

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE PUBLIC UTILITIES ACT

- and -

IN THE MATTER OF AN APPLICATION by **NOVA SCOTIA POWER INCORPORATED** for confidential treatment of material filed in its application for approval of a 2013 Capital Expenditure for the **South Canoe Wind Project (CI # 42127)**

BEFORE: Roberta J. Clarke, Q.C., Member, Panel Chair
Kulvinder S. Dhillon, P.Eng., Member
Murray E. Doehler, CA, P.Eng, Member

APPLICANT: **NOVA SCOTIA POWER INCORPORATED**
Nicole Godbout, LL.B.
David Landrigan, LL.B.

INTERVENORS: **CONSUMER ADVOCATE**
John Merrick, Q.C.
William J. Mahody, LL.B.

SMALL BUSINESS ADVOCATE
E. A. Nelson Blackburn, Q.C.

CAPE BRETON EXPLORATIONS LTD.
Rodney V. Northey, LL.B.
Thomas Brett, LL.B.

DECISION DATE: **January 14, 2014**

DECISION: Expanded reasons for the Board's ruling on confidentiality are given, as directed by the Court of Appeal.

I INTRODUCTION AND BACKGROUND

[1] Nova Scotia Power Incorporated (“NSPI”) filed an application (“Application”) with the Nova Scotia Utility and Review Board (“Board”) on December 7, 2012, seeking approval of a 2013 capital expenditure for the South Canoe Wind Project in the amount of approximately \$93,000,000. The Application had nineteen appendices, and NSPI requested that certain information included in the Application be maintained by the Board as confidential. The Board made a decision on January 14, 2013 with respect to this request, which will be discussed in greater detail below.

[2] A hearing on the merits of the Application took place on February 20 and 21, 2013, and the Board rendered its Decision on April 26, 2013 (2013 NSUARB 92). Cape Breton Explorations Limited (“CBEx”), a formal intervenor in the proceeding, filed an appeal of the Board’s decision with the Nova Scotia Court of Appeal.

[3] The Board understands that, as a part of that appeal process, the issue of the confidential treatment of NSPI’s documentation was raised. The Board has received the decision of the Court of Appeal, issued on November 26, 2013, which states, in part:

[47] I would remit the matter of the confidential treatment of the NSPI documents submitted to the Board with NSPI’s application for Board approval to the Board so that this Court can receive the benefit of its analysis in reaching its decision.

[2013 NSCA 134]

[4] From the direction of the Court of Appeal, the Board understands it is now to more fully explain, on the record, the reasons for its decision on the request for confidentiality based on the information before it at that time.

[5] This Supplemental Decision sets out the Board’s reasons as requested.

[6] The Board considers it useful to outline the context of NSPI's Application. Pursuant to s. 35 of the *Public Utilities Act*, R.S.N.S. 1989, c. 380, as amended, a public utility is required to obtain Board approval for any capital expenditure over \$250,000. The requests for such approval are generally known as capital work orders. By far, of all the utilities over which the Board has jurisdiction, NSPI files the largest number of these work orders. These NSPI requests may come to the Board as part of an annual capital expenditure plan, or may be filed on a quarterly basis, and as well, "outside" the quarter. The Board's processes for consideration of such requests for approval have been established over many years.

[7] It is not unusual for NSPI, or other public utilities regulated by the Board, to seek confidential treatment for certain information in these capital work orders. In general, the type of information maintained as confidential is the same as that for which similar treatment was requested in this Application.

[8] Not every capital work order is the subject of an oral hearing, although some cases warrant such a process, either due to the magnitude of the cost, or the nature of the project. Others are dealt with in a "paper" hearing, and some "standard" matters are reviewed by the Board without a hearing. However, each matter is accessible through the Board's website, and unless the Board approves confidential treatment, the materials filed are publicly available.

