



**NEW BRUNSWICK**  
ENERGY & UTILITIES BOARD

COMMISSION DE L'ÉNERGIE ET DES SERVICES PUBLICS  
**NOUVEAU-BRUNSWICK**

## **RULING ON OBJECTION**

**IN THE MATTER OF** an application by New Brunswick Power Corporation pursuant to subsection 103(1) of the *Electricity Act*, S.N.B. 2013, c. 7 for approval of the schedules of the rates for the fiscal year commencing April 1, 2023.

(Matter No. 541)

June 7, 2023

**Matter 541 – NB Power 2023-2024 General Rate Application**

**IN THE MATTER OF** an application by New Brunswick Power Corporation pursuant to subsection 103(1) of the *Electricity Act*, S.N.B. 2013, c. 7 for approval of the schedules of the rates for the fiscal year commencing April 1, 2023 (Matter No. 541)

**APPLICATION:** October 5, 2022

**NOTICE OF OBJECTION:** November 15, 2022

**NEW BRUNSWICK ENERGY AND UTILITIES BOARD (Board):**

Chairperson François Beaulieu

Members Heather Black

Stephanie Wilson

Counsel Abigail Herrington

Chief Clerk Kathleen Mitchell

**APPLICANT:**

New Brunswick Power Corporation (NB Power) John Furey

**INTERVENERS:**

David Amos per se

Canadian Federation of Independent Business Louis-Philippe Gauthier

Gerard Daly per se

Liberty Utilities (Gas New Brunswick) LP Brandy Gellner

J.D. Irving, Limited Nancy Rubin, K.C.

Twin Rivers Paper Company Inc. Len Hoyt, K.C.

Utilities Municipal Scott Stoll

**ACTING PUBLIC INTERVENER:** Richard Williams, K.C.

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## **1 Introduction and Summary Conclusions**

- [1] This ruling arises from a Notice of Objection filed by Board staff on November 15, 2022, under Rule 6.4.3 of the Board’s Rules of Procedure (Rules of Procedure), in which Board staff objects to NB Power’s Claim for Confidentiality over twenty documents filed in this matter.
- [2] The Claim for Confidentiality requests that the Board hold the documents in confidence under Section 34 of the *Energy and Utilities Board Act* (Act) because confidentiality agreements between NB Power and third parties require NB Power to seek confidential treatment of the documents, and the documents contain commercially sensitive information.
- [3] Pursuant to the Claim for Confidentiality, NB Power provided the documents to the Board, relevant Board staff, the Public Intervener, and all interveners who have signed a Confidentiality Undertaking.
- [4] Board staff withdrew their objection to some documents after NB Power removed certain redactions and filed additional evidence. The remaining documents, identified in the Notice of Objection as #1, #2, and #6 to #18, are power purchase agreements to which NB Power is a party (PPAs), amendments to PPAs, or documents related to PPAs (collectively, the challenged documents).
- [5] The issues to be decided are whether the challenged documents are confidential in nature and, if so, whether publication of the challenged documents is necessary in the public interest under section 34 of the Act.
- [6] The Board conducted a written public interest hearing to consider the Claim for Confidentiality and the Notice of Objection. The Board received submissions from Board staff, NB Power, and J.D. Irving, Limited.
- [7] For the following reasons, the Board will grant NB Power’s Claim for Confidentiality with respect to all challenged documents, except Document #2.

## **2 Overview**

- [8] The Board must enable the full and complete disclosure of all relevant information to ensure that its decisions are well-informed. To facilitate open, transparent, and accessible proceedings, the Board generally places materials it receives in the course of the exercise of its authority on the public record so that all interested parties can have equal access to

those materials. However, some relevant information is confidential in nature and may require protection from disclosure or publication.

- [9] Section 34 of the Act governs the circumstances under which the Board protects the confidentiality of information it obtains. Section 34 states that information concerning costs or other information that is by its nature confidential shall not be published unless, in the opinion of the Board, such publication is necessary in the public interest.
- [10] Where the Board determines in accordance with section 34 that information in a document is confidential, the Rules of Procedure provide the Board with several tools to ensure that any confidentiality order is as limited as necessary in the public interest. For example, the Board may protect the document from being published or revealed to any party, order a copy of the document to be provided to certain parties' designated recipients who have signed a Confidentiality Undertaking, or order that the document be placed on the public record in redacted form.

