

THE NEW BRUNSWICK BOARD OF  
COMMISSIONERS OF PUBLIC UTILITIES

IN THE MATTER OF AN APPLICATION BY  
THE NEW BRUNSWICK ELECTRIC POWER  
COMMISSION FOR APPROVAL OF CHANGES  
IN ITS CHARGES, RATES AND TOLLS

DECISION ON INTERIM REQUEST

BEFORE:	DAVID C. NICHOLSON	-	CHAIRMAN
	B. FERNAND NADEAU	-	VICE CHAIRMAN
	J. E. STEVENS	-	COMMISSIONER
	CLAUDETTE STYMIEST	-	COMMISSIONER
	IVAN McLEAN	-	COMMISSIONER
COUNSEL:	THOMAS B. DRUMMIE, Q.C.		COUNSEL FOR THE NEW
	RICHARD B COCHRANE, Q.C.		BRUNSWICK ELECTRIC POWER
	KAREN M. COLPITTS		COMMISSION
	E. NEIL McKELVEY, Q.C.		DENISON-POTACAN POTASH
	JAMES F. LeMESURIER		COMPANY, FRASER INC.,
			IRVING OIL LIMITED,
			MIRAMICHI PULP & PAPER
			INC., NBIP FOREST PRODUCTS
			INC., ROTHESAY PAPER
			LIMITED, ST. ANNE-NACKAWIC
			PULP COMPANY LTD., STONE
			CONSOLIDATED INC. AND
			BRUNSWICK MINING AND
			SMELTING CORPORATION
			LIMITED
	DAVID G. BARRY		POWER COMMISSION FOR THE
			CITY OF SAINT JOHN
	D. M. GILLIS, Q.C.		McCAIN FOODS LIMITED
	R. J. GILLIS, Q.C.		
	ROBERT L. KENNY, Q.C.		PUBLIC INTERVENORS
	IVAN ROBICHAUD		
	HARRY G. COLWELL		BOARD COUNSEL
SELF REPRESENTED INTERVENORS:	GERARD DALY		
	DR. J. VENART, KENNETH SOLLOWS AND DR. KUMA SUMATHIPALA		
	REVEREND LLOYD E. LAKE		

The New Brunswick Electric Power Commission (hereinafter referred to as NB Power) applied, on November 9, 1990, to the Board of Commissioners of Public Utilities (hereinafter referred to as the Board) for approval of a general increase in its charges, rates and tolls for services performed in New Brunswick. This application was made pursuant to Section 38 of the Public Utilities Act (hereinafter referred to as the Act).

The rate schedules filed with the application would result in average increases as follows:

- 6.9% effective January 1, 1991
- 2.6% effective April 1, 1991
- 2.6% effective October 1, 1991

On the same date NB Power requested by notice, pursuant to Section 41 of the Act, approval on an interim basis of the changes requested in its general application. An affidavit was filed with the notice in support of the request for interim approval. Subsequently, the Board issued information requests to NB Power which were responded to by it in early December.

Public notice of these applications was given pursuant to an order of the Board. A pre-hearing conference dealing with procedural matters relating to the full rate hearing together with a one day public hearing dealing with the interim request was held on December 18-20.

The Act was amended on January 1, 1990, and prior to that time there were no provisions for interim orders. Accordingly, this is the first time the Board has had to deal with a request for approval of rate changes on an interim basis. There was considerable discussion, at the public hearing, with respect to the Board's jurisdiction, power and extent of discretion as it should apply to interim orders. Section 41, which is the new section dealing with interim orders is as follows:

"41(1) The New Brunswick Electric Power Commission, when making an application under section 38 for a change in the charges, rates and tolls charged by it, may on thirty days notice to the Board, request the Board to approve on an interim basis a change in the charges, rates and tolls, which change would take effect before the rendering of the Board's final order or decision respecting the application.

41(2) Notwithstanding any other provision of this Act, where the Board is of the opinion that special circumstances exist, the Board

(a) may make an interim order approving a change in the charges, rates or tolls to be charged by The New Brunswick Electric Power Commission, and

(b) where an interim order is given under paragraph (a), shall set the time the change in the charges, rates or tolls is to take effect.