[9] The Board determined that the South Canoe Wind Project merited a formal hearing process, with the opportunity for participation by parties who wished to intervene in the proceeding. Accordingly, a Hearing Order was issued with an established timeline. NSPI had advised the Board in its Application that it was seeking Board approval by March 31, 2013, in order to meet certain deadlines for contractual

obligations. This meant that time was of the essence in order to allow for any Information Requests (“IRs”) to be issued and responded to, and for Intervenors to prepare and file evidence. Consequently, the Board needed to address the request for confidential treatment in a timely fashion.

[10] **The Board Regulatory Rules** provide the manner in which requests for confidential treatment are to be addressed in Rule 12:

12 (1) Subject to Rule 12(2), all documents filed in respect of an application shall be placed on the public record.

- (2) A party may request that all or any part of the document be held in confidence by the Board, which request shall be placed on the public record.
- (3) The burden of satisfying the Board that a document should be held in confidence is on the party claiming confidentiality.
- (4) Any request for confidentiality shall
 - (a) include a summary of the nature of the information in the document;
 - (b) state
 - (i) the reasons for the request, including the details of the nature and extent of the specific harm that would result if the document were publicly disclosed, and
 - (ii) any objection to placing an abridged version of the document on the public record, and the reasons for such an objection; and
 - (c) be filed with the Board and served on the parties.
- (5) Where a party has made a request under Rule 12(2), the document shall be held in confidence unless the Board orders otherwise.
- (6) A party may object to a request for confidentiality by filing an objection and serving the objection on the parties.
- (7) An objection shall state the reasons
 - (a) why the party requires disclosure of the document; and
 - (b) why disclosure would be in the public interest.
- (8) The party claiming confidentiality will have an opportunity to reply to any objection.
- (9) The Board may decide the issue with or without a hearing. Where the Board holds a hearing, the Board may direct that the hearing be held in the absence of the public.

- (10) In ruling on a request for confidentiality the Board shall consider
- (a) whether the document may disclose matters involving public security;
 - (b) whether the document may disclose sensitive financial, commercial or personal matters in relation to which the desirability of avoiding disclosure in the interest of any person affected outweighs the desirability of adhering to the principle that documents be available to the public; or
 - (c) such other matters as the Board deems appropriate.
- (11) The Board may
- (a) order that the document be held in confidence by the Board;
 - (b) order that the document be placed on the public record;
 - (c) order that an abridged version of the document be placed on the public record;
 - (d) order that the document be made available to a party to the proceeding, who has a good faith interest in accessing the confidential information and who would not otherwise be in conflict of interest, on such terms as the Board considers appropriate, including the signing of a confidentiality undertaking in a form approved by the Board;
 - (e) order that the document be withdrawn; and
 - (f) make any other order the Board may deem to be in the public interest.
- (12) Where the Board rejects a claim for confidentiality, the party claiming confidentiality may, within seven (7) days of receiving the Board's decision, or such other time as the Board may allow, notify the Board in writing that
- (a) if the party is an applicant, the application is withdrawn; or
 - (b) if the party is an intervenor, the intervention is withdrawn.
- (13) Where a party provides written notice to the Board pursuant to Rule 12(12), if the document is on file with the Board, the Board shall immediately return the documents for which confidentiality was claimed.

[11] The Board has considered that Rule 12 is in essence a codification of the criteria set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, in that it takes into account both the principle of open courts, and the prevention of “serious risk to an important interest” and balances the interests of the parties with the public interest.

II NSPI'S APPLICATION

[12] As noted above, NSPI filed its Application for approval of the capital expenditures for the South Canoe Wind Project on December 7, 2012. The cover letter accompanying the Application stated, in part:

Information presented in this application is non-confidential with the exception of certain information presented in the application and the supporting documentation in the appendices. NS Power's support for its request that this information be maintained by the Board as confidential is provided below.

The details, in accordance with Rule 12(4) are as follows:

Commercial information - Full and Partial Redaction

Costs per megawatt hour, various project cost details, IPP proposals, RFP and RFI for wind turbine procurement, procurement recommendation and other items associated with the cost of the project are considered confidential to protect value for customers and mitigate the risk of prospective proponents having access to pricing quotes and other commercially sensitive information.