### **3 Evaluation of Claims for Confidentiality**

- [11] One of the leading decisions on confidentiality orders in Canadian jurisprudence is *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41 (*Sierra Club*). The Supreme Court of Canada noted in that decision that granting a confidentiality order will negatively affect the Charter right to freedom of expression, as well as the principle of open and accessible court proceedings, and cautioned that the discretion to grant the order must be exercised in accordance with Charter principles. The Court stated that confidentiality orders should be granted only when necessary to prevent a serious risk to an important interest and where the salutary effects of a confidentiality order, meaning its beneficial effects, outweigh its deleterious effects, meaning harmful effects. The Court in *Sierra Club* characterized the effects of a confidentiality order on the public interest in open and accessible court proceedings and other effects on the right to free expression as harmful effects.
- [12] In the energy regulation context, the Nova Scotia Court of Appeal in *Cape Breton Explorations Ltd v. Nova Scotia (Attorney General)*, 2013 NSCA 134, applied the *Sierra Club* test to review the Nova Scotia Utility and Review Board's treatment of certain documents as confidential.
- [13] The Board will consider the test established by the Supreme Court of Canada in *Sierra Club* to determine whether a confidentiality order should be granted pursuant to section 34 of the Act.

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- [14] The first branch of the *Sierra Club* test will assist the Board in determining whether the information in the challenged documents is confidential in nature. The first branch of the test requires the party seeking a confidentiality order to establish that an order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonably alternative measures will not prevent the risk.
- [15] The Board will consider the second branch of the *Sierra Club* test to determine whether publication of the information is necessary in the public interest. The second branch of the test weighs the public interest benefit of a confidentiality order against its public interest harm.
- [16] Accordingly, the Board will consider the following questions to evaluate the challenged documents under s. 34:
1. Is the information confidential in nature?
    - a. Would publication pose a serious risk to an important interest of NB Power that can be expressed in terms of a public interest in confidentiality?
    - b. If yes, will reasonable alternative measures prevent the risk?
  2. Is publication necessary in the public interest?
    - a. Do the harmful effects of a confidentiality order outweigh its beneficial effects?

### 4 Fourteen challenged documents are confidential in nature

- [17] For the reasons below, the Board concludes that:
- [18] Documents #1 and #6 to #18 (collectively, the fourteen documents) are confidential in nature. They are subject to contractual confidentiality obligations and have been treated as confidential by NB Power. At this time, publishing the commercial information in those documents would pose a serious risk to NB Power’s ability to negotiate favourable terms in future commercial agreements and would harm ratepayers. The Board finds that no reasonable alternative to a confidentiality order would prevent this risk or allow for a limited confidentiality order.
- [19] Publication of the confidential information in these documents is not necessary in the public interest. The harm to the public interest arising from publishing the confidential information outweighs the public interest benefit.

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[20] Document #2 is not confidential in nature. While Document #2 is subject to a contractual confidentiality obligation, similar information has not been treated as confidential by NB Power. This past treatment supports the conclusion that the publication of Document #2 does not pose a serious risk to an important interest of NB Power.

[21] Since Document #2 is not confidential in nature, there is no need to consider whether the publication of that document is necessary in the public interest.

### 4.1 Publication would pose a serious risk to an important interest.

[22] To establish a serious risk to an important interest, the risk must be well grounded in the evidence and pose a serious threat to the interest in question. The “important interest” sought to be protected must be expressed as a public interest in confidentiality.

[23] Mr. Furey submitted that NB Power’s Claim for Confidentiality should be upheld because the challenged documents are subject to confidentiality provisions and contain confidential commercial terms such as pricing, volumes, contract term, and timing of supply. He cautioned that disclosing the challenged documents on the public record would ignore the public interest in preserving contractual confidentiality agreements and could harm the public interest by increasing ratepayers’ costs.

[24] Ms. Herrington argued that more than the mere existence of a confidentiality clause in an agreement should be required to protect information that is not inherently confidential or commercially sensitive. She submitted that NB Power has not filed any evidence to support its claim that information in the challenged documents, other than pricing, is commercially sensitive.

[25] Mr. Furey challenged these assertions. He submitted that Ms. Herrington fails to account for the recognized public interest in preserving confidentiality agreements and said that NB Power filed abundant evidence supporting the Claim for Confidentiality. He relied on the challenged documents themselves, including their confidentiality provisions requiring NB Power not to disclose any terms of the agreements or related confidential information. He also relied on other evidence on the record that, in his view, establishes that NB Power participates in competitive energy markets. Mr. Furey contended that no further evidence is necessary to demonstrate the potential public interest harm arising from disclosing the challenged documents on the public record.

