Applicant to file with the Board the Requested Documents on the public record, with the information that the Applicant has requested be protected by section 133 as described in exhibit A-8, redacted.

In reaching its decision the Board has determined, when examining the various rights and interests affected, that the filing of the unredacted Requested Documents will have a salutary effect on the Applicants right to a fair hearing. On the other hand the deleterious effects of filing of the unredacted Requested Documents on the principle of open courts and freedom of expression would be minimal.

The Board finds that it is necessary in the public interest that the unredacted Requested Documents be viewed at an *in camera* hearing. The Board will, in due course, issue an order which complies with its Policy on Issues of Confidentiality setting the time, date and location of an *in camera* hearing for consideration of the unredacted Requested Documents

The Requested Documents and NUG Information represents a very small portion of the information requested in more than 300 information requests. The material, while very important to the Board's deliberations, is very narrow and technical. In ordering the filing of the unredacted Requested Documents, the Board is satisfied that although there is significant public interest in these proceedings, open access to the unredacted Requested Documents during the proceedings would be only slightly impeded by the order granted.

The NUG Information has presented the Board with a particularly difficult problem. The NUG Information is to be found in the files of the NB Power group of generation

companies and generally relate to contracts with third parties. The Board considers the NUG Information to be very important for the purpose of setting fair and equitable rates.

The Board has determined that it does not have jurisdiction to order NUG Information to be filed with the Board and therefor will not make an order in respect of it.

The Board reiterates part of its decision of June 9:

> "The Act is also clear that the Board has no jurisdiction over the generation companies. We do believe strongly that if the NB Power group of companies has information that will assist this Board in establishing fair and equitable rates for the customers of Disco, then that information should be made available to this hearing process."

The Board notes that the White Paper on Energy made clear the government's intentions to establish a competitive market for electricity supplied to wholesale and large retail customers. The Legislature's intent is equally clear that such a market should be created and made to operate in New Brunswick. To this end, the legislation directed the separation of NB Power (NBP) into transmission and distribution companies that are fully regulated by this Board, and generation companies that were not to be subject to the rate-based regulatory oversight of this Board.

Prior to its division along functional lines (generation, transmission and distribution and the System Operator), the integrated NBP had contracted for power and energy supplies with certain non-utility generators (NUGs). These contracts, or power purchase agreements (PPAs), forming a part of the NUG Information, are for the supply of energy for sale into the New Brunswick market – a market composed of buyers and sellers. Since the NUGs are clearly the sellers of power and energy, it is evident that the intentions of the Legislature would have been best met by assigning their PPAs to the Applicant, which is the distribution company that is designated in legislation as the standard offer service provider for the market, and the company that must currently buy electricity to satisfy nearly 100% of the in-province load.

In fact, the PPAs were assigned to Genco. This has at least two significant negative implications for electricity users in New Brunswick:

1. It places the contracts beyond the reach of this Board in matters related to rate-making, frustrating the cost allocationand rate design process that is required to satisfy the dual goals of setting just and reasonable rates that are fair and equitable; and

2. It frustrates the growth of a competitive market for wholesale and large retail customers by placing Genco in a position from which it can clearly exercise significant market power, as it is the sole provider of electricity to the Applicant.

The Board also notes that these NUG contracts were made with NBP when it was a fully integrated and regulated utility company. The NUGs therefore had, or should have had, a

reasonable expectation that any contract they made with NBP might be subject to review in a public forum. It is only because NBP was restructured on October 1st of last year, and the contract assigned to what is arguably the wrong successor company, that the Board lacks the authority to compel filing of the contract in this rate-making proceeding.

Finally the Board notes that the contracts in question represent a significant portion of in-province capacity. Two of them relate to natural gas fuelled generators, the only ones in the province. The Applicant had indicated that $29 million of the requested revenue increase for the 2005/2006 year was due to expected high prices for natural gas.

This Board is of the view that its ability to discharge its duties, both in respect of retail rate review and in market monitoring to foster competition in generation, has been severely compromised by the assignment of the NUG PPA's to Genco rather than the Applicant.

The Board is also of the view that the situation can be best remedied, and the legislative intent of the act best met, by the Minister exercising his discretion through the Order-in-Council process to reassign the NUG PPAs from Genco to the Applicant.

2 Motion re video and audio recording of proceedings:

As noted at the outset of this decision the CBC has requested permission to attend all proceedings of the Board and record them by audio and video means and broadcast those recordings subject only to such restrictions respecting publication as may be properly imposed on any person generally and the print media.

The Board has decided that it is appropriate for all media, including television, to cover the Board's public hearing proceedings and to be able to broadcast recordings from the hearing, be it radio or television. Thus, the general rule now will be that video and audio can be used to record our proceedings. This will always be subject to the Board's being able to limit recording in some cases.

For example, cameras and recording equipment would not be permitted during "in camera" sessions. Another example would be when, during a rate hearing an "informal intervenor day" is held, for members of the general public who want to put their views to the Board, but do not want to participate in the entire hearing process. It is during that day that they are allowed to address the Board. Cameras and recording will be barred for that particular part of the process, however, any member of the general public who wishes to give an interview may do so outside the hearing room. Those who are intimidated by television/radio may feel free that they can address the Board without being subjected to audio or video recording.

3 Motion re notice:

The Media requested the Board provide advance notice of all future interlocutory proceedings at which the Board intended to hear motions requesting information or documents be classified as confidential. The Board has reviewed Justice Lamer's comments on notice at paragraph 49 of *Dagenais v Canadian Broadcasting Corporation,*[1994] 3 S.C.R. 835. He noted some practical problems and concluded that it really should be left to the discretion of the judge.

The Board considers it appropriate that a procedure for providing notice should be adopted by the Board. The Board also notes the impracticality of suspending the deliberations of the Board should confidentiality issues or an *in camera* hearing request arise on short notice to the Board. The Board will be in contact with the New Brunswick Press Council to hopefully arrange for a site to be established to provide notice similar to what we are told is used in Nova Scotia.

DATED AT THE CITY OF SAINT JOHN, NB THIS 22nd DAY OF JULY 2005.

David C. Nicholson, Chairman

R. Bell, Commissioner

J.A. Dumont, Commissioner

D. Ferguson Sonier, Commissioner

D.S. Nelson, Commissioner

K.F. Sollows, Commissioner