

QUÉBEC

RÉGIE DE L'ÉNERGIE

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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

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**Brookfield Energy Marketing Inc.**  
Plaintiff

and

**Hydro-Québec**  
Defendant

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**Final Decision**

*Complaints lodged under section 86 of the Act respecting the  
Régie de l'énergie*

## 1. INTRODUCTION

[1] On March 15, 2010, Brookfield Energy Marketing Inc. (BEMI) filed a complaint (P-130-001) with the Régie de l'énergie (the Régie) in which it contested a decision of Hydro-Québec when carrying on electric power transmission activities (the Transmission Provider).

[2] That decision, sent to BEMI on March 11, 2010, concerns the Transmission Provider's refusal to renew two 43-MW and 68-MW firm transmission agreements (including transmission losses) via the MATI-HQT-NE path (the MATI-NE Agreements) for the period of April 1, 2010 to March so that BEMI can continue taking transmission services until such time as a final decision is rendered<sup>1</sup>.

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

[4] The second complaint concerns the Transmission Provider's refusal to roll over two firm transmission service agreements, each for 105 MW (including transmission losses) via the ON-HQT-NE path (the ON-NE Agreements) for the period of September 2, 2010 to September 1, 2011. That complaint also includes an application for a safekeeping order so that BEMI can continue taking transmission services until such time as a final decision is rendered. BEMI also asks the Régie to hear this complaint together with Complaint P-130-001<sup>2</sup>.

## 2. PROCEDURE

[5] On March 25, 2010, the Régie heard the parties at a hearing on the application for a safekeeping order in relation to Matter No. P-130-001. The parties filed a draft safekeeping order that they asked the Régie to ratify. The same day, the Régie rendered Decision D-2010-031 in which it rendered a safekeeping order allowing BEMI to continue taking firm transmission services via the MATI-HQT-NE path as of April 1, 2010 until a final decision is rendered.

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<sup>1</sup> Matter No. P-130-001, Exhibit B-1, Application, pages 17 and 19.

<sup>2</sup> Matter No. P-130-003, Exhibit B-1, Application, pages 18 and 20.

[6] On May 21, 2010, the Transmission Provider requested that the hearing of Complaint P-130-001 be suspended until the final decision is rendered in rate case R-3669-2008 Phase 2.

[7] On May 28, 2010, BEMI objected to the Transmission Provider's request for suspension and submitted its arguments in that regard.

[8] On June 3, 2010, the Transmission Provider replied to BEMI's arguments. On June 7, 2010, BEMI submitted various supplementary comments.

[9] In Decision D-2010-075 of June 11, 2010, the Régie dismissed the application to suspend the hearing and summoned the parties to a preparatory meeting.

[10] On June 21, 2010, the Régie held the preparatory meeting to discuss, among other things, a schedule for dealing with the two complaint matters. At the meeting, both parties agreed 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 submitted a draft safekeeping order respecting Matter No. P-130-003 that they asked the Régie to approve. On July 14, 2010, in Decision D-2010-089, the Régie allowed the application for a safekeeping order to allow BEMI to continue taking transmission service via the ON-HQT-NE path until such time as a final decision is rendered.

[12] On July 14, 2010, the Régie also rendered Decision D-2010-090 in which it agreed to join Complaints P-130-001 and P-130-003 for oral hearing and fixed the schedule for dealing with the matters.

[13] On September 7, 2010, the Transmission Provider filed a solemn declaration in support of its claim for confidentiality of annexures 2, 3, 5, 6 and 11 of the internal review file of Complaint P-130-001, and annexures 2, 3, 5, 6 and 9 of the internal review file of Complaint P-130-003.

[14] The oral hearing of the complaints took place on September 14 to 17, 2010 inclusively.

### 3. THE FACTS

[15] BEMI is a customer of the Transmission Provider, and is active in the wholesale power markets in Québec, New Brunswick, Ontario and several American states, including those in the northeastern U.S.

[16] BEMI is the Transmission Provider's second largest customer of point-to-point transmission service. The conditions of the service applicable to it as such are found in Part II of the *Hydro-Québec's Open Access Transmission Tariff* (the HQ OATT)<sup>3</sup>.

[17] On January 5 and 9, 2007, BEMI filed two requests for long-term firm point-to-point transmission service with respective capacities of 43 MW and a 68 MW (including transmission losses) via the MATI-HQT-NE path<sup>4</sup>. The Transmission Provider accepted the requests and the service agreements were signed January 31, 2007 for service commencing April 1, 2007 and terminating March 31, 2008<sup>5</sup>.

[18] On August 2, 2007, BEMI filed two requests for long-term firm point-to-point transmission service of 105 MW each (including transmission losses) via the ON-HQT-NE path<sup>6</sup>. Further to an impact study completed by the Transmission Provider in May 2008, the latter accepted BEMI's service requests<sup>7</sup>. The agreements were signed on June 12, 2008 for service commencing on the latest of the following dates, June 1, 2009 or the date of the commissioning of the Ontario and Québec interconnection, represented by the ON-HQT path, and terminating one year after commencement of service<sup>8</sup>. Lastly, the termination date of the transmission service was fixed at September 2, 2010<sup>9</sup>.

[19] Between December 2007 and November 2008, BEMI purchased firm long-term transmission service rights on the U.S. side, for reserved capacities totaling 282 MW until 2013<sup>10</sup>.

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<sup>3</sup> Matter No. P-130-001, Exhibit B-1, Application, Allegation No. 4.

<sup>4</sup> Matter No. P-130-001, Exhibit B-1, Application, Allegation No. 20.

<sup>5</sup> Matter No. P-130-001, Exhibit B-1, EBMI-2.

<sup>6</sup> Matter No. P-130-003, Exhibit B-1, Application, Allegation No. 28.

<sup>7</sup> Matter No. P-130-003, Exhibit B-1, Application, Allegation No. 29.

<sup>8</sup> Matter No. P-130-003, Exhibit B-1, EBMI-6.

<sup>9</sup> Matter No. P-130-003, Exhibit B-1, Application, Allegations Nos.30 and 31.

<sup>10</sup> Matter No. P-130-001, Exhibit B-1, Application, Allegation No. 83 and Exhibit A-12-2, Stenographic Notes (SN) of September 15, 2010, Volume 2, pages 95 to 98.

[20] On January 14, 2008, BEMI requested renewal of the MATI-NE Agreements for the period of April 1, 2008 to March 31, 2009<sup>11</sup>.

[21] On March 4, 2008, the Transmission Provider agreed to that request, as appears from the entries posted on the Transmission Provider's OASIS site (*Open Access Same-time Information System*) and from letters from the latter<sup>12</sup>. In its letters, the Transmission Provider stated that given the limited life of the interconnection, an impact study would eventually be required to identify the cost of system upgrades at the time of a subsequent rollover request.