[26] The Court in *Sierra Club* determined in paragraph 61 of the decision that the objective of preserving a contractual obligation of confidentiality constitutes a sufficiently important commercial interest to pass the first branch of the test if the information has been

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consistently treated and regarded as confidential and, on a balance of probabilities, the commercial interests of the contracting parties could reasonably be harmed by disclosure.

[27] The Board considers each of these elements below.

### **4.1.1 All challenged documents are subject to confidentiality obligations**

[28] The Board finds that all information in the challenged documents is subject to contractual confidentiality obligations. Documents #9 and #14 contain confidentiality provisions that apply to all information in those documents, while the other challenged documents are subject to confidentiality obligations contained in PPAs previously filed with the Board.

### **4.1.2 Fourteen challenged documents have been treated as confidential**

[29] The fourteen documents were filed confidentially in this proceeding and NB Power has sought to maintain that protection by defending this Objection. Where related documents were filed in previous Board proceedings, they were also filed confidentially. The Board, therefore, finds that those documents have been consistently treated and regarded as confidential.

[30] Document #2 is a 2021 amendment to the cover sheet of a 2016 Master Power Purchase and Sale Agreement between Nalcor Energy Marketing Corporation and New Brunswick Energy Marketing Corporation. The original master agreement contains a confidentiality provision which, when read in combination with the standard underlying contract language, prohibits the parties from disclosing the completed cover sheet except in limited circumstances. This prohibition extends to the 2021 amendment.

[31] Document #2 was filed confidentially in this proceeding and NB Power has sought to maintain that protection by defending this Objection. However, the entire cover sheet of the 2016 Master Agreement was placed on the public record in Matter 430. While some of the information in the 2021 amendment differs from the information in the original agreement, the differences are minimal, and the nature of the information is the same. Therefore, the Board finds that the information in Document #2 has not been consistently treated as confidential.

[32] While the confidentiality obligations in the 2016 Master Power Purchase Agreement also apply to Document #13, no similar information has been previously published on the public record in proceedings of the Board.

[33] The Board, therefore, finds that all the challenged documents, except Document #2, have been treated as confidential.



#### **4.1.3 NB Power’s interests could be harmed by publishing the fourteen documents**

- [34] Mr. Furey submitted that disclosure of the commercial terms of the challenged documents could be advantageous to competitors, suppliers, or extra-provincial customers of NB Power in future negotiations, negatively impacting NB Power’s ability to secure future commercial agreements on the best possible terms. Disclosure could also damage NB Power’s commercial relationships with its counterparties and other sources of supply in the competitive electricity market.
- [35] The evidence in this proceeding supports Mr. Furey’s contention regarding the fourteen documents. NB Power has filed extensive evidence supporting its fuel and purchased power costs, out-of-province sales, and gross margin. This evidence discloses that NB Power purchases energy from competitive sources and, through its subsidiary, sells surplus energy in competitive markets in Canada and the United States. In this context, the risk Mr. Furey described is well grounded in the evidence.
- [36] The Board finds that disclosing the fourteen documents could reasonably harm the commercial interests of NB Power and its counterparties by negatively impacting NB Power’s ability to secure future commercial agreements on the best possible terms and damaging NB Power’s commercial relationships with its counterparties and other sources of supply in the competitive electricity market.
- [37] Further, the Board recognizes that protecting the confidentiality of commercial information in PPAs and related sensitive financial or operational information developed by or exchanged between NB Power and its counterparties is in the public interest because ratepayers benefit from favourable contractual terms secured by NB Power.

#### **4.1.4 Publication of the fourteen documents would pose a serious risk**

- [38] The Board is, therefore, satisfied that disclosing the fourteen documents on the public record would pose a serious risk to an important commercial interest of NB Power and, by extension, NB Power’s ratepayers.
- [39] Concerning Document #2, the Board finds that the commercial interests of the contracting parties could not reasonably be harmed by disclosure of its terms on the public record because similar information has previously been placed on the public record.