41(3) An interim order given by the Board under subsection (2) is not subject to modification, variation or reversal by the Lieutenant-Governor in Council except where the interim order is confirmed, in whole or in part, in the final order or decision of the Board and except within thirty days after the filing of the final order or decision of the Board with the President of the Executive Council under section 45.

41(4) Where the Board under subsection (2) makes an interim order approving a change in the charges, rates or tolls to be charged by The New Brunswick Electric Power Commission, the change shall be plainly indicated upon existing schedules.

41(5) The New Brunswick Electric Power Commission shall expeditiously rebate the overcollection to each person affected by an interim order if

(a) the Board in its final order or decision does not confirm the interim order, or

(b) the Lieutenant-Governor in Council within thirty days after the filing of a final order or decision of the Board with the President of the Executive Council under section 45, modifies, varies or reverses a final order or decision of the Board that confirms, in whole or in part, an interim order."

The Board will comment on the following issues that were raised and upon which submissions were made at the hearing before considering the request for interim relief:

- What constitutes special circumstances as contemplated in Section 41(2)
- What is the weight of evidence required to support a request for interim rate relief
- What is the authority and discretion of the Board in making an order pursuant to Section 41(2)(a)

In the preparation of the Board's comments a quick review was conducted of all Canadian and some American legislation dealing with the regulation of public utilities together with a number of reported decisions. Discussion of each issue follows.

- 1) What constitutes special circumstances as contemplated in Section 41(2).

Position of Applicant - NB Power's position as to what constitutes special circumstances was set forth in paragraph 17 of the affidavit of Mr. Kenneth B. Little, Vice-President Finance of NB Power. Three reasons were given and are set out below:

- 1) "the anticipated delay in the hearing of a general rate application"
- 2) "the unusual rise in oil prices"
- 3) "the objective of basing charges on cost of energy supplied to customers using it"

Position of Intervenor - Counsel for McCain Foods was of the opinion that special circumstances would require a demonstration of irreparable harm. Counsel for the Large Power Users stated that NB Power must show extraordinary circumstances, virtually in the nature of an emergency. The Public Intervenor said that in determining whether or not special circumstances exist that the Board should apply a severe test. Counsel for the Power Commission of the City of Saint John was of the opinion that special circumstances would relate to the financial circumstances of the

utility.

Review Findings - The phrase "special circumstances" was found in the legislation of Alberta, British Columbia and Manitoba as well as in the National Transportation Act. In all these statutes, the phrase was used in those sections that dealt with the ability of the regulator to issue interim orders ex parte. None of the statutes contained a definition of, or guidelines to be used in deciding what constitutes, "special circumstances".

No use of the phrase "special circumstances" was found in the American legislation that was reviewed. Nonetheless, certain regulators made reference to special circumstances in some of their decisions. In those decisions, the determination of whether or not special circumstances existed was based on the particular facts of the case before the tribunal. In general, one requirement for special circumstances was the existence of some factor outside the control of the utility. The regulators did not require that an emergency situation must exist. In other words, there was no need to demonstrate a threat to the utility's solvency or ability to render service. However, the evidence had to satisfy the regulators that harm could have resulted to the utility and to the ratepayers as well if the interim relief had not been granted.

Board Conclusions - The Canadian and American legislation reviewed

was of little assistance to the Board with respect to the interpretation of Section 41(2) of the Act. The Board considers that, in determining whether or not special circumstances exist, it must look to the facts associated with the particular request before it. The Board is of the opinion that the factors considered in the American decisions referred to above are significant.

- 2) What is the weight of evidence required to support a request for interim rate relief.

Position of Applicant - NB Power was of the opinion that only a prima facie case of need for the change requested must be presented.

Position of Intervenors - No intervenor took issue with the position taken by NB Power.

Review Findings - The review indicated that, as a minimum, a prima facie case of need must be presented.

