

ENGAGEMENT EBM-R.14

[Draft Translation]

DECISION

QUÉBEC

RÉGIE DE L'ÉNERGIE

D-2010-160	P-130-001 and P-130-003	December 20, 2010
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PRESENT:

Marc Turgeon
Michel Hardy
Richard Lassonde
Commissioners

Énergie Brookfield Marketing Inc.

Applicant

and

Hydro-Québec

Defendant

Final Decision

Complaints addressed pursuant to Section 86 of the *Act respecting the Régie de l'énergie*

[Draft Translation]

DECISION

1. INTRODUCTION

[1] On March 15, 2010, Énergie Brookfield Marketing Inc. (EBMI) filed a complaint (P-130-001) with the Régie de l'énergie (the Régie) in which it contests a decision made by Hydro-Québec (the Transmission Provider) in the course of its electricity transmission activities.

[2] This decision, forwarded to EBMI on March 11, 2010, deals with the Transmission Provider's refusal to renew two firm transmission agreements of 43 MW and 68 MW (including transmission losses) on the MATI-HQT-NE path (the MATI-NE Agreements) for the period from April 1, 2010 to March 31, 2011. The complaint also includes an application for a safeguard measure order so as to enable EBMI to continue to use the transmission services until a final decision is rendered¹.

[3] On June 9, 2010, EBMI files a second complaint (P-130-003) with the Régie in which it contests the May 21, 2010 decision by the Transmission Provider.

[4] This second complaint pertains to the Transmission Provider's refusal to rollover two firm transmission service agreements of 105 MW each (including transmission losses) on the ON-HQT-NE path (the ON-NE Agreements) for the period from September 2, 2010 to September 1, 2011. The complaint also includes an application for a safeguard measure order so as to enable EBMI to continue to use the transmission services until a final decision is rendered. EBMI is also asking the Régie to hear this complaint at the same time as complaint P-130-001².

2. PROCEEDINGS

[5] On March 25, 2010, the Régie hears the parties on the application for a safeguard measure order re file P-130-001. The parties file a draft safeguard order which they ask the Régie to ratify. On that same day, the Régie renders Decision D-2010-031 in which it issues a safeguard measure order enabling EBMI to continue to use the firm transmission

¹ File P-130-001, Exhibit B-1, application, pages 17 and 19.

² File P-130-003, Exhibit B-1, application, pages 18 and 20.

services on the MATI-HQT-NE path effective April 1, 2010 and until a final decision is rendered.

[6] On May 21, 2010, the Transmission Provider requests the suspension of the hearing on complaint P-130-001 while waiting for the final decision in connection with tariff file R-3669-2008 Phase 2.

[7] On May 28, 2010, EBMI objects to the Transmission Provider's application for suspension and submits its arguments in this respect.

[8] On June 3, 2010, the Transmission Provider responds to EBMI's arguments. On June 7, 2010, EBMI submits some additional comments.

[9] Through Decision D-2010-075 dated June 11, 2010, the Régie denies the request to suspend the hearing and summons the parties to a pre-hearing conference.

[10] On June 21, 2010, the Régie holds the pre-hearing conference to discuss, *inter alia*, a timetable to deal with the two complaint files. During this conference, both parties agree that complaints P-130-001 and P-130-003 should be joined for the purposes of the oral hearing.

[11] On July 9, 2010, the parties submit a draft safeguard measure order for file P-130-003 which they ask the Régie to ratify. On July 14, 2010, through Decision D-2010-089, the Régie grants the application for the safeguard measure order to enable EBMI to continue to use the transmission services on the ON-HQT-NE path until a final decision is rendered.

[12] On July 14, 2010, the Régie also renders Decision D-2010-090 in which it agrees to the joinder of complaints P-130-001 and P-130-003 for the oral hearing and schedules the timetable to deal with the files.

[13] On September 7, 2010, the Transmission Provider files a solemn affirmation in support of its petition to maintain the confidentiality of Schedules 2, 3, 5, 6 and 11 of the

internal inquiry file of complaint P-130-001, and of Schedules 2, 3, 5, 6 and 9 of the internal inquiry file of complaint P-130-003.

[14] The oral hearing of the complaints is held from September 14 to 17, 2010 inclusive.

3. THE FACTS

[15] EBMI is a customer of the Transmission Provider, active in wholesale electricity markets in Quebec, New Brunswick, Ontario and in several U.S. states, including those in the Northeast.

[16] EBMI is the second most important customer of the Transmission Provider's point-to-point transmission service. The conditions of this service applicable to it in this capacity are set out under Part II of the *Tariffs and Conditions of Hydro-Québec's Transmission Services* (the Tariffs and Conditions)³.

[17] On January 5 and 9, 2007, EBMI files two long-term firm point-to-point transmission service requests for respective capacities of 43 MW and 68 MW (including transmission losses) on the MATI-HQT-NE path⁴. The Transmission Provider agrees to the requests and service agreements are signed on January 31, 2007 for service starting on April 1, 2007 and ending on March 31, 2008⁵.

[18] On August 2, 2007, EBMI files two requests for long-term firm point-to-point transmission service of 105 MW each (including transmission losses) on the ON-HQT-NE path⁶. Further to an impact study conducted by the Transmission Provider in May 2008, the latter agrees to EBMI's service requests⁷. The agreements are signed on June 12, 2008 for service starting on the later of the following dates, June 1, 2009 or the in-service date of the Ontario and Quebec interconnection, represented by the ON-HQT

³ File P-130-001, Exhibit B-1, application, allegation no. 4.

⁴ File P-130-001, Exhibit B-1, application, allegation no. 20.

⁵ File P-130-001, Exhibit B-1, EBMI-2.

⁶ File P-130-003, Exhibit B-1, application, allegation no. 28.

⁷ File P-130-003, Exhibit B-1, application, allegation no. 29.

path, and ending one year after the start up of the service⁸. Lastly, the transmission service end date was set for September 2, 2010⁹.

[19] Between December 2007 and November 2008, EBMI subscribes to long-term firm transmission service rights on the U.S. side for reserved capacities totalling 282 MW until 2013¹⁰.

[20] On January 14, 2008, EBMI requests the renewal of the MATI-NE Agreements for the period from April 1, 2008 to March 31, 2009¹¹.

[21] On March 4, 2008, the Transmission Provider agrees to this request, as appears from the entries posted on the Transmission Provider's OASIS site (*Open Access Same-time Information System*) and from the latter's letters¹². In its letters, the Transmission Provider stipulates that as the interconnection's service life is limited, an impact study will eventually be required in order to identify the cost of additions to the network when a subsequent renewal request is made.

[22] From December 23, 2008 to January 31, 2009, the Transmission Provider posts the following notice on its OASIS site:

[Translation] "*Coordination of transmission capacities*

In the context of FERC Order 890, the Transmission Provider will undertake work in 2009 to align the transmission capacities posted on OASIS, with those posted on neighbouring networks. As the work progresses, new transmission values will be posted.

*Effective the publication of this notice, the Transmission Provider will analyze each new request for transmission service on its interconnections taking into account the limits on the neighbouring networks [...]*¹³."

⁸ File P-130-003, Exhibit B-1, EBMI-6.

⁹ File P-130-003, Exhibit B-1, application, allegations nos. 30 and 31.

¹⁰ File P-130-001, Exhibit B-1, application, allegation no. 83 and Exhibit A-12-2, stenographer's notes (SN) dated September 15, 2010, volume 2, pages 95 to 98.

¹¹ File P-130-001, Exhibit B-1, application, allegation no. 41 and Exhibit B-1, EBMI-8.

¹² File P-130-001, Exhibits B-1, EBMI-8 and EBMI-9.

¹³ File P-130-001, Exhibit B-1, EBMI-18.

[23] On January 20, 2009, EBMI requests renewal of the MATI-NE Agreements for the period from April 1, 2009 to March 31, 2010. On March 4, 2009, the Transmission Provider agrees to this request with the same reservations referred to in the March 4, 2008 letter regarding the interconnection's service life¹⁴.

[24] On July 1, 2009, a long-term firm transmission service undertaken by Hydro-Québec in its electricity generating activities (the Generator) starts on the HQT-NE path for a capacity of 1,200 MW and a term of 35 years. The Generator sent the request for this service on January 20, 2006¹⁵.

[25] From July 8 to August 9, 2009, the Transmission Provider posts the following notice on its OASIS site:

[Translation] "***Harmonization of transmission capacities***

This notice is further to the notice published by the Transmission Provider on OASIS on December 23, 2008.