## **4.2 Redaction of pricing information is not a reasonable alternative**

- [40] NB Power has established that the publication of the fourteen documents would pose a serious risk to the interests of the utility. The Board must consider whether any reasonable alternatives to a confidentiality order would prevent this risk or allow the Board to limit the order.
- [41] Ms. Herrington submitted that redacting pricing information would be a reasonable alternative to a confidentiality order and, therefore, the challenged documents should be disclosed on the public record with only pricing information redacted, pursuant to Rule 6.4.7(b) of the Rules of Procedure.
- [42] The Board concludes that more than redacting pricing information would be required to prevent the risk to NB Power because all commercial information in the PPAs is confidential in nature, not only the pricing information.
- [43] Mr. Furey submitted that redacting all commercial terms of the challenged documents would disclose little or no meaningful information on the public record and would not improve the ability of members of the public to understand the proceedings before the Board.
- [44] The Board concludes that redacting all commercially sensitive information is not a reasonable alternative measure in the circumstances. While redaction would allow for a limited confidentiality order, the Board concludes that redacting all commercially sensitive information would disclose no meaningful information on the public record to improve the ability of members of the public to understand NB Power’s operations or the Board’s proceedings.

## **5 Publication is not necessary in the public interest**

- [45] NB Power has established that the information in the fourteen documents is confidential in nature. In these circumstances, section 34 of the Act requires the Board to determine whether publication of the information is necessary in the public interest.
- [46] Ms. Herrington submitted that NB Power fails the second branch of the *Sierra Club* test because the infringement on the public’s right to freedom of expression outweighs any beneficial effects of a confidentiality order. In her view, a confidentiality order would have minimal beneficial effects because, unlike in the circumstances in *Sierra Club*, disclosure of the challenged documents will not prevent NB Power from relying on them in support of its general rate application.

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- [47] Mr. Furey disagreed with Ms. Herrington’s assessment of the effects of a confidentiality order. He submitted that a confidentiality order would have significant beneficial effects by assuring that ratepayers benefit from the most advantageous commercial terms in NB Power’s PPAs.
- [48] Ms. Rubin submitted that disclosing the challenged documents to the Board and interveners who have signed a Confidentiality Undertaking ensures a fair balance between maintaining confidentiality and promoting a fair process to adjudicate the application. In her view, the various interveners who access the challenged documents protect the public interest.
- [49] The Board finds that the beneficial effects of protecting the confidentiality of the fourteen documents are the consequences described in Section 4.1 of this Ruling. Those effects are significant because they directly impact the interest of NB Power’s ratepayers. Compelling NB Power to disclose the fourteen documents on the public record would cause the beneficial effects described in Section 4.1 to vanish.
- [50] The Court in *Sierra Club* held that the intrusion into the open court principle in that case was “fairly minimal” with no significant harmful effects, partly because the only restrictions related to public distribution. Similarly, NB Power has disclosed the challenged documents to the Board, Board staff, and all interveners who have signed Confidentiality Undertakings in Matter 541, including the Public Intervener. In past proceedings, the Board has highlighted the roles of the Public Intervener and Board staff in ensuring that the public interest is served where confidential information is not disclosed on the public record. The Board, therefore, concludes that any intrusion on freedom of expression arising from a confidentiality order over the fourteen documents is fairly minimal with no significant harmful effects.
- [51] Weighing these effects, the Board concludes that disclosure of confidential information would affect the interests of the utility, its ratepayers, and the contracting parties to an extent that outweighs the benefit of making those documents available to the public. The beneficial effects of a confidentiality order outweigh its harmful effects.

## 6 Conclusion

- [52] The fourteen documents are confidential in nature, and publication of that information is not necessary in the public interest.
- [53] The Board orders that the fourteen documents remain on file with the Board and protected from being published or revealed to the public or any party to the proceeding,

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except for those parties whose designated recipients have signed a Confidentiality Undertaking in this matter.

[54] The Board orders that Document #2 be revealed to the public by placing it on the public record. In accordance with Rule 6.4.12 of the Rules of Procedure, this order shall be implemented ten business days after the date of service of this Decision on NB Power.

[55] The Board considers that hearing efficiency may improve if the procedure by which parties and Board staff make and object to claims for confidential treatment of documents is refined. The Board, therefore, directs staff to initiate a review of Rule 6.4 of the Rules of Procedure.

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Dated at Saint John, New Brunswick, this 7<sup>th</sup> day of June, 2023.

A handwritten signature in cursive script, appearing to read "Stephanie Wilson".

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Stephanie Wilson  
Vice-Chairperson

A handwritten signature in cursive script, appearing to read "Heather Black".

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Heather Black  
Member