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

[Translation:]

***"Coordination of system capacities***

*In the context of FERC Order No. 890, in 2009 the Transmission Provider will undertake work to align the system transmission capacities posted on OASIS with those posted on neighbouring systems. As the work progresses, new transmission values will be posted.*

*As of publication of this notice, the Transmission Provider will study any new request for transmission service via its interconnections taking into account the limitations on neighbouring systems [...] <sup>13</sup>.*"

[23] On January 20, 2009, BEMI requested renewal of the MATI-NE Agreements for the period of April 1, 2009 to March 31, 2010. On March 4, 2009, the Transmission Provider agreed to that request with the same reservations stated in its letter of March 4, 2008, regarding the life of the interconnection<sup>14</sup>.

[24] On July 1, 2009, firm long-term transmission service purchased by Hydro-Québec when carrying on electric power generation activities (the "Generator"), commenced via

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<sup>11</sup> Matter No. P-130-001, Exhibit B-1, Application, Allegation No. 41 and Exhibit B-1, EBMI-8.

<sup>12</sup> Matter No. P-130-001, Exhibits B-1, EBMI-8 and EBMI-9.

<sup>13</sup> Matter No. P-130-001, Exhibit B-1, EBMI-18.

<sup>14</sup> Matter No. P-130-001, Exhibit B-1, EBMI-10.

the HQT-NE path with a capacity of 1,200 MW and for a term of 35 years. The Generator transmitted its request for such service on January 20, 2006<sup>15</sup>.

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

[Translation:]

***"Harmonization of transmission capacities***

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

*As of today, the Transmission Provider is harmonizing its available firm transmission capacities with those of neighbouring systems so that the transmission reservations of its customers will at all times be feasible based on the transmission capacities of neighbouring systems. Transmission capacities for each path for the next thirteen months are posted on the Transmission Provider's OASIS site.*

*No firm transmission reservation existing at the time of publication of this notice shall be affected by the harmonization. All new requests for firm transmission service including rollover requests shall be assessed on the basis of the new firm capacity values posted by the Transmission Provider<sup>16</sup>."*

[26] On January 19, 2010, BEMI requested renewal of the MATI-NE Agreements, as appears from the entries posted on the Transmission Provider's OASIS site and from BEMI's letter dated January 20, 2010<sup>17</sup>.

[27] On February 12, 2010, the Transmission Provider notified BEMI of its refusal to renew the MATI-NE Agreements as of April 1, 2010, for the following reason:

*"[...] Analysis of the firm transmission capacities via this path [MATI-NE] indicates however that Hydro-Québec when carrying on electric power transmission activities (the "Transmission Provider") is unable to provide the*

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<sup>15</sup> Matter No. P-130-001, Exhibit B-1, Application, Allegation No. 29 and Exhibit B-1, EBMI-5.

<sup>16</sup> Matter No. P-130-001, Exhibit B-1, EBMI-19.

<sup>17</sup> Matter No. P-130-001, Exhibit B-1, Application, Allegation No. 47 and Exhibit B-1, EBMI-11.

*capacity requested and therefore is not in a position to renew your request [...]*<sup>18</sup>."

[28] On February 22, 2010, BEMI submitted its request to renew the ON-NE Agreements for a period of one year commencing September 2, 2010, as appears from the entries posted on the Transmission Provider's OASIS site<sup>19</sup>.

[29] On February 25, 2010, BEMI submitted a complaint to the Transmission Provider regarding its February 12, 2010 decision refusing to renew the MATI-NE Agreements<sup>20</sup>.

[30] On March 11, 2010, the Transmission Provider informed BEMI that it maintained its decision communicated on February 12, 2010 refusing both requests to renew annual firm transmission service via the MATI-HQT-NE path for the period of April 1, 2010 to March 31, 2011<sup>21</sup>.

[31] On March 15, 2010, BEMI filed a complaint (P-130-001) with the Régie regarding the Transmission Provider's March 11, 2010 refusal to renew the MATI-NE Agreements.

[32] On March 23, 2010, the Transmission Provider informed BEMI that requests to renew the ON-NE Agreements would ultimately be treated in the same manner as the requests to renew the MATI-NE Agreements. In addition, the Transmission Provider stated that the present transmission service via the ON-NE path would terminate, at the earliest, on September 2, 2010, which date was most likely to be extended due to work on the Outaouais interconnection site scheduled from April 19 to May 10, 2010<sup>22</sup>.

[33] On May 13, 2010, BEMI submitted a complaint to the Transmission Provider concerning the refusal to renew the ON-NE Agreements<sup>23</sup>.

[34] On May 21, 2010, the Transmission Provider informed BEMI that it had maintained its position regarding its refusal to renew the ON-NE Agreements<sup>24</sup>.

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<sup>18</sup> Matter No. P-130-001, Exhibit B-1, EBMI-12.

<sup>19</sup> Matter No. P-130-003, Exhibit B-1, EBMI-5.

<sup>20</sup> Matter No. P-130-001, Exhibit B-1, EBMI-16.

<sup>21</sup> Matter No. P-130-001, Exhibit B-1, EBMI-17.

<sup>22</sup> Matter No. P-130-003, Exhibit B-1, EBMI-2.

<sup>23</sup> Matter No. P-130-003, Exhibit B-1, EBMI-13.

<sup>24</sup> Matter No. P-130-003, Exhibit B-1, EBMI-14.

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

#### 4. THE COMPLAINTS

[36] The conclusions sought by BEMI in Complaint P-130-001 that are still relevant are as follows:

[Translation:]

"[...]

*ALLOW the complaint of Complainant Brookfield Energy Marketing Inc.;*

*ORDER the Transmission Provider, Hydro-Québec when carrying on electric power transmission activities, to renew the (BEMI-2) 2007 Service Agreements for the period of April 1, 2010 to March 31, 2011, in accordance with the terms and conditions of the HQ OATT in effect on the date hereof and ORDER the Transmission Provider to allow Brookfield Energy Marketing Inc. to continue taking the long-term firm point-to-point transmission services via the Transmission Provider's system and specifically via the MATI-HQT-NE path, in accordance with the terms and conditions of the HQ OATT presently in effect and pursuant to decisions D-2009-018 [sic, D-2009-015] and D-2009-023 for a reserved capacity of 111/106 MW."*

[37] Regarding Complaint P-130-003, the conclusions sought that are still relevant are as follows:

[Translation:]

"[...]

*ALLOW the complaint of Complainant Brookfield Energy Marketing Inc.;*

*ORDER the Transmission Provider, Hydro-Québec when carrying on electric power transmission activities, to renew the ON-HQT-NE (BEMI-6) Service Agreements for the period of September 2, 2010 to September 1, 2011, according to the terms and conditions of the HQ OATT in effect on the date hereof and ORDER the Transmission Provider to allow Brookfield Energy Marketing Inc. to continue taking the firm long-term point to point transmission services via the Transmission Provider's system and specifically via the ON-HQT-NE path, in accordance with the terms and conditions of the HQ OATT presently in force and*

*pursuant to decisions D-2009-018 and D-2009-023 for a reserved capacity totaling 210/200 MW".*

[38] The Régie states that the version of the HQ OATT 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] Moreover, it is the Régie's understanding that the renewal period for Complaint P-130-003 should be October 22, 2010 to October 21, 2011 rather than September 2, 2010 to September 1, 2011, pursuant to the agreement submitted by the parties for the purposes of the safekeeping order<sup>25</sup>.