Board Conclusions - The Board is of the opinion that it is necessary for the applicant to provide, at a minimum, a prima facie case of need for any request for interim rate relief.

3. What is the authority and discretion of the Board in making

an order pursuant to Section 41(2)(a).

Position of Applicant - NB Power's position is that the Board must either approve the request for interim rate relief in its entirety or deny it completely. In other words, the Board has no discretion.

Position of Intervenors - None of the intervenors agreed with NB Power. Several of the intervenors made submissions that the Board has full discretion in this matter.

Review Findings - The review of the legislation indicates that in all cases the regulator has all of the discretion with respect to interim orders as it has with respect to final orders.

Board Conclusions - The Board is of the opinion that it has the authority to exercise full discretion in determining the appropriate change that would be the subject of any interim order. Section 41(2)(a) states that the Board "may make an interim order approving a change". It does not say "the" change as requested by NB Power. Inherent in the words "may" and "a change" is the authority for the Board to decide what is the appropriate amount of change, if any, in rates to be granted on an interim basis.

The Board will now discuss the specific request for



interim rate relief, that is:

- 6.9% effective January 1, 1991
- 2.6% effective April 1, 1991
- 2.6% effective October 1, 1991

NB Power's reasons why it believes that special circumstances exist are:

- 1) "the anticipated delay in the hearing of a general rate application"
  - 2) "the unusual rise in oil prices"
  - 3) "the objective of basing charges on cost of energy supplied to customers using it"
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- 1) "the anticipated delay in the hearing of a general rate application" - It is essential to have a full public hearing process to examine any application for approval of changes to NB Power's charges, rates and tolls in order to ensure that the public interest is protected. This hearing process is standard practice for any regulated utility and NB Power has been fully aware of this requirement for over a year since amendments to the Act were passed. A full public review

requires time to notify interested parties, to permit an exchange of information and to conduct the actual public hearing. The fact that the necessity of a full public review requires a considerable length of time is normally taken into consideration by a regulated utility in its standard budgeting and planning activities. Therefore, the requirement for time to permit a proper public review does not, in and of itself, constitute special circumstances.

- 2) "the unusual rise in oil prices" - Oil is a commodity which has experienced significant fluctuations in price in the past. This is clearly demonstrated by the chart provided at page 13 of NB Power's responses to the Board's interrogatories. The price of oil can go up and it can go down as well - both of which occurred in 1990. However, oil is only one component of NB Power's costs of operation. In any given situation, a rise in the price of oil may be offset by a reduction in some other cost or by an increase in revenue. Therefore a rise in the price of oil does not, in and of itself, constitute special circumstances.
  
- 3) "the objective of basing charges on cost of energy supplied to customers using it" - To the extent that this relates to fairness, it is a traditional regulatory objective and one

that is long term in nature. Therefore it does not, in and of itself, constitute special circumstances.

The above comments clearly indicate there are some events which this Board considers do not, in and of themselves, constitute special circumstances. As well, the Board has indicated that the review of legal precedents and legislation it was able to complete, indicated that New Brunswick is rather unique with respect to the legislation regarding interim rate increases and with respect to the definition of "special circumstances".

In this instance and to provide guidance for possible future interim requests, the Board is of the opinion that, generally, for the facts to constitute special circumstances, within the meaning of Section 41(2) of the Act, the following should exist:

- 1) That the projected results, reflecting all costs and revenues, demonstrate a prima facie need for a rate change.
- 2) That there is not sufficient time to permit the normal full public review.

- 3) That the circumstances which result in the need for a rate change are beyond the control of the applicant and as well, could not have been reasonably anticipated by the applicant.

The evidence of NB Power indicates that, without any increase in its rates, it will suffer a loss in the current, 1990-91 fiscal year. The possibility of a loss is serious because of its implications for the future. A loss means an interest coverage ratio below 1.0. When the ratio falls below 1.0 there is not sufficient income to make the interest payments on the outstanding debt. This is below the ratio that was agreed to as the minimum acceptable level for NB Power by all parties at the generic hearing which examined its financial and accounting policies (hereinafter referred to as the F & A hearing). An interest coverage ratio of less than 1.0 would severely limit the flexibility of NB Power to accommodate possible future developments. It may also reflect negatively on the credit rating of NB Power and the Province. To have a ratio of less than 1.0 would run contrary to NB Power's publicly stated financial objectives.