Effective today's date, the Transmission Provider is harmonizing its available firm transmission capacities with those of neighbouring networks so that the transmission reservations of its customers are attainable at all times according to the transmission capacities of neighbouring networks. The transmission capacities for each path over the next thirteen months are posted on the Transmission Provider's OASIS site.

No firm transmission reservation existing upon the publication of this notice is affected by this harmonization. All new requests for firm transmission service including renewal requests will be assessed in terms of the new firm capacity values posted by the Transmission Provider¹⁶."

[26] On January 19, 2010, EBMI requests the renewal of the MATI-NE Agreements, as appears from the entries posted on the Transmission Provider's OASIS site and from EBMI's letter dated January 20, 2010¹⁷.

¹⁴ File P-130-001, Exhibit B-1, EBMI-10.

¹⁵ File P-130-001, Exhibit B-1, application, allegation no. 29 and Exhibit B-1, EBMI-5.

¹⁶ File P-130-001, Exhibit B-1, EBMI-19.

¹⁷ File P-130-001, Exhibit B-1, application, allegation no. 47 and Exhibit B-1, EBMI-11.

[27] On February 12, 2010, the Transmission Provider notifies EBMI of its refusal to renew the MATI-NE Agreements as of April 1, 2010, on the following grounds:

[Translation] “[...] *However, the analysis of the firm transmission capacity on this path [MATI-NE] indicates that Hydro-Québec, in its electricity transmission activities (the “Transmission Provider”), cannot offer the requested capacity and, consequently, is not in a position to renew your request [...]*”¹⁸.”

[28] On February 22, 2010, EBMI submits its request to renew the ON-NE Agreements for a period of one year starting on September 2, 2010, as appears from the entries posted on the Transmission Provider’s OASIS site¹⁹.

[29] On February 25, 2010, EBMI lodges a complaint with the Transmission Provider against its February 12, 2010 decision to refuse to renew the MATI-NE Agreements²⁰.

[30] On March 11, 2010, the Transmission Provider informs EBMI that it is standing by its decision conveyed on February 12, 2010 to refuse the two requests for renewal of the annual firm transmission service on the MATI-HQT-NE path for the period from April 1, 2010 to March 31, 2011²¹.

[31] On March 15, 2010, EBMI files a complaint (P-130-001) with the Régie against the Transmission Provider’s March 11, 2010 decision regarding the refusal to renew the MATI-NE Agreements.

[32] On March 23, 2010, the Transmission Provider informs EBMI that the requests to renew the ON-NE Agreements will eventually be dealt with in the same way as the requests to renew the MATI-NE Agreements. Furthermore, the Transmission Provider stipulates that the current transmission service end date on the ON-NE path will be September 2, 2010 at the earliest, this date, in all likelihood, to be extended because of work at the Outaouais interconnection site scheduled from April 19 to May 10, 2010²².

¹⁸ File P-130-001, Exhibit B-1, EBMI-12.

¹⁹ File P-130-003, Exhibit B-1, EBMI-5.

²⁰ File P-130-001, Exhibit B-1, EBMI-16.

²¹ File P-130-001, Exhibit B-1, EBMI-17.

²² File P-130-003, Exhibit B-1, EBMI-2.

[33] On May 13, 2010, EBMI lodges a complaint with the Transmission Provider regarding the refusal to renew the ON-NE Agreements²³.

[34] On May 21, 2010, the Transmission Provider informs EBMI that it is maintaining its position to refuse to renew the ON-NE Agreements²⁴.

[35] On June 9, 2010, EBMI files a second complaint (P-130-003) with the Régie against the Transmission Provider's May 21, 2010 decision.

4. THE COMPLAINTS

[36] The conclusions sought by EBMI in connection with complaint P-130-001 which remain pertinent are the following:

[Translation] “[...]”

ALLOW the complaint by the complainant Énergie Brookfield Marketing Inc.;

ORDER the Transmission Provider, Hydro-Québec, in its electricity transmission activities, to rollover the 2007 Service Agreements (EBMI-2) for the period from April 1, 2010 to March 31, 2011 in accordance with the terms of the Tariffs and Conditions in effect on the date hereof and ORDER the Transmission Provider to allow Énergie Brookfield Marketing Inc. to continue to use the long-term firm point-to-point transmission services on the Transmission Provider's network and, in particular, on the MATI-HQT-NE path, in compliance with the terms of the Tariffs and Conditions currently in effect and ensuing from Decisions D-2009-018 [sic, D-2009-015] and D-2009-023 for a reserved capacity of 111/106 MW.”

[37] As for complaint P-130-003, the conclusions sought which remain pertinent are the following:

[Translation] “[...]”

²³ File P-130-003, Exhibit B-1, EBMI-13.

²⁴ File P-130-003, Exhibit B-1, EBMI-14.

GRANT the complaint by the complainant *Énergie Brookfield Marketing Inc.*;

ORDER the Transmission Provider, *Hydro-Québec*, in its electricity transmission activities, to rollover the *ON-HQT-NE Service Agreements (EBMI-6)* for the period from September 2, 2010 to September 1, 2011 in accordance with the terms of the Tariffs and Conditions in effect on the date hereof and **ORDER** the Transmission Provider to allow *Énergie Brookfield Marketing Inc.* to continue to use the long-term firm point-to-point transmission services on the Transmission Provider's network and, in particular, on the *ON-HQT-NE path*, in compliance with the terms of the Tariffs and Conditions currently in effect and ensuing from Decisions D-2009-018 and D-2009-023 for a reserved capacity totalling 210/200 MW."

[38] The Régie stipulates that the version of the Tariffs and Conditions applicable to complaint P-130-003 is the version approved by Decisions D-2010-032 and D-2010-041, and not the version approved by Decisions D-2009-018 and D-2009-023.

[39] In addition, the Régie understands that the renewal period for complaint P-130-003 should be from October 22, 2010 to October 21, 2011 rather than from September 2, 2010 to September 1, 2011, in accordance with the agreement submitted by the parties for the purposes of the safeguard measure order²⁵.

5. THE OBJECTIONS TO BE RULED ON

[40] At hearing, the Régie ruled on one objection by EBMI and two objections by the Transmission Provider.

[41] EBMI objected to a question to the Transmission Provider's witness about a statement by EBMI to the effect that the Transmission Provider would have given undue preference to the Generator. According to EBMI, this question would lead the witness to formulate an opinion. The Régie finds that the answer provided by the witness does not fall under the ambit of opinion²⁶. Consequently, the objection is overruled.

²⁵ File P-130-003, Exhibit C-1-6.

²⁶ File P-130-001, Exhibit A-12-3, SN dated September 16, 2010, volume 3, pages 90 and 91.

[42] The Transmission Provider's first objection pertained to the adducing in evidence of certain documents filed in connection with other files under the Régie's review, namely, files R-3669-2008 Phase 2 and R-3699-2009. However, this objection no longer had to be ruled on since the parties agreed on an alternative to the filing of these documents, that is, through admissions by the Transmission Provider²⁷.

[43] The Transmission Provider's second objection pertained to the adducing in evidence of a document entitled *ISO New England Inc. Transmission, Markets and Services Tariff* (ISO-NE Tariff). In filing this document, EBMI is seeking to show that ISO-NE (*Independent System Operator New England*) does not consider it necessary to co-ordinate the calculation of ATC (Available Transfer Capability or *capacité de transport disponible*) with the Transmission Provider's network, given the technical nature of the direct current interconnection between the two networks.

[44] In paragraph 127, the Régie expresses itself on the expediency of dealing with, in these files, the Transmission Provider's implementation of an approach based on the harmonization of the interconnections in terms of the receiving capabilities of the neighbouring networks (implementation of harmonization). In the context of the allegations of the complaints, the Régie rules that the ISO-NE Tariff is admissible as evidence and overrules the Transmission Provider's objection. However, for the reasons set out further on, the Régie rules that this document is not material for the purposes of this decision.

6. THE POSITION OF THE PARTIES

6.1 EBMI

[45] EBMI adopts a common position in both files of complaints P-130-001 and P-130-003.

²⁷ File P-130-001, Exhibit A-12-3, SN dated September 16, 2010, volume 3, pages 142 to 147.

[46] It contends that its service requests on the MATI-HQT-NE and ON-HQT-NE paths were deemed complete and were accepted by the Transmission Provider without any restriction or condition²⁸.