## 5. OBJECTIONS TAKEN UNDER DELIBERATION

[40] The Régie took under deliberation one objection made by BEMI and two objections made by the Transmission Provider at the hearing.

[41] BEMI objected to a question asked of one of the Transmission Provider's witnesses concerning a statement by BEMI to the effect that the Transmission Provider had unduly favoured the Generator. According to BEMI, that question would lead the fact witness to formulate an opinion. The Régie finds that the answer given by the witness was not in the nature of an opinion<sup>26</sup>. Therefore, the objection is overruled.

[42] The Transmission Provider's first objection concerned the production into evidence of certain documents filed in other matters under consideration before the Régie, namely Matters R-3669-2008 Phase 2 and R-3699-2009. However, that objection need not be decided, because the parties agreed on an alternative to producing those documents, namely through admissions by the Transmission Provider<sup>27</sup>.

[43] The Transmission Provider's second objection concerned the production into evidence of a document entitled "*ISO New England Inc. Transmission, Markets and Services Tariff*" (ISO-NE tariff). By filing that document, BEMI is seeking to show that

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<sup>25</sup> Matter No. P-130-003, Exhibit C-1-6.

<sup>26</sup> Matter No. P-130-001, Exhibit A-12-3, SN of September 16, 2010, Volume 3, pages 90 and 91.

<sup>27</sup> Matter No. P-130-001, Exhibit A-12-3, SN of September 16, 2010, Volume 3, pages 142 to 147.

ISO-NE (*Independent System Operator New England*) does not consider it necessary to coordinate calculation of the ATC (*Available Transfer Capability*) with the Transmission Provider's system, given the technical nature of the direct current tie between the two systems.

[44] At paragraph 127, the Régie discusses the opportunity, in the present matters, of addressing the Transmission Provider's implementation of an approach based on harmonization of interconnections according to the receiving capacities of neighbouring systems (implementation of harmonization). In the context of the allegations set forth in the complaints, the Régie finds that the ISO-NE tariff is admissible into evidence and overrules the Transmission Provider's objection. However, for reasons stated later on, the Régie does not consider that document conclusive for the purposes of this decision.

## 6. THE RESPECTIVE POSITIONS OF THE PARTIES

### 6.1 BEMI

[45] BEMI has adopted a common position in both complaints (P-130-001 and P-130-003).

[46] It submits that its requests for service via the MATI-HQT-NE and ON-HQT-NE paths were considered complete and were accepted by the Transmission Provider without restriction or condition<sup>28</sup>.

[47] BEMI is of the view that it is entitled to renew its agreements pursuant to section 2.2 of the HQ OATT. That section was approved by the Régie in all versions of the HQ OATT since its initial approval (decisions D-2002-286 and D-2003-12). The wording of section 2.2 in the HQ OATT presently in effect pursuant to decisions D-2009-015 and D-2009-023 has not undergone any significant amendments<sup>29</sup>. Section 2.2 reads as follows:

*"2.2 Reservation Priority for Existing Firm Service Customers: Existing firm transmission service customers with a contract term of one year or more have the*

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<sup>28</sup> Matter No. P-130-001, Exhibit B-1, Application, Allegation No. 22; Matter No. P-130-003, Exhibit B-1, Application, Allegation No. 32.

<sup>29</sup> Matter No. P-130-001, Exhibit B-1, Application, Allegation Nos. 114 and 115.

*right to continue to take 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 the longest competing request by any 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] BEMI claims that the right to renew firm transmission service under section 2.2 of the HQ OATT must be considered at the time of the initial request. Once the request is granted, the customer is entitled to demand renewal of its service regardless of any constraints that may subsequently occur on the Transmission Provider's system<sup>30</sup>.

[49] BEMI maintains that sections 2.2 and 13.6 of the HQ OATT applicable in this case were in substance copied from the equivalent provisions approved by the *Federal Energy Regulation Commission* (the FERC). It follows therefore that we cannot ignore the FERC's interpretation of those provisions, specifically the issue of rollover rights<sup>31</sup>.

[50] BEMI referred the Régie to certain sections of FERC Orders 888, 890 and 890-A that deal with the rollover rights of long-term transmission service customers. Basically, BEMI submits that, according to the FERC, where a customer signs a firm long-term service agreement, section 2.2 grants it a perpetual right to use the transmission service, provided that notice is given within the prescribed 60 days. Where a transmission provider wishes to limit entitlement to exercise the rollover right, the FERC states that such limitations must be recorded in the initial agreement and that no restriction may be added subsequently. Thus, if after the signing of the agreement, a problem on the system results in an insufficiency of available transmission capacity, the consequence is not the loss of the rollover right, but rather a curtailment in service pursuant to section 13.6 of the HQ OATT<sup>32</sup>.

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<sup>30</sup> Matter No. P-130-001, Exhibit B-1, Application, Allegations Nos. 116 and 117.

<sup>31</sup> Matter No. P-130-001, Exhibit A-12-4, SN of September 17, 2010, Volume 4, pages 56 to 58.

<sup>32</sup> Matter No. P-130-001, Exhibit A-12-4, SN of September 17, 2010, Volume 4, pages 85 to 91.

[51] BEMI also relies on the report of its expert, Mr. Craig Roach, who analyzed numerous FERC decisions, including *Exelon Generation Company, LLC v. Southwest Power Pool, Inc.*<sup>33</sup>. BEMI argues that, according to that decision, a Transmission Provider is obligated to maintain available capacity for customers who have renewal rights and that restrictions on those rights must be recorded in the initial service agreement.

[52] In this case, BEMI submits that the service agreements signed with the Transmission Provider contain no restriction or condition affecting the renewal rights provided for in section 2.2 of the HQ OATT. The only restriction referred to by the Transmission Provider in its letters accepting the renewal requests concerns the useful life of the interconnection, which is totally unrelated to the grounds for refusal cited by the Transmission Provider in 2010<sup>34</sup>.

[53] According to BEMI, insufficiency of transmission capacity on the Transmission Provider's system, due to a problem on the system or to some event does not affect a firm, long-term service customer's rollover rights. However, the situation could cause a curtailment in service for firm long-term transmission service customers within the meaning of section 13.6 of the HQ OATT<sup>35</sup>. That is also the opinion of expert witness Roach who relies on FERC decision in *ConocoPhillips*<sup>36</sup> to conclude that, in such a case, there should be pro rata curtailment in service for all firm point-to-point service customers ("*a pro rata curtailment of all firm customers including firm point-to-point customers*")<sup>37</sup>.

[54] Regarding the issue of harmonization, BEMI notes that the Transmission Provider unilaterally decided to curtail its available transfer capacity from 2,000 MW to 1,200 MW, knowing that this decision would affect BEMI's rights. Despite this, the Transmission Provider did not notify BEMI directly of the situation and did not ask the Régie to approve this major change<sup>38</sup>. BEMI submits that the Transmission Provider cannot amend contractual conditions by way of a notice posted on the OASIS site<sup>39</sup>.