Some of the Intervenors suggested at the hearing that NB Power has sufficient reserve accounts and/or equity which could be used to absorb the projected loss. The rationale for the reserve accounts of NB Power was fully canvassed at the F & A hearing.

These accounts are set up for specific purposes and have rules that govern the flow of funds into and out of each account. They are not intended nor does the Board believe that they should be used to offset any potential losses due to any factors other than those presently governing the particular reserves.

The purpose of having equity in NB Power's capital structure was also fully discussed at the F & A hearing. Equity is a necessary requirement of a properly managed corporation. It is not standard practice to plan for a reduction in equity simply as a result of normal operating circumstances.

The evidence presented by NB Power indicates that the utility will suffer a loss of \$2.0 million in fiscal 1990-91 unless it receives approval to raise its rates. This is a significant change from the original budget wherein a net income of \$25.0 million was projected. The examination which occurred at the interim hearing clearly indicates that this \$27.0 million deviation from budget is due to a number of factors. The large increase in the price of oil is a significant factor but so is the increase in variable expenses. In its responses to the information requests NB Power indicated that the fact, that the variable expenses for 1990-91 would exceed the original budget, was known early in the fiscal period. As a result, efforts were made to reduce the variable expenses. Unfortunately, the latest projections indicate

that these efforts were unsuccessful. In fact, had oil prices remained as budgeted, NB Power would still be projecting a significant reduction in net income from that originally budgeted. This would have resulted in a much lower interest coverage ratio than originally planned and clearly would have been inconsistent with NB Power's financial objectives as stated during the F & A hearing. The Board is concerned that, in spite of early indications of worsening financial performance NB Power did not make an application for rate relief until November, 1990.

For the above reasons, the Board is of the opinion that NB Power has demonstrated a prima facie need that it requires a change in its rates in its current fiscal year (1990-91).

There was extensive discussion at the pre-hearing conference on the subject of when a full public review could occur. The earliest time that a full public hearing could be held is mid-July, 1991. This is almost four months after the end of the 1990-91 fiscal period. Therefore, the Board is of the opinion that there is not sufficient time to permit the normal full public review of the application in the current fiscal period.

The request for interim relief appears to have been predicated largely on the price of oil. Oil prices have risen substantially since August and continue to be significantly above

budgeted amounts. The effect of this on NB Power's in-province generation costs for 1990-91 was estimated to be approximately \$15 million in Mr. Little's affidavit. The requested increase for the 1990-91 fiscal period of 6.9%, had it gone into effect on Jan. 1, 1991, would have produced \$13.5 million of additional revenues in the current fiscal period. The Board is of the opinion that the rise in the price of oil is a relatively recent event and could not reasonably have been foreseen by NB Power.

Therefore, the Board considers that, for the 1990-91 year, special circumstances do exist and approves, on an interim basis, the requested increases in the charges, rates and tolls of NB Power as contained in Appendix A of the application which will result in an average increase of 6.9%. The effective date of the changes will be January 16, 1991.

In the event that a rebate may be necessary, as a result of the final rates established subsequent to a full public review, the Board orders NB Power to keep sufficient records so as to comply with Section 41(5) of the Act. NB Power shall file with the Board a description of how this will be accomplished within three weeks of this decision.

With respect to the 1991-92 fiscal year the evidence indicates that NB Power will suffer a significant loss in the

absence of rate relief. The Board is of the opinion that NB Power has demonstrated a prima facie need for rate relief for the fiscal year 1991-92.

As indicated above, it has been determined that a full public review of the current rate application could occur as early as mid-July of 1991. The Board recognizes that, in order to do so, all of the normally required information could not be supplied by NB Power.