[47] EBMI considers that it has a right to renew its agreements in application of Section 2.2 of the Tariffs and Conditions. This section was approved by the Régie in all the versions of the Tariffs and Conditions since its initial approval (Decisions D-2002-286 and D-2003-12). The wording of Section 2.2 found in the Tariffs and Conditions currently in effect pursuant to Decisions D-2009-015 and D-2009-023 has not been significantly amended²⁹. Section 2.2 reads as follows:

“2.2 Reservation Priority for Existing Firm Service Customers: Existing firm transmission service customers with a contract term one year or more have the right to continue to use the Transmission Provider’s Transmission Service when their contract expires, rolls over or is renewed. This transmission reservation priority is independent of whether the existing customer continues to purchase electricity from the Generator or elects to purchase electricity from another Delivering Party. If at the end of the contract term, the Transmission Provider’s Transmission System cannot accommodate all of the requests for Transmission Service, the existing firm service customer must agree to accept a contract term at least equal to that of a new competing request by a new Eligible Customer and to pay the current just and reasonable rate, as approved by the Régie, for such service. This transmission reservation priority for existing firm service customers is an ongoing right that may be exercised at the end of all firm contracts of one year or longer provided the customer notifies the Transmission Provider in writing and on OASIS no later than sixty (60) days before the end of the contract.”

[48] EBMI claims that the right to renew a firm transmission service pursuant to Section 2.2 of the Tariffs and Conditions is considered at the time of the initial request. Once the request is granted, the customer is entitled to require the rollover of its service regardless of the constraints that might subsequently arise on the Transmission Provider’s network³⁰.

²⁸ File P-130-001, Exhibit B-1, application, allegation no. 22; file P-130-003, Exhibit B-1, application, allegation no. 32.

²⁹ File P-130-001, Exhibit B-1, application, allegations nos. 114 and 115.

³⁰ File P-130-001, Exhibit B-1, application, allegations nos. 116 and 117.

[49] EBMI contends that the texts of Sections 2.2 and 13.6 of the Tariffs and Conditions applicable in the case at hand were translated literally from equivalent provisions approved by the Federal Energy Regulation Commission (the FERC). It ensues that the FERC's interpretation of these provisions, in particular, on the question of rollover rights³¹, cannot be disregarded.

[50] EBMI refers the Régie to certain sections of FERC Orders 888, 890 and 890-A that deal with the rollover right of long-term transmission service customers. Basically, EBMI submits that, according to the FERC, where a customer signs a long-term firm service agreement, Section 2.2 grants such customer a perpetual right to use the transmission service, to the extent the prior notice is sent within the stipulated 60-day period. Where a transmission provider wants to limit the right to exercise the rollover right, the FERC stipulates that these limits must be stated in the initial agreement and that no restriction can be made subsequently. Thus, if, after the agreement is signed, a system problem results in a curtailment of the available transmission capacity, the consequence is not the loss of the rollover right but rather the curtailment of the service according to Section 13.6 of the Tariffs and Conditions³².

[51] EBMI also bases itself on the report by its expert, Mr. Craig Roach, who analyzed several FERC decisions, namely, the *Exelon Generation Company, LLC c. Southwest Power Pool, Inc.* case³³. EBMI submits that, according to this decision, a transmission provider is obliged to maintain the available capacity for customers having renewal rights and that the restrictions relating to these rights must be stated in the initial service agreement.

[52] In the case at hand, EBMI submits that the service agreements signed with the Transmission Provider did not contain any restriction or condition pertaining to the renewal right under Section 2.2 of the Tariffs and Conditions. The only restriction to which the Transmission Provider refers in its letters agreeing to the renewal requests deals with the interconnection's service life which is by no means related to the reason for refusal raised by the Transmission Provider in 2010³⁴.

³¹ File P-130-001, Exhibit A-12-4, SN dated September 17, 2010, volume 4, pages 56 to 58.

³² File P-130-001, Exhibit A-12-4, SN dated September 17, 2010, volume 4, pages 85 to 91.

³³ File P-130-001, Exhibit B-22, EBMI's statement of arguments, volume 2, tab 4 A, *Exelon Generation Company, LLC c. Southwest Power Pool, Inc.* [99 FERC 61,235].

³⁴ File P-130-001, Exhibit A-12-4, SN dated September 17, 2010, volume 4, pages 19 and 20.

[53] According to EBMI, a lack of transmission capacity on the Transmission Provider's network owing to a system problem or some event does not result in the loss of a long-term firm service customer's rollover right. However, this situation might result in a curtailment of the service for long-term firm transmission service customers within the meaning of Section 13.6 of the Tariffs and Conditions³⁵. This is also the opinion of expert witness Roach who bases himself of the FERC's decision in *ConocoPhillips*³⁶ to conclude that, in such a case, a pro rata curtailment of all firm customers including firm point-to-point customers³⁷ must be applied.

[54] As for the question of harmonization, EBMI points out that the Transmission Provider alone decided to curtail its available transmission capacity from 2,000 MW to 1,200 MW, knowing that this decision would impact on EBMI's rights. Despite everything, the Transmission Provider did not directly apprise EBMI of this situation and did not ask the Régie to approve this material change³⁸. EBMI contends that the Transmission Provider cannot amend contractual conditions by way of notices posted on the OASIS site³⁹.

[55] According to EBMI, the Transmission Provider unilaterally decided to proceed with the harmonization of its available transmission capacities with the aim of making sure that customers having firm transmission service agreements can complete their transactions at all times. EBMI submits that such an approach is tantamount to interference in the inter-customer business environment⁴⁰.

[56] Lastly, EBMI considers that the Transmission Provider modified the ATC calculation methodology set out in Attachment C of the Tariffs and Conditions⁴¹ and, therefore, that pre-authorization from the Régie was required⁴².

[57] Moreover, as for the alternative solution to the complaints that was proposed by the Transmission Provider and consisted in using a non-firm transmission service product,

³⁵ File P-130-001, Exhibit A-12-4, SN dated September 17, 2010, volume 4, pages 85 and 86.

³⁶ File P-130-001, Exhibit B-13, report by expert C. Roach, July 30, 2010, pages 18 and 19.

³⁷ File P-130-001, Exhibit B-13, report by expert C. Roach, July 30, 2010, page 18, paragraph 34.

³⁸ File P-130-001, Exhibit A-12-4, SN dated September 17, 2010, volume 4, pages 26 and 27.

³⁹ File P-130-001, Exhibit A-12-4, SN dated September 17, 2010, volume 4, page 25.

⁴⁰ File P-130-001, Exhibit A-12-4, SN dated September 17, 2010, volume 4, pages 32 and 33.

⁴¹ File P-130-001, Exhibit A-12-4, SN dated September 17, 2010, volume 4, page 64.

⁴² File P-130-001, Exhibit B-1, application, allegation no. 96.

EBMI considers that this question of whether a non-firm service suffices to meet its needs is not relevant to the purpose of its complaints⁴³.

6.2 THE TRANSMISSION PROVIDER

[58] The Transmission Provider contends that it dealt with EBMI's renewal applications in accordance with Sections 2.2 (Reservation Priority for Existing Firm Service Customers), 13.2 (Reservation Priority), 17.5 (Response to a Completed Application) and with Attachment C (Methodology for Assessing Available Transfer Capability) of the Tariffs and Conditions⁴⁴.

[59] Basing itself on the FERC's decision in *Tenaska Power Services Co.*⁴⁵, the Transmission Provider contends that it could use the method of its choice in considering renewal applications according to Section 2.2 of the Tariffs and Conditions⁴⁶. The Transmission Provider also refers to two FERC decisions, namely, *Long Island Lighting Company*⁴⁷ and *Southwest Power Pool, Inc.*⁴⁸, to maintain that Section 2.2 grants a reservation priority right where there is a competing request⁴⁹.

[60] In addition, the Transmission Provider submits that a renewal application is treated like a new application for the following reasons: (i) a renewal application must be entered on the OASIS site with a new application number, (ii) a renewal application leads to the conclusion of a new transmission service agreement and (iii) the fact that a renewal application is treated like a new application was clearly indicated in the July 8, 2009 notice on the OASIS site⁵⁰.

⁴³ File P-130-001, Exhibit B-11, EBMI's responses to request for information no. 1 from the Transmission Provider and Exhibit A-12-1, SN dated September 14, 2010, volume 1, pages 77 and 78.

⁴⁴ File P-130-001, Exhibit C-1-20, Transmission Provider's memorandum of arguments, allegation no. 8.

⁴⁵ *Tenaska Power Services Co. v. Midwest Independent Transmission System Operator, Inc.*, Order on Complaints, Dockets No. EL04-43-000 and EL04-46-000, March 8, 2004, paragraph 48.

⁴⁶ File P-130-001, Exhibit C-1-20, Transmission Provider's memorandum of arguments, allegation no. 9 and Exhibit A-12-4, SN dated September 17, 2010, volume 4, page 127.