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<sup>33</sup> Matter No. P-130-001, Exhibit B-22, BEMI's pleadings, Volume 2, Tab 4 A, *Exelon Generation Company, LLC v. Southwest Power Pool, Inc.* [99 FERC 61,235].

<sup>34</sup> Matter No. P-130-001, Exhibit A-12-4, SN of September 17, 2010, Volume 4, pages 19 and 20.

<sup>35</sup> Matter No. P-130-001, Exhibit A-12-4, SN of September 17, 2010, Volume 4, pages 85 and 86.

<sup>36</sup> Matter No. P-130-001, Exhibit B-13, Report of expert C. Roach, July 30, 2010, pages 18 and 19.

<sup>37</sup> Matter No. P-130-001, Exhibit B-13, Report of expert C. Roach, July 30, 2010, page 18, paragraph 34.

<sup>38</sup> Matter No. P-130-001, Exhibit A-12-4, SN of September 17, 2010, Volume 4, pages 26 and 27.

<sup>39</sup> Matter No. P-130-001, Exhibit A-12-4, SN of September 17, 2010, Volume 4, page 25.

[55] According to BEMI, the Transmission Provider unilaterally decided to harmonize its available transmission capacities to ensure that customers with firm transmission service agreements can conclude their transactions at all times. BEMI submits that such an approach amounts to interfering in the commercial context between customers<sup>40</sup>.

[56] Lastly, BEMI considers that the Transmission Provider changed the methodology for calculating the ATC stipulated in Attachment C of the HQ OATT<sup>41</sup> which therefore required prior authorization from the Régie<sup>42</sup>.

[57] Furthermore, as regards the alternative solution to the complaints proposed by the Transmission Provider which consists in using a non-firm transmission service, BEMI is considers the issue regarding the sufficiency of a non-firm service to meet its needs as irrelevant to the subject of its complaints<sup>43</sup>.

## 6.2 THE TRANSMISSION PROVIDER

[58] The Transmission Provider maintains that it treated BEMI's renewal requests in accordance with sections 2.2 (Reservation Priority for Existing Firm Service Customer), 13.2 (Reservation Priority), 17.5 (Response to a Completed Application) and with Attachment C (Methodology for Assessing Available Transmission Capability) of the HQ OATT<sup>44</sup>.

[59] The Transmission Provider, relying on the FERC decision in *Tenaska Power Services Co.*<sup>45</sup>, maintains that it could use the method of its choice to consider renewal requests under section 2.2 of the HQ OATT<sup>46</sup>. The Transmission Provider also refers to two FERC decisions, namely *Long Island Lighting Company*<sup>47</sup> and *Southwest Power*

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<sup>40</sup> Matter No. P-130-001, Exhibit A-12-4, SN of September 17, 2010, Volume 4, pages 32 and 33.

<sup>41</sup> Matter No. P-130-001, Exhibit A-12-4, SN of September 17, 2010, Volume 4, page 64.

<sup>42</sup> Matter No. P-130-001, Exhibit B-1, Application, Allegation No. 96.

<sup>43</sup> Matter No. P-130-001, Exhibit B-11, BEMI's reply to the Carrier's Request for Information No. 1 and Exhibit A-12-1, SN of September 14, 2010, Volume 1, pages 77 and 78.

<sup>44</sup> Matter No. P-130-001, Exhibit C-1-20, Carrier's Arguments, Allegation No. 8.

<sup>45</sup> *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.

<sup>46</sup> Matter No. P-130-001, Exhibit C-1-20, Carrier's Arguments, Allegation No. 9 and Exhibit A-12-4, SN of September 17, 2010, Volume 4, page 127.

<sup>47</sup> *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.

*Pool, Inc.*<sup>48</sup> to maintain that section 2.2 grants a reservation priority right where there is a competing request<sup>49</sup>.

[60] Moreover, the Transmission Provider submits that a renewal request is treated as a new request for the following reasons: (i) a request to renew must be recorded on the OASIS site with a new request number, (ii) request to renew leads to the signing of a new transmission service agreement and (iii) the fact that a request to renew is treated like a new request was clearly stated in the notice of July 8, 2009 on the OASIS site<sup>50</sup>.

[61] Requests for renewal are examined on the basis of conditions existing at the time of the filing of such requests and by taking into consideration the reservation priorities under section 13.2 of the HQ OATT<sup>51</sup>.

[62] Furthermore, section 2.2 of the HQ OATT may not be interpreted as providing access to transmission service *in perpetuity*<sup>52</sup>.

[63] Also, Attachment C stipulates the methodology that the Transmission Provider must use in calculating the ATC. Since July 8, 2009, the Transmission Provider takes into account the capacities of neighbouring systems by applying the *Transmission Reliability Margin* (TRM). To do so, the Transmission Provider claims that it has not changed the methodology or equation used to calculate the ATC<sup>53</sup>.

[64] By applying the ATC calculation method in accordance with Attachment C, the Transmission Provider determined that the ATC in firm transmission via the HQT-NE path has been 1,200 MW since July 8, 2009<sup>54</sup>.

[65] That capacity is determined on the basis of constraints on the neighbouring system known by BEMI at the time of the initial requests for service and at the time of the

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

<sup>49</sup> Matter No. P-130-001, Exhibit C-1-20, Carrier's Arguments, Allegation No. 10 a).

<sup>50</sup> Matter No. P-130-001, Exhibit C-1-20, Carrier's Arguments, Allegation No. 10 b).

<sup>51</sup> Matter No. P-130-001, Exhibit C-1-20, Carrier's Arguments, Allegations Nos. 10 c) and 10 d).

<sup>52</sup> Matter No. P-130-001, Exhibit C-1-20, Carrier's Arguments, Allegation No. 10 e).

<sup>53</sup> Matter No. P-130-001, Exhibit C-1-20, Carrier's Arguments, Allegations Nos. 12 to 14.

<sup>54</sup> Matter No. P-130-001, Exhibit C-1-20, Carrier's Arguments, Allegation No. 15.

renewal of those requests. By using the constraints of neighbouring systems to determine the ATC, the Transmission Provider wanted to use a transparent, not arbitrary, value<sup>55</sup>.

[66] The Transmission Provider submits that it is solely responsible for the management and planning of its transmission system. Management of a transmission system includes the application of values and other constraints that the Transmission Provider considers appropriate in determining the ATC on the system, in accordance with Attachment C and industry practices. Absent probative evidence of error or non-compliance regarding the Transmission Provider's application of Attachment C, it is not the Régie's role to interfere in the determination of a transfer capability value<sup>56</sup>.

[67] The Transmission Provider submits that harmonization of transmission capacity is aimed at ensuring that its customers' transmission reservations are feasible at all times, on the basis of the transmission capacities of neighbouring systems. That is part of a commercial approach aimed at [translation:] *greater transparency and consistency of information*<sup>57</sup>.