The more a supplier is aware of NS Power's specific requirements and competitors' bids, the better their ability to obtain the highest price, reduce competition and ultimately increase the cost for NS Power and its customers. The cost of such transparency is not always immediately evident. Information from regulatory proceedings can provide competitive advantages over other suppliers, and that could be advantageous in bidding or negotiation. Higher prices, or avoidable contractual constraints, will result in unnecessary higher costs to customers.

NS Power strives to keep the terms and conditions of suppliers' pricing and arrangements confidential from their other customers or potential competitors. This prevents competitors from using their information to gain a competitive advantage. This is equally true for NS Power, which desires to protect its ability to acquire capital services and equipment on the most competitive terms. Those "best" terms may not be available if there is a risk that they will be disclosed to the customers or competitors of the supplier.

Since NS Power customer rates are cost-based the maintenance of confidentiality for this item is to the direct benefit of customers. [Emphasis added]

[NSPI Letter, December 7, 2012]

[13] NSPI asked the Board to approve the confidential or partially confidential treatment of the documentation as well as a Confidentiality Undertaking which would provide Intervenors with access to confidential information on certain conditions. Such an undertaking is consistent with the provisions of Rule 12(11)(d).

[14] The following chart prepared by the Board summarizes the documents filed and the nature of NSPI's request:

Document Name	Appendix No.	No. of Pages	Confidential Treatment
Application	-	26	Partially confidential
UARB Approval Sheet	A	5	Partially confidential
Renewable Energy Regulations	B	25	Non-confidential
Renewable Energy Administrator's Request for Proposals for 300 GWh	C	49	Non-confidential
Nova Scotia Power – 100 MW Wind Turbine Generators Request for Information and Expression of Interest	D	7	Non-confidential per December 20 filing in response to Board's letter of December 14
Nova Scotia Wind Turbine Generator Request for Proposals	E	43	Partially confidential per December 20 filing in response to Board's letter of December 14
Nova Scotia Power Procurement Recommendation RFP Wind Turbine Generator	F	20	Confidential in its entirety
Map – South Canoe turbine layout	G	1	Non-confidential
Power Purchase Agreement between NSPI and Oxford Frozen Foods Limited	H	90	Confidential in its entirety
Power Purchase Agreement between NSPI and Minas Basin Pulp and Power Limited	I	90	Confidential in its entirety
South Canoe Financial Model	J	13	Confidential in its entirety
Oxford Frozen Foods Limited Response to REA RFP	K	214	Confidential in its entirety
Minas Basin Pulp and Power Limited Response to REA RFP	L	57	Confidential in its entirety
Ground Lease between Timberland Holdings (2010) Limited and NSPI	M	64	Confidential in its entirety
Asset Sharing Agreement between NSPI, Oxford Frozen Foods Limited and Minas Basin Pulp and Power Limited	N	31	Confidential in its entirety
Project Construction and Operating Agreement among NSPI, Oxford Frozen Foods Limited and Minas Basin Pulp and Power Limited	O	79	Confidential in its entirety
Term Sheet June 2012 between NSPI Minas Basin Pulp and Paper Limited and	P	18	Confidential in its entirety

Document Name	Appendix No.	No. of Pages	Confidential Treatment
Oxford Frozen Foods Limited			
Letter Agreement Draft (Oxford, Minas, NSPI, Acciona)	Q	7	Confidential in its entirety
Lease Addendum and Option for Grant of Easement – Timberland Holdings (2010) Limited, Oxford Frozen Foods Limited, Minas Basin Pulp and Power Limited and NSPI	R	41	Non-confidential
South Canoe Wind Project Organization Chart	S	1	Non-confidential

[15] In response, the Board wrote to NSPI on December 14, 2012, approving the Confidentiality Undertaking, and stating, in part:

The Board has considered the request for confidential treatment of certain information filed in support of the application. Reserving the right to consider this request further, the Board now asks NSPI to provide justification for confidential treatment of Appendices D and E. The Board understands that these documents were initially issued publicly.

[16] The Board requested a response from NSPI by December 20, 2012.