⁴⁷ *Long Island Lighting Company v. Northeast Utilities Service Company*, Order Denying Complaint and Accepting Termination, Dockets No. EL97-34-000 and ER97-2746-000, June 26, 1997, page 4.

⁴⁸ *Southwest Power Pool, Inc.*, Order on Paper Hearing, Docket No. EL09-40-000, January 21, 2010, paragraph 28.

⁴⁹ File P-130-001, Exhibit C-1-20, Transmission Provider's memorandum of arguments, allegation no. 10 a).

⁵⁰ File P-130-001, Exhibit C-1-20, Transmission Provider's memorandum of arguments, allegation no. 10 b).

[61] Renewal applications are analyzed in terms of the conditions that exist when these applications are filed, taking into consideration the reservation priorities according to Section 13.2 of the Tariffs and Conditions⁵¹.

[62] In addition, Section 2.2 of the Tariffs and Conditions must not be construed as offering access to a transmission service in perpetuity⁵².

[63] Moreover, Attachment C provides the method which the Transmission Provider must use to calculate the ATC. Since July 8, 2009, the Transmission Provider takes into account the capacities of neighbouring systems through the Transmission Reliability Margin (TRM). In so doing, the Transmission Provider claims that it has not modified the method or the equation used to calculate the ATC⁵³.

[64] In applying the ATC calculation method in accordance with Attachment C, the Transmission Provider determined that the firm transmission ATC on the HQT-NE path has been 1,200 MW since July 8, 2009⁵⁴.

[65] This capacity is established in terms of constraints on the neighbouring system recognized by EBMI at the time of initial service applications and at the time of the renewal of these applications. In using neighbouring network constraints to establish the ATC, the Transmission Provider wanted to use a transparent and non-random value⁵⁵.

[66] The Transmission Provider contends that it alone is responsible for managing and planning its transmission network. The management of the transmission network includes the application of values and other constraints that seem appropriate to the Transmission Provider to determine the ATC on the network in compliance with Attachment C and industry-recognized practices. In the absence of any probative demonstration of error or non-compliance with regard to the application of Attachment C by the Transmission

⁵¹ File P-130-001, Exhibit C-1-20, Transmission Provider's memorandum of arguments, allegations nos. 10 c) and 10 d).

⁵² File P-130-001, Exhibit C-1-20, Transmission Provider's memorandum of arguments, allegation no. 10 e).

⁵³ File P-130-001, Exhibit C-1-20, Transmission Provider's memorandum of arguments, allegations nos. 12 to 14.

⁵⁴ File P-130-001, Exhibit C-1-20, Transmission Provider's memorandum of arguments, allegation no. 15.

⁵⁵ File P-130-001, Exhibit C-1-20, Transmission Provider's memorandum of arguments, allegations nos. 16 and 17.

provider, it is not the role of the Régie to interfere in the determination of a transmission capacity value⁵⁶.

[67] The Transmission Provider submits that the harmonization of transmission capacities is intended to ensure that its customers' transmission reservations are attainable at all times, in terms of the transmission capacities of neighbouring networks. This is in keeping with a business-like approach, the purpose of which is greater information transparency and consistency⁵⁷.

[68] The Transmission Provider explains having duly informed its customers about the harmonization through notices posted on its OASIS site. According to the Transmission Provider, the publication of notices on OASIS enables it to communicate with all customers at the same time and in a transparent way. Information on the co-ordination of transmission capacities that is found in the notices on OASIS is commercial in nature and all customers must have same-time access to such information in compliance with the Transmission Provider's Code of Conduct⁵⁸.

[69] Moreover, the Transmission Provider contends that it proposed an effective, available solution to EBMI capable of putting an end to the complaint⁵⁹ that consists in using an available and valid non-firm transmission service product⁶⁰.

[70] On the question of the application of Section 13.6 of the Tariffs and Conditions pertaining to the curtailment of the firm transmission service in cases where there are constraints on the network, the Transmission Provider points out that the proportional curtailment of services has consequences on third parties, in particular, the Generator and that the Régie cannot render a decision in this respect without permitting these third parties to make representations⁶¹.

⁵⁶ File P-130-001, Exhibit C-1-20, Transmission Provider's memorandum of arguments, allegations nos. 19 to 22.

⁵⁷ File P-130-001, Exhibit C-1-20, Transmission Provider's memorandum of arguments, allegations nos. 24 and 25.

⁵⁸ File P-130-001, Exhibit C-1-20, Transmission Provider's memorandum of arguments, allegations nos. 26 to 28.

⁵⁹ File P-130-001, Exhibit B-1, EBMI-17, section 2.4.

⁶⁰ File P-130-001, Exhibit C-1-20, Transmission Provider's memorandum of arguments, allegation no. 31.

⁶¹ File P-130-001, Exhibit A-12-4, SN dated September 17, 2010, volume 4, pages 145 and 146.

[71] According to the Transmission Provider, the application of proportional curtailments on the Generator's and EBMI's firm transmission capacity reservations, as provided for under Section 13.6 of the Tariffs and Conditions, would be unfair for the Generator as the latter would sustain a curtailment on a contract with a 35-year term while EBMI could decide to not renew its commitments in the future. In addition, as EBMI holds more firm transmission on the Transmission Provider's network than that of ISO-NE, a proportional curtailment would not have any impact for EBMI⁶².

6.3 EBMI'S RESPONSE

[72] On the application of the proportional curtailment rule according to Section 13.6 of the Tariffs and Conditions and that would affect the Generator, EBMI points out that the application of Section 13.6 provides how all the customers are affected by a curtailment in transmission capacity. In addition, if harmonization triggers the application of the proportionality rule under Section 13.6, EBMI contends that it is an indication that customers are affected by the harmonization and that this change introduced by the Transmission Provider should have been the subject matter of a specific application to the Régie⁶³.

[73] On the application of Section 13.6 of the Tariffs and Conditions, EBMI points out that this section covers the lack of the Transmission Provider's network capacity where a technical problem occurs, such as the loss of a line. When the Transmission Provider decides to impose a restriction having an impact on the customer base, as it does by implementing harmonization, this would no longer fall under the application of Section 13.6 but from a policy change, as underscored by expert Roach, then requiring an amendment to the Tariffs and Conditions. The appropriate forum to introduce such changes is a tariff case⁶⁴.

[74] As for the FERC decisions cited by the Transmission Provider, EBMI considers that these decisions deal with the tie-breaking mechanism of Section 2.2 of the *Pro Forma* Open Access Transmission Tariff (*pro forma* tariff) applicable where a request

⁶² File P-130-001, Exhibit A-12-4, SN dated September 17, 2010, volume 4, pages 148 to 151.

⁶³ File P-130-001, Exhibit A-12-4, SN dated September 17, 2010, volume 4, page 181.

⁶⁴ File P-130-001, Exhibit A-12-4, SN dated September 17, 2010, volume 4, pages 184 to 186.

competes with a customer's renewal request⁶⁵. According to EBMI, these decisions do not apply to the right to renew a contract as in the case at hand.

7. THE RÉGIE'S OPINION

[75] The Régie is dealing with two complaints from EBMI pertaining to the Transmission Provider's refusal to grant it the renewal of four long-term firm transmission service agreements for a period of one year. As a ground for the refusal, the Transmission Provider argues that it cannot offer the requested firm transmission capacities. The lack of capacity results from the fact that the Transmission Provider has proceeded to harmonize its firm transmission capacity with that of the neighbouring network and that the implementation of such harmonization resulted in curtailing the firm transmission capacity available on the HQT-NE path from 2,000 MW to 1,200 MW.

[76] In accordance with Section 98 of the *Act respecting the Régie de l'énergie*⁶⁶ (the Act), where the Régie examines a complaint, it must ascertain if the Transmission Provider complies with the application of the transmission tariffs and conditions. Where it considers the complaint valid, Section 101 of the Act vests the Régie with the power to order the Transmission Provider, within the time frame it fixes, to apply the measures which it determines in relation to the application of the tariffs and the conditions.

[77] The Régie must, therefore, ascertain if the Transmission Provider's decision to deny the requests to renew the MATI-NE Agreements and the ON-NE Agreements on the grounds of the lack of firm available transmission capacity due to the harmonization process which it implemented on July 8, 2009, complies with the provisions of the Tariffs and Conditions.

[78] More specifically, the Régie must ask itself if the Transmission Provider was well founded in treating EBMI's renewal requests like new service applications and, consequently, determine if the firm transmission capacity was sufficient to accept these renewal requests.

⁶⁵ File P-130-001, Exhibit A-12-4, SN dated September 17, 2010, volume 4, pages 182 and 183.