[68] The Transmission Provider explained that it validly informed its customers of the harmonization via notices posted on its OASIS site. According to the Transmission Provider, publication of notices on OASIS allows it to communicate with all customers simultaneously and transparently. Information regarding the coordination of transmission capacities via notices on OASIS is commercial in nature and all customers must have access to that information at the same time, in accordance with the Transmission Provider's Code of Conduct<sup>58</sup>.

[69] Moreover, the Transmission Provider submits that it proposed a solution to BEMI that is efficient, available and capable of resolving the complaint<sup>59</sup>, which consists in using available and appropriate non-firm transmission service<sup>60</sup>.

[70] On the issue of the application of section 13.6 of the HQ OATT concerning the curtailment of firm transmission service in the event of system constraints, the Transmission Provider noted that a pro rata curtailment of services has consequences for

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<sup>55</sup> Matter No. P-130-001, Exhibit C-1-20, Carrier's Arguments, Allegations Nos.16 and 17.

<sup>56</sup> Matter No. P-130-001, Exhibit C-1-20, Carrier's Arguments, Allegations Nos.19 to 22.

<sup>57</sup> Matter No. P-130-001, Exhibit C-1-20, Carrier's Arguments, Allegations Nos.24 and 25.

<sup>58</sup> Matter No. P-130-001, Exhibit C-1-20, Carrier's Arguments, Allegations Nos.26 to 28.

<sup>59</sup> Matter No. P-130-001, Exhibit B-1, EBMI-17, section 2.4.

<sup>60</sup> Matter No. P-130-001, Exhibit C-1-20, Carrier's Arguments, Allegation No. 31.

third parties, specifically the Generator, and that the Régie cannot render a decision in that regard without allowing such third parties to make representations<sup>61</sup>.

[71] According to the Transmission Provider, the application of pro rata curtailments on the firm transmission capacity reservations of the Generator and of BEMI, as provided for in section 13.6 of the HQ OATT, would be unfair for the Generator because it would sustain a curtailment on a contract with a term of 35 years, whereas BEMI could decide to not renew its commitments in the future. Moreover, as BEMI has more firm transmission via the Transmission Provider's system than via ISO-NE, a pro rata curtailment would have no impact on BEMI<sup>62</sup>.

### 6.3 BEMI'S REPLY

[72] Respecting application of the pro rata curtailment rule under section 13.6 of the HQ OATT, which would affect the Generator, BEMI notes that section 13.6 provides the manner in which all customers are affected by curtailment of transmission capacity. Moreover, if harmonization must trigger application of the pro rate rule of section 13.6, BEMI submits that this indicates that customers are affected by harmonization and that this change introduced by the Transmission Provider should have been the subject of a specific application to the Régie<sup>63</sup>.

[73] Respecting the application of section 13.6 of the HQ OATT, BEMI notes that the section concerns the insufficiency of capacity on the Transmission Provider's system in the event of a technical problem, such as the loss of a line. If the Transmission Provider decides to impose a restriction on itself that affects its customers, as occurred by implementing harmonization, it does not come under section 13.6 but, as noted by expert Roach, is a change in *policy* requiring amendment of the HQ OATT. The appropriate forum for introducing such changes is a rate case<sup>64</sup>.

[74] Regarding the FERC decisions cited by the Transmission Provider, in BEMI's view they concern the *tie-breaking* mechanism of section 2.2 of the *Pro Forma Open Access Transmission Tariff* applicable where there is a request competing with a customer's

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<sup>61</sup> Matter No. P-130-001, Exhibit A-12-4, SN of September 17, 2010, Volume 4, pages 145 and 146.

<sup>62</sup> Matter No. P-130-001, Exhibit A-12-4, SN of September 17, 2010, Volume 4, pages 148 to 151.

<sup>63</sup> Matter No. P-130-001, Exhibit A-12-4, SN of September 17, 2010, Volume 4, page 181.

<sup>64</sup> Matter No. P-130-001, Exhibit A-12-4, SN of September 17, 2010, Volume 4, pages 184 to 186.

request to renew<sup>65</sup>. According to BEMI, those decisions do not concern the right to renew a contract as in this case.

## 7. OPINION OF THE RÉGIE

[75] The Régie is asked to decide two complaints filed by BEMI concerning the Transmission Provider's refusal to renew four long-term firm transmission service agreements for a period of one year. The Transmission Provider cites as the reason for its refusal the fact that it cannot provide the firm transmission capacities requested. The insufficiency of capacity is due to the fact that the Transmission Provider proceeded to harmonize its firm transmission capacity with that of the neighbouring system and that implementation of harmonization reduced the firm transmission capacity available on the HQT-NE path from 2,000 MW to 1,200 MW.

[76] Pursuant to section 98 of the *Act respecting the Régie de l'énergie*<sup>66</sup> (the Act), in examining a complaint, the Régie must ascertain if the electric power carrier (the Transmission Provider) complied with the HQ OATT. If it considers the complaint valid, section 101 of the Act confers on the Régie the power to order the electric power carrier (the Transmission Provider) to implement, within the time limit fixed by the Régie, such measures as it may determine regarding application of the HQ OATT.

[77] The Régie must therefore determine if the Transmission Provider's decision to refuse the renewal requests of the MATI-NE and ON-NE Agreements on the grounds of insufficiency of available firm transmission capacity because of the harmonization process that it implemented on July 8, 2009, is in conformity with the provisions of the HQ OATT.

[78] Specifically, the Régie must ascertain if the Transmission Provider was well founded in treating BEMI's renewal requests as new requests for service and, therefore, determine if the firm transmission capacity was sufficient to agree to the renewal requests.

[79] The main issue raised by the complaints concerns the scope of section 2.2 of the HQ OATT, which section is worth quoting again:

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<sup>65</sup> Matter No. P-130-001, Exhibit A-12-4, SN of September 17, 2010, Volume 4, pages 182 and 183.

<sup>66</sup> R.S.Q., c. R-6.01.

*"2.2 Reservation Priority for Existing Firm Service Customer: Existing firm transmission service customers with a contract term of one year or more have the right to continue to take 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 an 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." [Emphasis added]*

[80] Furthermore, the Régie is of the view that the issue of whether the alternative solution proposed by the Transmission Provider to BEMI that it use a non-firm transmission service is valid or not, is irrelevant to the dispute before it.

### **The scope of section 2.2 of the HQ OATT**

[81] Section 2.2 of the HQ OATT currently in effect originates from Hydro-Québec Bylaw 659<sup>67</sup> (Bylaw 659).

[82] Bylaw 659 basically reproduces the Pro Forma Tariff adopted by the FERC in its Order No. 888 of April 24, 1996.

[83] Section 2.2 of the HQ OATT which applies to the present complaints substantially mirrors section 2.2 of the Pro Forma Tariff, as appears from the various comparative English versions of that section filed by BEMI<sup>68</sup>.

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<sup>67</sup> *Hydro-Québec Bylaw number 659 respecting the conditions and rates for open access transmission service*, 129 G.O. Part II, March 12, 1997, page 971, approved by Order-in-Council No. 276-97 of the Government of Québec on March 5, 1997.