[17] In the interim, the Board received an email from the President of CBEx, dated December 17, 2012, stating the company wished to have formal intervenor status in the proceeding. The request included the following statement:

Our company's interest is primarily because we were a bidder in the recent RFP that awarded NSPI and its partners the PPA related to the matter above and therefore have an interest in the integrity of the process. [Emphasis added]

[18] By letter dated December 18, 2012, the Board sought comments from NSPI on the request made by CBEx, and received a letter from Eric Ferguson, Director, Regulatory Affairs, dated December 19, 2012, which stated that it did not object to the granting of intervenor status and further stating:

The Company does advise the Board that because this party is an Independent Power Producer (IPP) and as such a bidder in the REA process and potential supplier to the Company, NS Power will be unable to accept a Confidential Undertaking from this party should the IPP wish to submit one. [Emphasis added]

[19] The Board then approved the request for formal intervenor status for CBEx by letter dated December 20, 2012, which enclosed a copy of the NSPI December 19, 2012 letter to the Board.

[20] The Board received requests for intervenor status from the Small Business Advocate and the Consumer Advocate on December 19, 2012 and January 1, 2013 respectively, and standing was granted to them.

[21] On December 20, 2012, NSPI refiled its Application, together with a covering letter, in response to the Board's letter of December 14, 2012. The Board considers it useful to set out the covering letter in its entirety:

On December 7, 2012, NS Power submitted to the UARB CI 42127 – South Canoe Wind Project. On December 14, 2012, the UARB issued a letter to NS Power requesting justification of the confidential designation of Appendices D and E. Appendices D and E are NS Power's Request for Information (RFI) and Request for Proposals (RFP) respectively. The RFI and RFP pertain to NS Power's procurement of wind turbine generators. These were not issued publically.

Prospective wind turbine generator manufacturers were provided the RFI and RFP on a confidential basis. Per Section 6 of the RFI and Section 13 of the RFP, these documents were provided to proponents on the express understanding that they would keep the information in strict confidence. NS Power had in place two-way confidentiality and Non-Disclosure Agreements with every vendor.

The RFP contains the following commercially sensitive information:

- Proprietary wind data collected by a third party consultant.
- Various locations of potential future wind farm development.

Release of this information could harm NS Power in potential future negotiations regarding the development of those sites. NS Power maintains that this information should remain confidential. In an effort to maintain confidentiality on only those commercially sensitive portions, NS Power has produced a partially confidential and redacted version of Appendix E.

(Please note that some site information pertaining to "Site 6" and "Site 7", which would otherwise be designated confidential, is non-confidential whereas these correspond to the Sable and South Canoe wind projects respectively; this information is now public.)

With respect to the RFI, it is no longer necessary to maintain confidentiality. NS Power has re-designated Appendix D as non-confidential. NS Power has produced a revised partially confidential and redacted version of the South Canoe application reflecting these changes. [Emphasis added]

[22] For the reasons which follow, the Board issued a letter dated January 14, 2013, which was sent to NSPI and all interested parties, including the President of CBEx, which gave the Board's decision on the request for confidential treatment of the materials filed in the Application. The letter stated, in part:

...The Board accepts the explanations provided for the confidential treatment of certain information in this Application.

Therefore, in response to NSPI's request in its letter of December 20, 2012, the Board approves the confidential treatment of information in this Application as requested at this time. Should an intervenor object to such treatment, however, the Board reserves the right to re-consider this issue pursuant to Board Rule 12. [Emphasis added]

[23] The confidentiality undertaking process is designed to permit all parties who are not in a conflict, and who have an interest in the proceeding, full access to documentation, assuming they are prepared to abide by the terms of the Confidentiality Undertaking. The Board sees this as a mechanism to ensure full disclosure to interested parties while at the same time protecting ratepayers.

[24] The Board understands that all Intervenors, including Counsel for CBEx, but not CBEx itself, executed the Confidentiality Undertaking as approved by the Board, giving them access to the information which had been redacted. In addition to the Application documents, the Board considers that by the provisions of Paragraph 2 of the Confidentiality Undertaking, "Designated Confidential Information", as described therein, extends to Responses to IRs and other evidence, including any Reply Evidence filed with the Board by NSPI. The Board also considers this applies to testimony in confidential or *in camera* sessions of the hearing, and to post-hearing submissions.