⁶⁶ R.S.Q., c. R-6.01.

[79] The main question raised by these complaints deals with the scope of Section 2.2 of the Tariffs and Conditions which merits being recited once again:

*“2.2 Reservation Priority for Existing Firm Service Customers: Existing firm transmission service customers with a contract term one year or more have the right to continue to use the Transmission Provider’s Transmission Service when their contract expires, rolls over or is renewed. This transmission reservation priority is independent of whether the existing customer continues to purchase electricity from the Generator or elects to purchase electricity from another Delivering Party. If at the end of the contract term, the Transmission Provider’s Transmission System cannot accommodate all of the requests for Transmission Service, the existing firm service customer must agree to accept a contract term at least equal to that of a new competing request by a new Eligible Customer and to pay the current just and reasonable rate, as approved by the Régie, for such service. This transmission reservation priority for existing firm service customers is an ongoing right that may be exercised at the end of all firm contracts of one year or longer provided the customer notifies the Transmission provider in writing and on OASIS no later than sixty (60) days before the end of the contract.”*⁶⁷. [emphasis added]

[80] Furthermore, the Régie is of the opinion that the question of whether or not the alternative solution proposed by the Transmission Provider to EBMI to use a non-firm transmission service product is valid, is irrelevant to the argument before it.

The scope of Section 2.2 of the Tariffs and Conditions

[81] Section 2.2 of the Tariffs and Conditions currently in effect stems from Hydro-Québec Bylaw 659⁶⁸ (Bylaw 659).

[82] Bylaw 659 basically reproduces the text of the *pro forma* tariff adopted by the FERC through its Order 888 dated April 24, 1996.

⁶⁷ Version of the Tariffs and Conditions as approved by Decisions D-2009-015 and D-2009-023 for complaint P-130-001 and by Decisions D-2010-032 and D-2010-041 for complaint P-130-003. No amendment to Section 2.2 between the 2009 and 2010 versions.

⁶⁸ *Hydro-Québec Bylaw 659 respecting the conditions and rates for open access transmission service*, 129 G.O. Part II, March 12, 1997, page 1248, approved by Government of Québec Order-in-Council 276-97 dated March 5, 1997.

[83] The text of Section 2.2 of the Tariff and Conditions applicable to these complaints substantially mirrors the text of Section 2.2 of the *pro forma* tariff, as appears from the different comparative English versions of this section filed by EBMI⁶⁹.

[84] In this context, and while it is not bound by FERC decisions, the Régie considers that the FERC decisions are relevant in order to shed some light enabling it to interpret the scope of the renewal right under Section 2.2 of the Tariffs and Conditions.

[85] Thus, in chronological order, the Régie recaps the relevant FERC decisions that deal with Section 2.2 of the *pro forma* tariff.

[86] On April 24, 1996, the FERC issued Order 888 that led to the adoption of the *pro forma* tariff. In this order, it deals with a customer's right to continue to use a firm transmission service in these words:

“175 [...] A further issue concerning firm contract customers is their right to transmission capacity (and the rate for such capacity) when their contracts expire by their own terms or become subject to renewal or rollover. We have concluded that all firm transmission customers (requirements and transmission-only), upon the expiration of their contracts or at the time their contracts become subject to renewal or rollover, should have the right to continue to take transmission service from their existing transmission provider. The limitations are that the underlying contract must have been for a term of one-year or more and the existing customer must agree to match the rate offered by another potential customer, up to the transmission provider's maximum filed transmission rate at that time, and to accept a contract term at least as long as that offered by the potential customer.

176/ This means that there is no right to grandfather the historical price of the transmission service. Thus, if not enough capacity is available to meet all requests for service, the right of first refusal gives the capacity to the existing customer who had contractually been using the capacity on a long-term, firm basis, assuming that it meets the conditions set forth above⁷⁰.” [emphasis added]

⁶⁹ File P-130-001, Exhibit B-22, EBMI's statement of arguments, volume 1, tab 2 D.

⁷⁰ File P-130-001, Exhibit B-22, EBMI's statement of arguments, volume 1, tab 3 I A, pages 5 and 6.

[87] In Order 888-A dated March 4, 1997, the FERC specifically goes over the Right of First Refusal:

“Right of First Refusal

In the Final Rule, the Commission concluded that all firm transmission customers (requirements and transmission-only), upon the expiration of their contracts or at the time their contracts become subject to renewal or rollover, should have the right to continue to take transmission service from their existing transmission provider. 46 / If not enough capacity is available to meet all requests for service, the right of first refusal gives the existing customer who had contractually been using the capacity on a long-term, firm basis the option of keeping the capacity. However, the limitations imposed by the Commission are that the underlying contract must have been for a term of one- year or more and the existing customer must agree to match the rate offered by another potential customer, up to the transmission provider's maximum filed transmission rate at that time, and to accept a contract term at least as long as that offered by the potential customer. 47 / Moreover, the Commission indicated that this right of first refusal is an ongoing right that may be exercised at the end of all firm contract terms (including all future unbundled transmission contracts)⁷¹. “[emphasis added]

[...]

“Commission Conclusion

In this order, the Commission reaffirms its decision to give a reservation priority to existing and future firm transmission customers served under a contract of one year or more, and also addresses petitioner arguments regarding the Commission-imposed limitations associated with the exercise of that priority⁷².” [emphasis added]

[88] It emerges from these FERC orders that, on the one hand, the long-term firm transmission service customer of one year or more has the right to continue to use the service upon expiry of its service agreement. On the other hand, where the existing customer decides to continue to use the service and where there are other competing requests, if the network capacity is not enough to meet all the requests, the existing customer has a right of priority over the other requests provided the best competing request is matched.

⁷¹ File P-130-001, Exhibit B-22, EBMI’s statement of arguments, volume 1, tab 3 I B, pages 1 and 2.

⁷² File P-130-001, Exhibit B-22, EBMI’s statement of arguments, volume 1, tab 3 I B, page 7.

[89] On May 31, 2002, in the matter of *Exelon Generation Company, LLC* (Exelon) v. *Southwest Power Pool, Inc.* (SPP), the FERC ruled on the application of Section 2.2 of the *pro forma* tariff in a situation where a transmission provider denied a renewal request on the grounds of not enough transmission capacity further to conducting an impact study⁷³.

[90] In this case, the transmission provider, SPP, refused to renew Exelon's service agreement because of firm commitment changes (native load growth, changes in external trading patterns, generation dispatch modeling assumptions and loop flow changes). These changes resulted in overloads on portions of SPP's network while waiting for reinforcement work to be completed⁷⁴.

[91] Like Section 2.2 of the Tariffs and Conditions, the text of Section 2.2 of SPP's tariff provides that the existing customer of a long-term firm service has the right to continue to use the transmission service upon expiry, rollover or renewal of its commitment. Even though the reason associated with the constraints of SPP's network in this matter are not of the same nature as the reason given by the Transmission Provider to refuse EBMI's renewal requests, this decision is relevant to determine the scope to be given to Section 2.2 regarding the right to renew a firm contract of one year or more.

[92] SPP argued, in particular, that Section 2.2 was not applicable in the absence of a competing request and that a renewal request should be treated like a new request. The FERC rejected SPP's arguments and allowed the complaint for the following reasons:

"23. The Commission will grant Exelon's complaint. Section 2.2 of SPP's OATT provides, in relevant part:

***Reservation Priority For Existing Firm Service Customers:** Existing firm service customers (wholesale requirements and transmission-only, with a contract term of one-year or more, and retail) . . . have the right to continue to take transmission service from the Transmission Provider when the contract expires, rolls over, or is renewed . . . This transmission reservation priority for existing firm service customers is an ongoing right that may be exercised . . . at the end of all firm contract terms of one year or longer . . . If competing existing firm service requirements customers apply for service that cannot be fully provided, the priority rights will be ranked in accordance with first-come, first-served*

⁷³ File P-130-001, Exhibit B-22, EBMI's statement of arguments, volume 2, tab 4 A, paragraph 3.

⁷⁴ File P-130-001, Exhibit B-22, EBMI's statement of arguments, volume 2, tab 4 A, paragraphs 13 and 25.

principles. If firm service customers tie, then the capacity for which they receive priority rights under this Tariff shall be apportioned on a pro rata basis.