<sup>68</sup> Matter No. P-130-001, Exhibit B-22, BEMI's pleadings, Volume 1, Tab 2 D.

[84] In this context, and even though it is not bound by FERC decisions, the Régie considers those decisions relevant in shedding light on the issue, allowing it to interpret the scope of the rollover rights provided for in section 2.2 of the HQ OATT.

[85] The Régie thus considers, in chronological order, the relevant FERC decisions dealing with section 2.2 of the pro forma tariff.

[86] On April 24, 1996, the FERC issued Order No. 888 which led to adoption of the Pro Forma Tariff. In that Order, it dealt with the right of a customer to continue taking firm transmission service in the following terms:

*"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 above<sup>69</sup>." [Emphasis added]*

[87] In Order No. 888-A of March 4, 1997, the FERC specifically addressed 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*

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<sup>69</sup> Matter No. P-130-001, Exhibit B-22, BEMI's pleadings, Volume 1, Tab 3 I A, pages 5 and 6.

*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)<sup>70</sup>." [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 priority<sup>71</sup>." [Emphasis added]*

[88] From such FERC Orders it is clear that, on the one hand, the customer of firm long-term transmission service for one year or longer is entitled to continue to take transmission service upon the expiration of its service agreement. On the other hand, where the existing customer decides to continue to take the service and if there are other competing requests, if the capacity on the system is insufficient to satisfy all requests, the existing customer is entitled to priority over the other requests on condition that it matches the best competing offer.

[89] On May 31, 2002, in *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 refused a rollover request on the grounds of insufficient transmission capacity, further to an impact study<sup>72</sup>.

[90] In that case, SPP, the transmission provider, refused to renew customer Exelon's service agreement due to changes in firm commitments ("*native load growth, changes in external trading patterns, generation dispatch modeling assumptions and loop flow*

<sup>70</sup> Matter No. P-130-001, Exhibit B-22, BEMI's pleadings, Volume 1, Tab 3 I B, pages 1 and 2.

<sup>71</sup> Matter No. P-130-001, Exhibit B-22, BEMI's pleadings, Volume 1, Tab 3 I B, page 7.

<sup>72</sup> Matter No. P-130-001, Exhibit B-22, BEMI's pleadings, Volume 2, Tab 4 A, paragraph 3.

changes"). The changes resulted in overloads on parts of the SPP's system, while awaiting completion of reinforcement work<sup>73</sup>.

[91] Like section 2.2 of the HQ OATT, section 2.2 of SPP's OATT provided that the existing customer of firm long-term service is entitled to continue to take the transmission service upon the expiration, roll over or renewal of its commitment. Even if the reason related to constraints of SPP's system in this case is not of the same nature as the reason cited by the Transmission Provider for refusing BEMI's rollover requests, the decision is pertinent for determining the scope of section 2.2 regarding the right to renew a firm contract term of one year or longer.

[92] SPP argued that section 2.2 did not apply in the absence of a competing request and that a renewal request had to be treated as 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 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*

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<sup>73</sup> Matter No. P-130-001, Exhibit B-22, BEMI's pleadings, Volume 2, Tab 4 A, paragraphs 13 and 25.

*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 controls<sup>74</sup>."*  
[Emphasis added]

[93] Thus, According to the FERC, section 2.2 grants to an existing customer who has a firm long-term reservation for a term of one year or longer a right to renew the transmission service upon expiration of its agreement, regardless of whether there is a competing request. The FERC also added that the transmission provider is obligated to maintain available capacity to allow customers to exercise their rollover rights and that any limitation of that right must be stated in the initial service agreement.

[94] SPP applied to the FERC for a review of that decision. In November 2002, the FERC dismissed SPP's application for review and clearly reiterated the transmission provider's obligation to ensure that it maintains available transmission capability to satisfy

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<sup>74</sup> Matter No. P-130-001, Exhibit B-22, BEMI's pleadings, Volume 2, Tab 4 A, pages 6 to 8.

the requests of customers with rollover rights. Moreover, should a constraint arise after the signing of the initial agreement, the FERC stated that the transmission provider is obligated to upgrade the system to relieve the constraint or to apply the firm service curtailment procedure provided for in SPP's OATT:

*"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 constraints 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 it<sup>75</sup>." [Emphasis added]*

[95] Moreover, in the same decision, the FERC was motivated to specify the only case where a rollover request may be treated as 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 over its service would be where that customer requests a change to a receipt or*

<sup>75</sup> Matter No. P-130-001, Exhibit B-22, BEMI's pleadings, Volume 2, Tab 4 B, pages 5 and 6.

*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 capacity*<sup>76</sup>. [Emphasis added]

[96] The Régie understands from that decision that, according to the FERC, a rollover request may not be treated as a new request, except where the customer wishes to modify the point of receipt or delivery in its existing service agreement.

[97] On February 16, 2007, in Order No. 890, the FERC again stated its position respecting the scope of section 2.2 of the pro forma OATT:

### **"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 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*

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<sup>76</sup> Matter No. P-130-001, Exhibit B-22, BEMI's pleadings, Volume 2, Tab 4 B, page 16.

*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 right<sup>77</sup>." [Emphasis added]*

[98] The FERC revisited the issue of restrictions on rollover rights in its Order No. 890-A of December 28, 2007:

## **"2. Rollover Rights**

[...]

*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*

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<sup>77</sup> Matter No. P-130-001, Exhibit B-22, BEMI's pleadings, Volume 1, Tab 3 I C, pages 712 to 715, 743 and 744.

No. 890, this will remain the only appropriate way to restrict a rollover right<sup>78</sup>."  
[Emphasis added]

[99] The Régie notes that the FERC maintained its position regarding the nature of rollover rights provided for in section 2.2.

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

- **Section 2.2 grants to an existing customer of firm long-term transmission service with a contract with a term of one year or more the right to continue to take the transmission service upon expiration of its service agreement, on condition that it gives notice to that effect within the prescribed time limit. That right exists, irrespective of competing requests;**
- **A Transmission Provider has an obligation to ensure that there is sufficient capacity on its transmission system to satisfy requests from customers with rollover rights;**
- **A rollover request may not be treated as a new request;**
- **The limitations or restrictions on rollover rights must be specified in the initial service agreement.**

[101] For the purposes of the present complaints, given the absence of competing requests at the time of the rollover requests, which is not contested by the Transmission Provider<sup>79</sup>, only the first part of section 2.2 of the HQ OATT is at issue, namely the right of an existing customer of firm transmission service contract for a term of one year or more to continue to take transmission service upon the expiration of the agreement.

[102] In this case, BEMI is an existing customer within the meaning of section 2.2 of the HQ OATT with a rollover right, because the service agreements in question are firm transmission contracts for one year or longer. BEMI has also complied with the condition precedent to exercising the rollover right by sending the Transmission Provider at least sixty days' written notice prior to the expiration of its agreements.

[103] That being said, the Régie must ascertain if any restrictions on the right to renew were stipulated in the initial agreements.

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<sup>78</sup> Matter No. P-130-001, Exhibit B-22, BEMI's pleadings, Volume 1, Tab 3 I D, pages 334, 335 and 359.

