



Nova Scotia Utility and Review Board

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February 23, 2010

To Interested Parties

Confidentiality Issue - P-128.09

In the Nuttby Mountain Decision, 2009 NSUARB 179, at paragraph 72 through 74, the Board discussed submissions on confidentiality made by one of the intervenors Scotia Investments Limited. That portion of the Decision reads as follows:

[72] While IRs were being issued and replies received, one of the Intervenors, Robert Patzelt, of Scotia Investments Limited, made application under Regulatory Rule 12 challenging the refusal by NSPI to allow him access to certain information, even with a signed confidentiality undertaking. (Scotia letter dated October 23, 2009)

[73] The application raised broader issues about NSPI's position and practices in relation to confidentiality and access to information it claims to be confidential. Submissions were received from Scotia, Avon et al., and from counsel for NSPI.

[74] The Board does not find it necessary to address this issue for the purposes of these specific requests for work order approvals. However, the public interest demands a transparent regulatory process. There are legitimate factors which require a balance of that interest with commercial interests which have an impact, less directly perhaps, on ratepayers. The Board recognizes that these broader issues require consideration. The Board will address this in a separate decision after further consultation.

The issues raised by Scotia Investments Limited were:

1. Non-confidential information in the public domain;
2. Access of parties to confidential information; and
3. Method of access to confidential information.

The Board has determined that it should now proceed to deal with the confidentiality issues raised by Mr. Patzelt on behalf of Scotia Investments.

The process will be as follows:

1. All submissions to date will be considered as part of the record and need not be refiled or reargued;

2. Parties may file additional submissions by March 25, 2010;
3. Reply submissions must be filed by April 8, 2010.

Following that, the Board will make a decision on the issues raised by Mr. Patzelt.

On the issue of confidentiality generally, the Board will be taking steps to more rigorously enforce Rule 12 as it relates to confidential filings by NSPI and intervenors. In that regard, attached to this letter is a copy of a letter dated January 8, 2010 to NSPI from the Executive Director of the Board. Parties are advised that these Rules apply equally to intervenors and will be enforced in future.

Because of the confidentiality undertaking process, which has provided most parties access to confidential documents, both the Board and the parties have not been attentive to policing Rule 12. However, the Board process is a public one and only those documents that are judged to be confidential should have that status.

Finally, parties should be aware that the Board is concerned that the level of confidential filings in certain proceedings currently before it impairs the ability of the Board to produce a transparent decision which publicly and fully discloses the material considered by the Board such that the public, and any reviewing court, would be able to determine how the Board makes its decision. The Board will continue to monitor this problem.

Yours very truly,



Nancy McNeil
Regulatory Affairs Officer/Clerk

Enclosure (1)



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January 8, 2010

Via Courier

Mr. Rene Gallant
General Manager, Regulatory Affairs
Nova Scotia Power Inc.
10th Floor, Barrington Tower
1894 Barrington Street
P.O. Box 910, Scotia Square
Halifax, NS B3J 2W5

Dear Mr. Gallant:

Confidential Filings

We are writing in relation to a matter of growing concern to the Board. Specifically, there appears to be an excessive amount of information being filed in confidence and without proper substantiation pursuant to Regulatory Rule 12. We are concerned that some information is being marked as confidential as a matter of routine rather than intent. This tends to undermine the public's understanding of and confidence in the regulatory process. It also complicates administration and security of files here at the Board.

To illustrate the problem, during the last year a number of capital expenditure requests were received which were marked as confidential. Enclosed with this letter is an example of a request received on November 3, 2009 describing six (6) capital expenditure requests designated as confidential. While the evidence in support of the application may be confidential, the Board does not consider the applications themselves to be confidential. It is also the Board's opinion that the information contained in the November 3rd letter itself is not confidential. That includes the "CI" number, the general description of the proposed expenditure, the dollar values disclosed, and the letter itself.

This issue of confidential capital expenditure requests was raised verbally by Board staff with NSPI staff in late August 2009. It was our understanding from those conversations that capital expenditure requests themselves would not be considered as confidential although there may be confidential evidence filed in support of the requests. Confidential evidence would be retained in confidence provided that the requirements of Board Regulatory Rule 12 were, generally speaking, met. A copy of that Rule is enclosed for your reference. It was also our understanding that, where

confidential information has been filed, a redacted version of the evidence would be provided for public access.

The Board will consider holding evidence filed in support of applications as confidential provided the proper request is made in compliance with Rule 12(4). That section states:

- (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.

Please note that non-specific claims of harm are not considered to be sufficient. For information to be considered confidential there must be a reasonable expectation of significant harm. A general statement of a non-specific possibility of harm is not usually sufficient.

To date Rule 12 has not been strictly applied. That appears to have led to the significant increase in the number of confidential filings over time. To correct this:

1. Any future filings claiming confidentiality on the application itself must be appropriately substantiated. Applications received and marked as confidential but not accompanied by the appropriate request under Rule 12 will be acknowledged but will not be considered as an active file until the appropriate justification has been received and ruled on by a Member.
2. Similarly, non-confidential applications received and accompanied by confidential evidence must:
 - a. have a redacted version of the evidence filed or an explanation why it is not possible or appropriate to provide a redaction, and
 - b. be accompanied by the appropriate justification under Rule 12 for each item of confidential evidence.

In this situation the application will be considered filed and duly acknowledged, however, consideration of the matter will be delayed until the appropriate justification has been received under Rule 12 and ruled on by a Member. The delay and cause will be recorded in the file.

Where possible, the specific information to be held in confidence must be identified. It is neither useful or acceptable to mark an entire document as confidential when only parts need to be protected. If substantially all of a document is made up of confidential information then it is reasonable for NSPI to request that the entire document be treated as confidential.

Thank you for your attention to this matter. If there are any questions or concerns we would be pleased to discuss them.

Yours very truly,

Paul G. Allen, C.A.
Executive Director

PGA/cf
Enclosures

cc. Mr. Robert P. Boutilier, P.Eng
Director, Regulatory Affairs
Nova Scotia Power Inc.

Clerks of the Board