24. As stated earlier, Section 2.2 of the SPP OATT adopts the language of the Commission's pro forma OATT. The Commission has consistently held that under Section 2.2, all firm transmission customers (requirements and transmission-only), upon the expiration of their contracts or at the time their contracts become subject to renewal or rollover, have a right to continue to take transmission service from their existing transmission provider. The underlying contract must have been for a term of one-year or more (i.e., be a long-term contract) and the existing transmission customer must agree to match the rate offered by another potential transmission customer (up to the transmission provider's maximum filed rate at that time) and to accept a contract term at least as long as that offered by the potential customer (sometimes referred to as the right of first refusal). This rollover right, set forth in Section 2.2, was intended to apply regardless of whether there is a competing request for transmission service. Thus, Exelon has the right to request a rollover of its existing firm point-to-point transmission service.

25. SPP maintains that it is unable to provide the requested service due to changes to existing firm uses on its system including native load growth, changes in external trading patterns, generation dispatch modeling assumptions, and loop flow changes. SPP's arguments in this regard are not sufficient to override Exelon's rollover rights under Section 2.2 of the SPP OATT. Under Section 2.2, SPP is obligated to maintain available transmission capacity for its existing long-term transmission customers with rollover rights, such as Exelon, until the time expires for those customers to exercise their rollover rights. While we stated in Entergy that "by exercising a right of first refusal an existing transmission customer is, in effect, arranging a new long-term firm point-to-point transmission service," that does not diminish an existing customer's rollover right and related reservation priority as SPP argues. In this regard, we note that Exelon properly complied with SPP's tariff and exercised its rollover right on March 11, 2002, more than 60 days prior to the June 1, 2002 expiration date.

[...]

27. The Commission has consistently reaffirmed this policy, stating that a transmission provider can deny a customer the ability to rollover its long-term firm service contract only if the transmission provider includes in the original service agreement specific, reasonably forecasted native load needs that will use the transmission capacity provided under the contract at the end of the contract term. Any limitations to the rollover rights must be clearly stated in the customer's service agreement. Because the service agreement at issue here contains no such limitations on Exelon's rollover rights, Section 2.2 of the SPP OATT controls⁷⁵." [emphasis added]

⁷⁵ File P-130-001, Exhibit B-22, EBMI's statement of arguments, volume 2, tab 4 A, pages 6 to 8.

[93] Thus, according to the FERC, Section 2.2 grants an existing customer with a long-term firm reservation of one year or more a right to renew the transmission service upon expiry of its agreement whether or not there is a competing request. The FERC also adds that a transmission provider is obliged to maintain the available capacity to allow customers to exercise their renewal right and that any limitation on this right must be stated in the initial service agreement.

[94] SPP filed a motion for review of this decision with the FERC. In November 2002, the FERC denied SPP's motion for review and clearly reiterated the transmission provider's obligation to maintain available transmission capacity in order to meet the requests of customers that hold renewal rights. In addition, in the event a constraint would arise after the initial agreement is signed, the FERC indicated that the transmission provider is obliged to build additions to the network to mitigate the system constraint or implement the firm service curtailment procedure under the SPP tariff:

“13. SSP’s arguments do not diminish Exelon’s rollover rights under Section 2.2 of the SPP OATT. Under Section 2.2 of its OATT, SPP is responsible for maintaining available transmission capacity for existing long-term transmission customers with rollover rights, such as Exelon, until the time expires for those customers to exercise their rollover rights. In providing for Exelon’s rollover rights in Section 2.2, SPP is responsible for evaluating the impact of the exercise of these rights on its system.

14. [...] Under section 2.2 of its OATT, SPP is responsible for maintaining available transmission capacity for existing long-term transmission customers with rollover rights, such as Exelon, until the time expires for those customers to exercise their rollover rights. Thus, the constraint that SPP cites are not sufficient to override Exelon’s rollover rights. If constraints arise after a transmission provider enters into a long-term agreement with a transmission customer (and that agreement contains no restrictions on the transmission customer’s rollover rights), the obligation is on the transmission provider to either build additional transmission facilities to relieve the constraint or to implement the curtailment procedures set forth in its OATT.

15. In its rehearing request, SPP states that “[t]he Commission’s order will force SPP and other transmission providers to presume that all long-term customers will renew their service, and evaluate the impact of the service for years beyond the requested term of the proposed service agreement.” SPP is correct in this

regard. Indeed, it was the intent of the Commission in establishing the rollover policy that long-term customers have the right to continue to take service and, accordingly, that the transmission provider be in the position of continuing to provide it⁷⁶.” [emphasis added]

[95] In addition, in this very same decision, the FERC was compelled to stipulate the sole case where a renewal request may be treated like a new request:

“40 [...] The only instance in which a transmission provider can require a new system impact study for an existing long-term customer seeking to rollover its service would be where that customer requests a change to a receipt or delivery point in an existing long-term firm transmission service agreement. In that instance, the customer’s request can be treated as a new request for service for purposes of the availability of capacity⁷⁷.” [emphasis added]

[96] From this decision, it is the Régie’s understanding that, according to the FERC, a renewal request can only be treated like a new request where the customer wants to change the receipt or delivery point in its existing service agreement.

[97] On February 16, 2007, in Order 890, the FERC reiterated its position on the scope of Section 2.2 of the *pro forma* tariff:

“3. Rollover Rights

1214. Section 2.2 of the pro forma OATT allows existing firm transmission service customers – wholesale requirements and transmission-only customers with contracts of one year or more – the right to continue to take transmission service from the transmission provider when the customer’s contract expires.

[...]

1215. [...] Once a transmission provider evaluates the impact on its system of serving a long-term firm transmission customer and grants the transmission customer existing capacity, the transmission provider must plan and operate its system with the expectation that it will continue to provide service to the transmission customer should the transmission customer exercise the right of first

⁷⁶ File P-130-001, Exhibit B-22, EBMI’s statement of arguments, volume 2, tab 4 B, pages 5 and 6.

⁷⁷ File P-130-001, Exhibit B-22, EBMI’s statement of arguments, volume 2, tab 4 B, page 16.

refusal. If constraints arise after a transmission provider enters into a long-term agreement with the transmission customer (and that agreement does not contain an allowed restriction on the transmission customer's right of first refusal), the obligation is on the transmission provider to either curtail service to all affected customers or build more capacity to relieve the constraint. A transmission provider is obligated to curtail service pursuant to its OATT or expand its system when its system becomes constrained such that it cannot satisfy existing transmission customers, including the exercise of their rollover rights, because it should have planned and operated its system with the expectation that each long-term firm transmission customer will exercise its rollover rights.

[...]

Commission Determination

1255. The Commission will not adopt any changes to its matching policies at this time. At the time of rollover of their contracts, transmission customers will continue to be required to match competing requests for service as to term and rate in order to roll over their service. This preserves the current policy goal of providing a mechanism for awarding capacity to those who value it most, as well as providing for a tie-breaking mechanism when needed that gives priority to existing customers so that they may continue to receive transmission service. Absent the requirement that the customer match the contract term of a competing request, transmission providers could be forced to enter into shorter-term arrangements that could be detrimental from both an operational standpoint (i.e., system planning) and a financial standpoint. We clarify, however, that transmission customers must also enter into a transmission contract of at least five years in order to obtain a subsequent rollover right in the absence of a competing request for a longer term.

1256. The Commission will continue to require rollover restrictions based on reasonable forecasts of native load growth or preexisting contracts that commence in the future to be included in the initial transmission service agreement. This will remain the only appropriate way to restrict a rollover right⁷⁸.” [emphasis added]

[98] The FERC returns to the question of restrictions on renewal or rollover rights in Order 890-A dated December 28, 2007:

“2. Rollover Rights

[...]

⁷⁸ File P-130-001, Exhibit B-22, EBMI's statement of arguments, volume 1, tab 3 I C, pages 712 to 715, 743 and 744.

633. *The Commission declined to eliminate the requirement that an existing transmission customer match competing offers as to term and rate in order to roll over its service. The Commission also continued to require rollover restrictions to be based only on reasonable forecasts of native load growth or preexisting contracts that commence in the future. The Commission affirmed that any restrictions on a customer's rollover rights must be included in the initial transmission service agreement.*

[...]

Commission Determination

675. *The Commission continues to believe it is appropriate to require that rollover restrictions be based on reasonable forecasts of native load growth or preexisting contracts that commence in the future and that such restrictions be included in the initial transmission service agreement. As explained in Order No. 890, this will remain the only appropriate way to restrict a rollover right⁷⁹.*”
[emphasis added]

[99] The Régie notes that the FERC maintains its position on the nature of the renewal or rollover right under Section 2.2.