<sup>79</sup> Matter No. P-130-001, Exhibit B-1, EBMI-17, page 5, section 2.3.1.

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

[Translation:]

*"For HQT-NE interconnection maintenance purposes, service will be interrupted from April 30 to May 3, 2007. The Transmission Provider has scheduled work on the L1101 and L110 lines, therefore transmission service between MATI-HQT will not be available between October 1 and 12, 2007<sup>80</sup>."*

[105] The Régie is of the view that the purpose of the above clause was not to restrict the rollover rights provided for in section 2.2 of the HQ OATT, but to stipulate the specific periods during which service would not be available during the term of the agreements. Such a clause cannot operate to restrict the rollover rights provided for in section 2.2 of the HQ OATT.

[106] The Régie notes that the Transmission Provider subsequently accepted the requests to renew the service for the MATI-NE Agreements in 2008 and 2009, with the following qualification:

[Translation:]

*"The Transmission Provider hereby advises you that the life of the interconnection represented by the path covered in your request is limited and that an impact study will ultimately be required to identify the cost of system upgrades or work to maintain the service requested. At the time of a subsequent rollover request, you will be required to undertake to defray the cost of such a study and ultimately pay your share of the costs should you exercise your rollover rights, pursuant to Hydro-Québec's Open Access Transmission Tariff then in effect<sup>81</sup>."* [Emphasis added]

[107] According to the Régie, the statements made by the Transmission Provider, regarding the useful life of the equipment has no effect on the rollover rights provided for

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<sup>80</sup> Matter No. P-130-001, Exhibit B-1, EBMI-2, Appendix B.

<sup>81</sup> Matter No. P-130-001, Exhibits B-1, EBMI-9 and EBMI-10, letters from the Carrier of March 4, 2008 and March 4, 2009.

in section 2.2 of the OATT, especially given that they are subsequent to the signing of the initial agreements.

[108] As regards the ON-NE Agreements, they were not the subject of any special clause that could restrict BEMI's rollover rights.

[109] The Régie finds therefore that there was no clause in the initial service agreements that could restrict BEMI's rollover rights. Nevertheless, the Transmission Provider refused the requests to renew on the grounds that the transmission capacity was insufficient when the requests were considered. In reaching that conclusion, the Transmission Provider considered the rollover requests as new requests and applied the "*first-come, first-served*" principle stipulated in section 13.2 of the HQ OATT:

*"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]

[110] The Régie understands that given that the Generator's request for 1,200 MW service was prior to BEMI's rollover requests, the Transmission Provider therefore determined, further to implementation of harmonization, that the firm transmission capacity over the HQT-NE path was not sufficient to grant BEMI's requests. However, section 13.2 provides the following for existing customers:

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

[111] According to the Régie, as regards reservation priority, rollover requests of existing customers clearly are subject to rules distinct from those that apply to new requests. The "*first-come, first-served*" principle therefore does not apply to rollover requests.

[112] According to the Régie, to allow the Transmission Provider to treat a rollover request as a new request would ignore the very existence of the rollover rights provided for in section 2.2 of the HQ OATT.

[113] Lastly, the fact that a rollover request requires a new entry on the OASIS site, the granting of a new number and the signing of a new agreement cannot justify the

Transmission Provider to treat it as a new request for service. In the Régie's view, these are administrative practices that cannot affect the rights of existing customers like BEMI.

**[114] Therefore, the Régie finds that the Transmission Provider could not treat BEMI's requests for renewal as new requests for service.**

[115] BEMI, as an existing long-term firm point-to-point transmission service customer, having given notice of renewal within the prescribed time limit, was therefore entitled to renew the MATI-NE and ON-NE Agreements, pursuant to section 2.2 of the HQ OATT.

**[116] Thus, the Régie finds that the Transmission Provider's decision refusing the requests to renew the MATI-NE and ON-NE Agreements solely on the grounds that the ATC on the HQT-NE path defined after implementation of harmonization was insufficient, contravened section 2.2 of the HQ OATT.**

[117] Furthermore, the Régie finds that renewal of the MATI-NE and ON-NE Agreements for all capacity would result in there being more than 1,500 MW in firm reservations via the HQT-NE path, by taking into account the Generator's contract for 1,200 MW that commenced July 1, 2009.

[118] In the decision pertaining to the application for review of the *Exelon* case cited earlier, the FERC stated that, where a system constraint occurs after the signing of an initial agreement, the transmission provider has two options: build upgrades on the system to relieve the system constraint or curtail the firm service pursuant to section 13.6 of the HQ OATT. It is clear that the first option does not apply because the Transmission Provider's system does not have a problem, given that the capacity of the HQT-NE path is 2,000 MW. It is this maximum transmission capacity of 2,000 MW that has been posted on the OASIS site since the opening of the HQT-NE path.

[119] Regarding the second option, BEMI has suggested that if Transmission Provider is entitled to curtail the available transmission capacity from 2,000 to 1,200 MW, one solution would be to apply section 13.6 of the HQ OATT by curtailing the firm customer service on a pro rata basis to bring the total firm reservation capacities to 1,200 MW.

[120] The Régie therefore considers it opportune to deal with that issue in the following paragraphs.

### Applicability of section 13.6 of the HQ OATT

[121] Section 13.6 of the HQ OATT 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 HQ OATT provides for the situations that could lead to curtailments in firm transmission service. The Transmission Provider may implement curtailments on its system, where necessary, to maintain reliable operation of the system. The section also states that curtailments may apply in the case of an electrical emergency, or to deal with an emergency or any other contingency that could compromise reliability of the transmission system.

[123] In the case before us, the evidence on file has not proved that the Transmission Provider was dealing with an actual constraint on its system that could justify the curtailments of firm service as provided for in section 13.6. In that respect, the Régie accepts the testimony of Mr. Sylvain Clermont, the Transmission Provider's witness, that

there was no degradation of service on the HQT-NE path, notwithstanding that firm reservations on that path total over 1,500 MW<sup>82</sup>.

[124] Moreover, in its pleadings, the Transmission Provider admitted that there was no problem of access to the system<sup>83</sup>, or of congestion<sup>84</sup>.

**[125] The Régie finds that the current situation on the HQT-NE path does not jeopardize reliable operation of the transmission system and, according to the evidence on file, does not justify curtailments of service pursuant to section 13.6 of the HQ OATT.**

## Conclusion

**[126] For the reasons stated above, the Régie finds that the Transmission Provider's decision refusing to renew the MATI-NE and ON-NE Agreements is not in conformity with section 2.2 of the HQ OATT. It was not required that BEMI's renewal requests be treated as new requests by the Transmission Provider. BEMI is therefore entitled to renew the MATI-NE Agreements for the period of April 1, 2010 to March 31, 2011, and the ON-NE Agreements for the period of October 22, 2010 to October 21, 2011. The Régie further finds that curtailment of firm services under section 13.6 of the HQ OATT does not apply in the two matters before it.**

[127] Whether the Transmission Provider's decision to implement harmonization or coordinate the transmission capacity on its system with that of neighbouring system ISO-NE required prior authorization of the Régie remains academic for the purposes of this decision for Commissioners Turgeon and Hardy, given their conclusions regarding the scope of section 2.2 of the HQ OATT and BEMI's rights under the MATI-NE and ON-NE Agreements.