III BOARD ANALYSIS AND FINDINGS

[25] In its findings on the request for confidential treatment, the Board has considered that the public interest is equivalent to the NSPI ratepayers' interests.

[26] As no request for confidentiality was made for Appendices B, C, D, G, R and S, the Board did not need to turn its attention to them.

[27] With respect to the Application, the only redacted sections were certain items in the cost summary and purchase prices per MWh for the independent power producers (“IPPs”) with whom NSPI has partnered for the South Canoe Wind Project. Partial confidentiality was also claimed for cost items in Appendix A.

[28] In the Board’s opinion the details of such costs are commercial information, which, if publicly revealed, could harm ratepayers. It is important that NSPI obtain the best prices for materials and contracts so that projects can be undertaken at the lowest cost. Thus, the rate base is maintained at an amount which is no higher than necessary in order to provide safe and reliable electricity to ratepayers. Should suppliers have access to this information through a Board proceeding, the Board agrees with NSPI that “competitive advantages” may be gained, which would ultimately result in higher costs to ratepayers.

[29] In its revised filing, NSPI claimed partially confidential treatment of Appendix E for two areas: proprietary wind data collected by a third party consultant; and locations of potential future wind farm development. The Board noted that Appendix E contained specific clauses in Section 13 by which NSPI and responders to the RFP had mutual confidentiality covenants.

[30] The Board agreed that third party proprietary information should not be publicly disclosed. If this information were to be made public by the Board, NSPI’s representations to third parties that it would remain confidential would be undermined. This in turn could make it more difficult for NSPI to obtain the best terms for ratepayers because third parties would be reluctant to contract with NSPI in such circumstances.

The Board considered that any public interest in having this information un-redacted was outweighed by the importance of ensuring the proprietary rights of the owner of the information, taking the potential impact to NSPI ratepayers into account.

[31] With respect to the location of potential wind farms, the Board noted the redacted information includes the relative location of possible sites and their size. The Board was aware that NSPI has obligations under the *Renewable Electricity Regulations* to supply certain quantities of electricity generated from renewable sources by certain milestone dates. The Board was also aware that NSPI seeks opportunities to develop or participate in wind farms to satisfy these requirements. In that regard, it is in competition with other IPPs for suitable sites. Should these locations become publicly known, NSPI would likely be at a competitive disadvantage, both in terms of land lease costs, and site acquisition. This could result in NSPI having to pay higher costs for wind farm development, or pay higher costs to IPPs. Consequently, the Board found this information should be maintained as confidential.

[32] Appendix F is the procurement recommendation made by NSPI staff as a result of responses to the RFP (Appendix E). NSPI's position was that this information should be confidential because it contains commercially sensitive information. The Board found this includes documentation of NSPI's due diligence in reviewing and evaluating the various responses to the RFP. The Board considered that if this information was not filed in confidence, it might prove damaging to commercial relationships which could result in higher costs for ratepayers. This might also result in NSPI's decision makers being less stringent or candid in their evaluations. Therefore, the Board accepted the claim for confidentiality.

[33] Appendices H and I are Power Purchase Agreements (“PPAs”) between NSPI and Oxford Frozen Foods and Minas Basin Pulp and Power Limited, respectively. These PPAs are based on the standard form of PPA for response to the REA’s RFP, which was approved (with certain directed changes) by the Board in a Decision dated May 3, 2012 (2012 NSUARB 49). The standard form PPA itself (without specific commercial terms to be negotiated) was thus in the public domain already, and was also, undoubtedly, familiar to all bidders under the REA’s RFP.

[34] Each PPA contains Section 8 addressing “Confidentiality”. The Board recognized that stating that a document is confidential does not make it so. However, the document contains defined “Commercial Terms” which will vary with each IPP, including the Energy Bid, Energy Rate, and Marginal Cost Rate, for example, and the Project Description. These are commercial terms negotiated by the parties. NSPI claims that this is sensitive commercial information and should be maintained as confidential. The Board agreed that it is important that the commercial interests of both parties to the PPA ought to be protected because it will, ultimately, assure that the ratepayers receive the benefit of the best terms. They can negotiate without fear of disclosure, by means of a Board proceeding, of information which could impair their competitive bargaining positions.