[100] **In light of FERC orders and decisions, the Régie retains the following principles for the purposes of this decision:**

- **Section 2.2 grants an existing customer of a long-term firm transmission service with a contract term of one year or more a right to continue to use the transmission service upon expiry of its service agreement, provided it sends a prior notice in this respect within the prescribed time limit. This right exists whether or not there are competing requests;**
- **A transmission provider is responsible for ensuring that its system has enough transmission capacity to meet the requests of customers holding renewal rights;**
- **A renewal request cannot be treated like a new request;**
- **Renewal right limitations or restrictions must be stated in the initial service agreement.**

⁷⁹ File P-130-001, Exhibit B-22, EBMI's statement of arguments, volume 1, tab 3 I D, pages 334, 335 and 359.

[101] For the purposes of these complaints, given the absence of competing requests when the renewal requests are made, which the Transmission Provider⁸⁰ does not contest, only the first aspect of Section 2.2 of the Tariffs and Conditions is at issue, namely the right of an existing customer of a firm transmission service with a term of one year or more to continue to use the transmission the transmission service upon expiry of the agreement.

[102] In the case at hand, EBMI is an existing customer within the meaning of Section 2.2 of the Tariff and Conditions which benefits from the renewal right since the service agreements at issue are firm transmission contracts of one year or more. EBMI has also complied with the condition precedent to the exercise of the renewal right by sending the Transmission Provider a prior notice of at least sixty days before expiry of its agreements.

[103] Having said this, the Régie must determine if the restrictions to the renewal right were stated in the initial agreements.

[104] In the case of the MATI-NE Agreements, the Régie notes that the Transmission Provider inserted a clause in Schedule B setting out certain restrictions regarding the availability of the service:

[Translation] "For maintenance reasons on the HQT-NE interconnection, the service will be interrupted from April 30 to May 3, 2007. The Transmission Provider had also provided for work on the L1101 and L1104 lines, consequently, the transmission service between MATI-HQT will not be available between October 1 and 12, 2007⁸¹."

[105] The Régie considers that this clause was not intended to restrict the renewal right under Section 2.2 of the Tariffs and Conditions, but to stipulate the specific periods of time during which the service would not be available during the term of the agreements. Such a clause cannot serve to restrict the renewal right under Section 2.2 of the Tariffs and Conditions.

⁸⁰ File P-130-001, Exhibit B-1, EBMI-17, page 5, section 2.3.1.

⁸¹ File P-130-001, Exhibit B-1, EBMI-2, Schedule B.

[106] The Régie notes that the Transmission Provider subsequently accepted the service renewal requests for the MATI-NE Agreements in 2008 and in 2009, however, stipulating as follows:

[Translation] “ *The Transmission Provider hereby notifies you that the service life of the interconnection that is represented by the path referred to in your request is limited and that an impact study will eventually be required in order to identify the cost of additions to the system or work enabling the requested service to be maintained. Upon a subsequent renewal request, you will then have to undertake to defray the costs of this study and eventually assume the share of the costs incumbent on you if you exercise your renewal right, in accordance with Hydro-Québec’s Transmission Service Tariffs and Conditions that will then be in effect*⁸².” [emphasis added]

[107] According to the Régie, the particulars added by the Transmission Provider with regard to the service life of the equipment has no bearing on the renewal right under Section 2.2 of the Tariffs and Conditions, especially since they came after the initial agreements were signed.

[108] With regard to the ON-NE Agreements, they were not the subject matter of any particular clause that could have a restrictive effect on EBMI’s renewal right.

[109] The Régie therefore concludes that there was no clause in the initial service agreements that could restrict EBMI’s renewal right. Nonetheless, the Transmission Provider denied the renewal requests on the grounds that there was not enough transmission capacity when the renewal requests were analyzed. To reach this conclusion, the Transmission Provider considered the renewal requests like new requests and applied the “first-come, first-served” principle under Section 13.2 of the Tariffs and Conditions:

“13.2 Reservation Priority: Long-Term Firm Point-to-Point Transmission Service shall be available on a first-come, first-served basis, i.e., in the chronological sequence in which each Transmission Customer has reserved service. [...]”
[emphasis added]

⁸² File P-130-001, Exhibits B-1, EBMI-9 and EBMI-10, letters from the Transmission Provider dated March 4, 2008 and March 4, 2009.

[110] The Régie understands that as the Generator's 1,200 MW service request was prior to EBMI's renewal requests, the Transmission Provider thus determined, further to the implementation of harmonization, that the firm transmission capacity on the HQT-NE path was no longer enough to grant EBMI's requests. However, the same Section 13.2 provides as follows for existing customers:

"[...] Reservation priorities for existing firm service customers are provided in Section 2.2. [...]"

[111] According to the Régie, with regard to reservation priority, it is clear that the renewal requests of existing customers fall under rules that are distinct from those applicable to new requests. The "first-come, first-served" principle does not therefore apply to renewal requests.

[112] In fact, according to the Régie, to allow the Transmission Provider to treat a renewal request like a new request would amount to disregarding the very existence of the renewal right under Section 2.2 of the Tariffs and Conditions.

[113] Lastly, the fact that a renewal request requires a new entry on the OASIS site, the granting of a new number and the signing of a new agreement cannot justify its treatment by the Transmission Provider like a new service request. In the Régie's opinion, these are administrative practices that cannot serve to affect the rights of existing customers like EBMI.

[114] Consequently, the Régie rules that the Transmission Provider could not treat EBMI's renewal requests like new service requests.

[115] As an existing long-term firm point-to-point transmission service customer and as it had sent its renewal notice within the recommended time limit, in accordance with Section 2.2 of the Tariffs and Conditions, EBMI therefore had the right to renew the MATI-NE Agreements and the ON-NE Agreements.

[116] Thus, the Régie finds that the Transmission Provider's decision to deny the requests to renew the MATI-NE Agreements and the ON-NE Agreements on the sole ground that the ATC on the HQT-NE path defined further to the implementation of

harmonization was not enough, contravenes Section 2.2 of the Tariffs and Conditions.

[117] Moreover, the Régie notes that the renewal of the MATI-NE Agreements and the ON-NE Agreements for total capacities would ensure that there would be more than 1,500 MW of firm reservations on the HQT-NE path, taking into account the Generator's 1,200 MW contract that started on July 1, 2009.

[118] In the decision on the motion to review the aforementioned Exelon case, the FERC indicated that where a constraint would occur on the network after an initial agreement is signed, the transmission provider has two options: build additions to the network to mitigate the constraint on the network or curtail the firm service in accordance with Section 13.6 of the Tariffs and Conditions. It is clear that the first option is not applicable, since the Transmission Provider's network does not have any problem, given the fact that the HQT-NE path's capacity is 2,000 MW. It is, moreover, this maximum transmission capacity of 2,000 MW that has been posted on the OASIS site since the HQT-NE path opened.

[119] As for the second option, EBMI suggested that, in the case where the Transmission Provider has the right to curtail the available transmission capacity from 2,000 MW to 1,200 MW, one solution might consist in applying Section 13.6 of the Tariffs and Conditions by proportionally curtailing the firm service of customers in order to bring the total firm reservation capacity to 1,200 MW.

[120] The Régie therefore deems it expedient to address this question in the following paragraphs.

The applicability of Section 13.6 of the Tariffs and Conditions

[121] Section 13.6 of the Tariffs and Conditions reads as follows:

"13.6 Curtailment of Firm Transmission Service: In the event that a Curtailment on the Transmission Provider's Transmission System, or a portion thereof, is required to maintain reliable operation of such system, Curtailments shall be made on a non-discriminatory basis to the transactions that effectively relieve the

constraint. If multiple transactions require Curtailment, to the extent practicable and consistent with Good Utility practice, Curtailments shall be proportionally allocated among Native-Load Customers, Network Customers and Transmission Customers taking Firm Point-to-Point Transmission Service. All Curtailments shall be made on a non-discriminatory basis; however, Non-Firm Point-to-Point Transmission Service shall be subordinate to Firm Transmission Service. When the Transmission Provider determines that an electrical emergency exists on its Transmission System and implements emergency procedures to curtail Firm Transmission Service, the Transmission Customer shall make the required Curtailments upon request of the Transmission Provider. However, the transmission Provider reserves the right to curtail, in whole or in part, any Firm Transmission Service provided under the provisions herein when, in its sole discretion, an emergency or other contingency impairs or degrades the reliability of its Transmission System. The Transmission Provider shall notify all affected Transmission Customers in a timely manner of any scheduled Curtailments."
[emphasis added]

[122] Section 13.6 of the Tariffs and Conditions provides for situations that might lead to firm transmission service curtailments. The Transmission Provider can impose curtailments on its system, where necessary, to maintain reliable system operations. It is also mentioned that curtailments can be imposed where an electrical emergency arises to deal with an emergency or other unforeseeable condition that might compromise the transmission system's reliability.