## 8. SUPPLEMENTARY OPINION OF COMMISSIONER LASSONDE

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<sup>82</sup> Matter No. P-130-001, Exhibit A-12-3, SN of September 16, 2010, Volume 3, pages 112, 113 and 118.

<sup>83</sup> Matter No. P-130-001, Exhibit A-12-4, SN of September 17, 2010, Volume 4, pages 143 and 144.

<sup>84</sup> Matter No. P-130-001, Exhibit A-12-4, SN of September 17, 2010, Volume 4, page 152.

[128] I concur with my colleagues that BEMI has a clear right to renew the MATI-NE and ON-NE Agreements (the Agreements) pursuant to section 2.2 of the HQ OATT.

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

[130] On the issue of harmonization of firm transmission capacity via the HQT-NE path taking into account the limitations on the neighbouring system managed by ISO-NE, I would like to point out the following.

[131] BEMI argued<sup>85</sup> that harmonization is not [translation:] "*strictly a matter of system management*" and that the Transmission Provider could not engage in such an operation without [translation:] "*the Régie considering if it is warranted, its relevance, its impact on the rights of existing transmission customers and, as the case may be, setting guidelines for implementation*".

[132] Once the issue of BEMI's right to continue taking the firm transmission upon renewal of the Agreements is settled, what the Transmission Provider must do in the event of circumstances limiting the firm transmission capacity on the HQT-NE path, is, in my view, a matter of system management on both sides of the border.

[133] Even if, in connection with another request<sup>86</sup>, the Transmission Provider wants to add provisions to the HQ OATT concerning the harmonization of its system capacity with that of neighbouring systems, that does not mean that it was required to obtain Régie approval to manage a situation that could affect the firm transmission capacity on the HQT-NE path.

[134] It has been put into evidence that the Transmission Provider contracted with BEMI and the Generator for firm transmission services via the HQT-NE path for approximately 1,500 MW, however constraints on the neighbouring system may curtail that capacity to 1,200 MW.

[135] Even if curtailment of the firm transmission service via the HQT-NE path is hypothetical for the time being because both these firm service customers of the

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<sup>85</sup> Matter No. P-130-001, Exhibit B-1, Application, Allegations Nos.93 to 96.

<sup>86</sup> Matter No. R-3669-2008 Phase 2.

Transmission Provider — BEMI for 306 MW and the Generator for 1,200 MW — are able to transmit such quantities via the path in question. As the Transmission Provider's firm transmission service customers, BEMI and the Generator may, at any time, demand transmission of the total quantities stipulated in their service agreements.

[136] The day such transmission become impossible because ISO-NE will not allow it, as there is no capacity restriction on the Transmission Provider's system via that path (2,000 MW being available), logic dictates that ISO-NE must manage the restriction on the US side of the HQT-NE path by applying the provisions of the pro forma OATT, the provisions of which are similar to those of section 13.6 of the Hydro-Québec OATT.

[137] Whether, in such circumstances, it is the Transmission Provider or ISO-NE that is responsible for managing transmission capacity restrictions on the HQT-NE path, it must be done in a non-discriminatory manner in order to satisfy the demand of firm service customers, including BEMI and the Generator.

[138] In short, aside from the part of the Transmission Provider's notice published on OASIS between July 8, and August 9, 2009, in which the Transmission Provider assimilated firm transmission renewal requests to new requests, it is normal for the Transmission Provider to have informed its customers, by notice on OASIS, that it would be examining the transmission values on its system taking into account the system capacities on the neighbouring system. In my view, that did not contravene the HQ OATT.

[139] Moreover, such a notice on OASIS appears to be logical and necessary in the context where the Transmission Provider's firm commitments respecting its system have exceeded firm transmission limits that ISO-NE could impose in certain circumstances and that it could, as the case may be, have an impact on requests for firm transmission service from new customers.

## **9. THE CLAIM FOR CONFIDENTIALITY**

[140] The Transmission Provider filed annexures 2, 3, 5, 6 and 11 of the internal review file of Complaint P-130-001 and annexures 2, 3, 5, 6 and 9 of the internal review file of

Complaint P-130-003 all on a confidential basis. Those annexures contain the minutes of meetings held between ISO-NE and the Transmission Provider.

[141] The Transmission Provider has allowed BEMI representatives to consult those documents on condition that they sign a confidentiality and non-disclosure agreement.

[142] On September 7, 2010, the Transmission Provider filed a solemn declaration by Mr. Sylvain Clermont in support of its claim for confidentiality of the attachments. Mr. Clermont alleges that those attachments contain information, certain aspects of which are commercial in nature and are the subject of an obligation of confidentiality under the *Interconnection Operating Agreement between ISO New England Inc. and Hydro-Québec TransÉnergie*. Thus, according to Mr. Clermont, public disclosure of such information would run counter to the Transmission Provider's contractual obligations.

[143] The Transmission Provider asks the Régie to apply section 30 of the Act and prohibit any disclosure of the information and data contained in the confidential attachments. BEMI has not objected to that request.

[144] **Therefore,**

**The Régie de l'énergie:**

**ALLOWS** BEMI's complaints P-130-001 and P-130-003;

**ORDERS** the Transmission Provider to roll over, for the period of April 1, 2010 to March 31, 2011, the MATI-NE Agreements in accordance with the terms and conditions of the Hydro-Québec OATT in effect on the date hereof, and **ORDERS** the Transmission Provider to allow BEMI to continue to take long-the term firm point-to-point transmission services via the Transmission Provider's system, and specifically via the MATI-HQT-NE path, in accordance with the terms and conditions of the Hydro-Québec OATT pursuant to decisions D-2009-015 and D-2009-023, for a reserved capacity of 111/106 MW;

**ORDERS** the Transmission Provider to roll over, for the period of October 22, 2010 to October 21, 2011, the ON-NE Agreements in accordance with the terms and conditions of the Hydro-Québec OATT in effect on the date hereof, and **ORDERS** the Transmission Provider to allow BEMI to continue to take the long-term firm point-to-point transmission services via the Transmission Provider's system, and specifically via the ON-HQT-NE path, in accordance with the terms and conditions of the Hydro-Québec OATT pursuant to decisions D-2010-032 and D-2010-041, for a reserved capacity totaling 210/200 MW;

**ALLOWS** the Transmission Provider's claim of confidentiality;

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

- Exhibit HQT-22, annexures 2, 3, 5, 6 and 11 of Matter No. P-130-001,
- Exhibit HQT-18, annexures 2, 3, 5, 6 and 9 of Matter No. P-130-003.

Marc Turgeon  
Commissioner

Michel Hardy  
Commissioner

Richard Lassonde  
Commissioner

BEMI was represented by Mtre Paule Hamelin and Mtre Pierre Legault;  
Hydro-Québec was represented by Mtre Yves Frechette.