As a result of the discussion at the pre-hearing conference, the Board considers that sufficient information would be available to permit a full public review of the 1991-92 year as early as mid-July, 1991. The reduced information requirements, facilitating the earlier hearing, would be compensated for by the anticipated full rate hearing for the 1992-93 fiscal period being held during the last quarter of the 1991-92 year. Full normal information requirements will be met for that hearing. Therefore, the Board is of the opinion that there is sufficient time to permit the normal full public review of the rate application as it pertains to the 1991-92 year.

The major factors which lead to a need for rate relief in 1991-92 fiscal period are significant increases in both variable and fixed expenses as well as a projection that oil prices will



continue to be high. The Board is of the opinion that these items cannot be considered recent in relation to the 1991/92 fiscal year which does not even begin for approximately three months. The Board is also of the opinion that variable and fixed expenses are not items beyond the control of NB Power.

For these reasons, the Board finds that, special circumstances do not exist for the 1991-92 year. Therefore the Board does not approve, on an interim basis, the requested increases as contained in Appendices B and C of the application, that is, average increases of 2.6% on April 1, 1991 and 2.6% on October 1, 1991.

NB Power had knowledge of the type of information that would be required of it in a general rate application as early as the spring of 1990. This Board recognizes that NB Power is new to regulation and during the 1990 year was involved in a number of generic hearings. However, it is obvious to the Board that little or no effort was expended by NB Power to compile the required information during the 1½ month period from the filing of this application to the pre-hearing conference on December 17, 1990. This lack of attention to the requirements of the regulatory process is of considerable concern to the Board.

The Board is concerned about the possibility of a

significant loss by NB Power in 1991-92. The increases contained in Appendix A of the application have been approved on an interim basis and will continue until the Board's decision at the full rate hearing. This will help to offset some of the projected increases in costs. However, it may be that further increases are necessary. The Board anticipates that NB Power will file applications for rate increases with respect to both the 1992-93 and 1993-94 years as indicated by Mr. Little on pages 181-2 of the transcript. The Board considers it desirable that applications for rate increases be considered prior to or very early in the relevant year so as to minimize the possibility of disruption to customers and so that the Board will be considering the projected costs and revenues of a future rate period as contemplated by Section 42(1) of the Act. To have a public hearing on the current application late in 1991 would make it difficult, if not impossible, to achieve the appropriate timing for any possible rate application for the 1992-93 year.

The Board has decided that special circumstances do not exist with respect to the 1991-92 fiscal period. For this reason and in light of the considerations discussed above, the Board considers that it is appropriate to proceed with a full public review of the current application as quickly as possible. Therefore, the Board has decided that the public hearing to review the application will commence on July 17, 1991. A schedule of

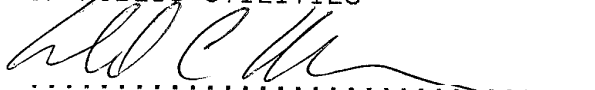
events leading up to the hearing will be provided to all registered parties by separate letter.

The Board directs NB Power to file its prefiled evidence in support of this application on or before March 5, 1991. This information will include the amended minimum filing requirements as agreed to at the December pre-hearing conference. A copy of these requirements will be sent to all registered parties with the schedule of events.


The Board has given consideration to the matter of the location of the hearing and it will be held in the City of Saint John.

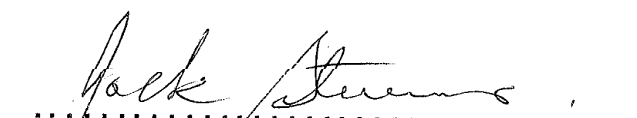
DATED at the City of Saint John, New Brunswick this 10th day of January, 1991.

THE BOARD OF COMMISSIONERS  
OF PUBLIC UTILITIES

  
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David C. Nicholson, Chairman

  
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B. Fernand Nadeau, Vice Chairman

  
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Claudette Stymiest, Commissioner

  
.....  
Jack Stevens, Commissioner

  
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Ivan McLean, Commissioner