[123] In the case at hand, the evidence on file did not show that the Transmission Provider encountered any real constraint on its system that could justify the imposition of firm service curtailments under Section 13.6. In this respect, the Régie retains the testimony of the Transmission Provider's witness, Mr. Sylvain Clermont, that there was no service degradation on the HQT-NE path even though firm reservations on this path total more than 1,500 MW⁸³.

[124] In addition, during oral arguments, the Transmission Provider admitted that there is no system access problem⁸⁴ and no congestion⁸⁵.

[125] The Régie finds that the current status on the HQT-NE path does not jeopardize the reliable operation of the transmission system and, according to the

⁸³ File P-130-001, Exhibit A-12-3, SN dated September 16, 2010, volume 3, pages 112, 113 and 118.

⁸⁴ File P-130-001, Exhibit A-12-4, SN dated September 17, 2010, volume 4, pages 143 and 144.

⁸⁵ File P-130-001, Exhibit A-12-4, SN dated September 17, 2010, volume 4, page 152.

evidence on file, does not justify the imposition of service curtailments in accordance with Section 13.6 of the Tariffs and Conditions.

Conclusion

[126] For the reasons referred to, the Régie concludes that the Transmission Provider's decision to refuse to renew the MATI-NE Agreements and the ON-NE Agreements does not comply with Section 2.2 of the Tariffs and Conditions. The Transmission Provider should not have treated EBMI's renewal requests like new requests. Therefore, EBMI has the right to renew the MATI-NE Agreements for the period from April 1, 2010 to March 31, 2011, and the ON-NE Agreements for the period from October 22, 2010 to October 21, 2011. Moreover, the Régie rules that the curtailment of firm services according to Section 13.6 of the Tariffs and Conditions is not applicable in these cases.

[127] The question of whether the Transmission Provider's decision to harmonize or coordinate its system's transmission capacity with that of the neighbouring ISO-NE system should have been the subject matter of pre-authorization by the Régie remains academic for the purposes of this decision for Commissioners Turgeon and Hardy, given the conclusions reached by the panel on the scope of Section 2.2 of the Tariffs and Conditions and EBMI's rights under the MATI-NE and ON-NE Agreements.

8. THE ADDITIONAL OPINION OF COMMISSIONER LASSONDE

[128] I concur with my colleagues on the fact that EBMI has a clear right to the renewal of the MATI-NE Agreements and the ON-NE Agreements (the Agreements) in accordance with Section 2.2 of the Tariffs and Conditions.

[129] EBMI is, therefore, a long-term firm point-to-point transmission customer much like any other customer of the same service with the related rights and obligations.

[130] As for the question of the harmonization of firm transmission capacities on the HQT-NE path taking into account the limits of the neighbouring system managed by ISO-NE, I wish to stipulate the following.

[131] EBMI argued⁸⁶ that the harmonization transaction is not [translation] “*a plain and simple question of network management*” and that the Transmission Provider could not engage in such a transaction without [translation] “*the Régie reviewing the merits and relevance of and the impact on the rights of existing transmission customers and, as the case may be, without it setting out guidelines for the implementation*”.

[132] Once resolved, the question of EBMI’s right to continue to use the firm transmission upon renewal of the Agreements, which the Transmission Provider must do in the event of circumstances limiting the firm transmission capacity on the HQT-NE path, is, according to me, a question of network management on both sides of the border.

[133] Even if, in connection with another request⁸⁷, the Transmission Provider wants to add provisions to the Tariffs and Conditions regarding the harmonization of its network’s capacity with that of neighbouring networks, this does not mean that it should obtain authorization from the Régie to manage a situation that might have an impact on the firm transmission capacity on the HQT-NE path.

[134] It is adduced in evidence that the Transmission Provider contracted firm transmission services on the HQT-NE path with EBMI and the Generator for approximately 1,500 MW, even though constraints on the neighbouring network can curtail this capacity to 1,200 MW.

[135] While the curtailment of the firm transmission service on the HQT-NE path seems hypothetical for the time being since the Transmission Provider’s two firm service customers — EBMI for 306 MW and the Generator for 1,200 MW — manage to transmit (wheel) these quantities on the path in question, as firm transmission service customers of the Transmission Provider, EBMI and the Generator can, at any time, request the transmission (wheeling) of all the quantities set out in their service agreements.

[136] The day on which any such transmission (wheeling) cannot take place because ISO-NE will not permit it, as there are no Transmission Provider network capacity restrictions on this path (2,000 MW being available), logic dictates that ISO-NE manage

⁸⁶ File P-130-001, Exhibit B-1, application, allegations nos. 93 to 96.

⁸⁷ File R-3669-2008 Phase 2.

the restriction on the American side of the HQT-NE path by applying the provisions of the OATT, the provisions of which are similar to those under Section 13.6 of the Tariffs and Conditions.

[137] Whether, under similar circumstances, it is incumbent on the Transmission Provider or ISO-NE to manage transmission capacity restrictions on the HQT-NE path, this should take place on a non-discriminatory basis to meet the requests of firm service customers, including EBMI and the Generator.

[138] In short, apart from the portion of the Transmission Provider's notice on OASIS published between July 8 and August 9, 2009, in which the Transmission Provider likened firm transmission renewal requests to new requests, it seems normal to me that the Transmission Provider notified its customers, through notification on OASIS, that it was going to analyze the transmission values on its network taking into account the wheeling capacities on the neighbouring network. In my opinion, this does not contravene the Tariffs and Conditions.

[139] In addition, such a notice on OASIS seems logical and necessary to me in the context where the Transmission Provider's firm commitments on its network already exceed the firm transmission limits that ISO-NE could impose under certain circumstances and which can, as the case may be, have an impact on the firm transmission requests of new customers.

9. REQUEST FOR CONFIDENTIALITY

[140] The Transmission Provider files Schedules 2, 3, 5, 6 and 11 of the internal inquiry file of complaint P-130-001 and Schedules 2, 3, 5, 6 and 9 of the internal inquiry file of complaint P-130-003 on a confidential basis. These schedules contain the minutes of the meetings held between ISO-NE and the Transmission Provider.

[141] The Transmission Provider allowed EBMI's representatives to consult these documents after they signed a confidentiality and non-disclosure agreement.

[142] On September 7, 2010, the Transmission Provider filed a solemn affirmation by Mr. Sylvain Clermont in support of its petition to maintain the confidentiality of these schedules. Mr. Clermont contends that these schedules contain information, certain aspects of which are commercial in nature and form the subject matter of an obligation of confidentiality pursuant to the *Interconnection Operators Agreement between ISO New England Inc. and Hydro-Québec TransÉnergie*. Thus, according to Mr. Clermont, the public disclosure of such information would be counter to the Transmission Provider's contractual obligations.

[143] The Transmission Provider is petitioning the Régie to avail itself of Section 30 of the Act and ban any disclosure of the information and data set out in the confidential schedules. EBMI has not opposed this petition.

[144] **For these reasons,**

The Régie de l'énergie:

GRANTS EMBI's complaints P-130-001 and P-130-003;

ORDERS the Transmission Provider to rollover the MATI-NE Agreements for the period from April 1, 2010 to March 31, 2011 in accordance with the terms of the Tariffs and Conditions in effect on the date hereof, and **ORDERS** the Transmission Provider to allow EBMI to continue to use the long-term firm point-to-point transmission services on the Transmission Provider's network and, in particular, on the MATI-HQT-NE path, in compliance with the terms of the Tariffs and Conditions ensuing from Decisions D-2009-015 and D-2009-023, for a reserved capacity of 111/106 MW;

ORDERS the Transmission Provider to rollover the ON-NE Agreements for the period from October 22, 2010 to October 21, 2011 in accordance with the terms of the Tariffs and Conditions in effect on the date hereof, and **ORDERS** the Transmission Provider to allow EBMI to continue to use the long-term firm point-to-point transmission services on the Transmission Provider's network and, in particular, on the ON-HQT-NE path, in compliance with the terms of the Tariffs and Conditions ensuing from Decisions D-2010-032 and D-2010-041, for a reserved capacity totalling 210/200 MW;

GRANTS the Transmission Provider's petition for confidentiality;

PROHIBITS the disclosure, publication or dissemination of the following documents:

- Exhibit HQT-22, Schedules 2, 3, 5, 6 and 11 of file P-130-001,
- Exhibit HQT-18, Schedules 2, 3, 5, 6 and 9 of file P-130-003.

Marc Turgeon
Commissioner

Michel Hardy
Commissioner

Richard Lassonde
Commissioner

EBMI represented by Attorneys Paule Hamelin and Pierre Legault;

Hydro-Québec represented by Attorney Yves Fréchette.