[35] The Board was aware that one of the Intervenors (CBEx) was also a bidder in the REA’s RFP. The Application before the Board was not an appeal of the REA’s decision. This was, in the Board’s view, an example of a situation where the disclosure of commercially sensitive information about NSPI and other bidders could be damaging to ratepayers in future transactions.

[36] The Board found that the PPAs should be afforded confidential treatment as a result. The PPAs are an integral part of a set of complex contractual arrangements for the South Canoe Project. Accordingly, the Board found that the confidential treatment for the PPAs applies equally to Appendices N, O, and P, all of which are negotiated contracts between NSPI, Oxford and Minas. The same is true of the negotiated land lease at Appendix M, and as discussed above regarding potential wind farm development sites, it is critical for ratepayers that NSPI be able to obtain the best commercial terms so non-disclosure is essential.

[37] Financial modeling information proposed by NSPI such as contained in Appendix J has traditionally been recognized by the Board as commercially sensitive. The modeling uses the cost information presented in the Application and Appendix A, which the Board had found to be confidential. The Board found it would be inappropriate for this information to be made publicly available.

[38] The Board noted that Appendices K and L are the Responses from the IPPs to the REA's RFP. They were not documents prepared by NSPI. Appendix K is clearly marked as commercially confidential. The commercial interests which warrant protection here are those of the IPPs. Consequently, it is important that they be protected from disclosure to other potential IPPs or bidders. Maintaining them as confidential also provides a benefit to NSPI, and in turn to ratepayers.

[39] The Board also noted that the REA's RFP (Appendix C) allowed bidders to have their proposals treated as confidential (Section 2.5).

[40] The Board was satisfied that these documents should be maintained as confidential in the proceeding.

[41] Finally, with respect to Appendix Q, which contains negotiated terms of a commercial contract or draft agreement between the turbine supplier and the proponents of the South Canoe Wind Project, NSPI claimed the information about the cost is commercially sensitive. NSPI needs to acquire capital materials "...on the most competitive terms." Counterparties will be unlikely to want to have this information publicly available in order to maintain their competitive positions and prevent other suppliers from learning the terms and conditions of their business. Disclosure of such information in this instance could potentially harm NSPI, and its ratepayers, in future negotiations. The Board was satisfied this information should remain confidential.

[42] The Board was aware that any party who signed the approved Confidential Undertaking, if not in a conflict of interest, would have full access to the confidential documents, and be able to participate in confidential sessions of the hearing.

[43] The Board, in issuing its letter of January 14, 2013, reserved the right to reconsider the issue if an Intervenor objected to its decision. The Board observes, as noted in its Decision of April 26, 2013, no party objected before or during the hearing.

IV CONCLUSION

[44] Pursuant to Board Regulatory Rule 12, NSPI requested confidential or partially confidential treatment of certain documentation filed in this Application. After considering the reasons provided by NSPI in its letters of December 7, 2012 and December 20, 2012, the Board approved the request (as amended).

[45] The Board considered, pursuant to Rule 12(10)(b), that disclosure of the documents would result in sensitive financial and commercial information becoming

publicly available where the interests of NSPI, its ratepayers, and the contracting parties would be affected to an extent which outweighed the principle of making those documents available to the public.

[46] The Responses to IRs and subsequent filings contain redactions of information which the Board had approved for confidential treatment, or information which, in the Board's view, was derived from or reflected such information. Thus, by virtue of the terms of the Confidentiality Undertaking approved by the Board, these are also considered confidential for the same reasons.

[47] These are the extended reasons provided as a result of the direction of the Court of Appeal noted above.

DATED at Halifax, Nova Scotia, this 14th day of January, 2014.

Roberta J. Clarke

Kulvinder S. Dhillon

Murray E. Doehler