NOVA SCOTIA COURT OF APPEAL
Citation: ***Cape Breton Explorations Ltd. v. Nova Scotia (Attorney General)***, 2015 NSCA 35

Date: 20150410
Docket: CA 416544
Registry: Halifax

Between:

Cape Breton Explorations Ltd.

Appellant

v.

The Attorney General of Nova Scotia, Nova Scotia Power Incorporated, and The Nova Scotia Utility and Review Board

Respondents

Judges:	Saunders, Farrar and Bryson, JJ.A.
Appeal Heard:	December 10, 2014, in Halifax, Nova Scotia
Held:	Appeal allowed, in part, per reasons for judgment of Farrar, J.A.; Saunders and Bryson, JJ.A. concurring.
Counsel:	Richard Stephenson and Michael Fenrick, for the appellant Daniel M. Campbell, Q.C. and Jack Townsend, for the respondent, Nova Scotia Power Incorporated Richard Melanson, for the respondent, Nova Scotia Utility and Review Board, for the appellant Edward Gores, Q.C., for the respondent Attorney General of Nova Scotia

INDEX

Reasons for judgment:

Overview

[1] The Nova Scotia Utility and Review Board (UARB) approved Nova Scotia Power Inc.'s (NSPI) application to include in its rate base its $93M investment in a project known as the South Canoe Wind Project.

[2] Cape Breton Explorations (CBEx), an unsuccessful bidder on the South Canoe Wind Project, and an intervenor before the UARB, appeals the UARB decision. It argues that the UARB erred in allowing the investment to be included in NSPI's rate base. It also argues the UARB erred in treating documents filed by NSPI in support of its application as confidential.

[3] For the reasons that follow, I would allow the appeal, in part, set aside the UARB decision and exclude the NSPI investment in the South Canoe Wind Project from the rate base. I would not interfere with the UARB's confidentiality decision.

Background and Procedural History

[4] In April 2010, in a document entitled "Renewable Energy Plan", the Nova Scotia Department of Energy set out a detailed program to move Nova Scotia away from carbon-based electricity towards "greener, more local resources".

[5] The Plan committed to have 25% renewable electricity by 2015 and set a goal of 40% renewable energy by 2020.

[6] The Plan provides:

> Large and medium-sized renewable energy projects will be split evenly between Nova Scotia Power (NSPI) and Independent Power Producers (IPPs). The Utility and Review Board will evaluate and approve NSPI-sponsored projects in the traditional way. Independent producers will compete for projects in a bidding process managed by a new authority, the Renewable Electricity Administrator (Renewable Energy Plan, p. 2). [Emphasis added]

[7] In May 2010, the Nova Scotia Legislature amended the **Electricity Act**, S.N.S. 2004, c. 25, as amended, to provide for the procurement of renewable, low-impact electricity. I will consider the amendments to the **Electricity Act** in more detail when addressing the grounds of appeal.

[8] In October 2010, the **Renewable Energy Regulations**, N.S. Reg. 165/2010, as am. (the **Regulation**) were passed to regulate the procurement of renewable energy and to set mandatory minimum requirements for renewable electricity procurement from independent power producers (IPPs).

[9] On February 2, 2012, the Renewable Energy Administrator issued a "Request for Proposals" (RFP) for 300 gigawatt hours of renewable energy from IPP's which stated:

> This RFP outlines the terms and conditions under which the IPP's are to develop proposals in response to this process and the evaluation framework which the Renewable Energy Administrator will use to select proponents that will be awarded Power Purchase Agreements (PPA's).
>
> The Terms of Reference for the Renewable Energy Administrator stated that the Renewable Energy Administrator will be responsible for administering a competitive bid process for a minimum of 300 GWh of renewable energy from IPP's to reach the 2015 target and to require that the RFP process be conducted in a fair and transparent manner. [Emphasis added]

[10] It was contemplated the winning bidders would execute a Power Purchase Agreement with NSPI.

[11] On June 27, 2012, Oxford Frozen Foods* ("Oxford"), Minas Basin Pulp and Paper* ("Minas") and NSPI entered into an agreement (the "Term Sheet"). The effective date of the Term Sheet was set out as June 26, 2012. The Term Sheet provides the agreement pursuant to which Oxford and Minas were to submit bids to the Renewable Energy Administrator:

> The purpose of the Term Sheet is to summarize the principal terms and conditions upon which OFF will submit a proposal (the "OFF Project Proposal") to the Renewable Energy Administrator for a 78 MW energy project at South Canoe, Nova Scotia… and MBPP will submit a proposal to the Renewable Energy Administrator for a 24 MW energy project at South Canoe, Nova Scotia… The proposal to be submitted in furtherance of the OFF Project and the MBPP Project (collectively, the "Projects") are being submitted in response to, and in compliance with, the Request for Proposals for 300 GWh of Renewable Energy from Independent Power Producers as issued by the Renewable Energy Administrator and dated June 6, 2012 (the "RFP"). The Parties acknowledge that

* Oxford and Minas are referred to as OFF and MBPP before the UARB and in the contract documents. I have used their names to avoid the use of too many acronyms.

> in order to comply with the RFP each Project must be submitted by a qualified IPP.

[12] The Term Sheet acknowledges the **Electricity Act** and RFP requirement that the renewable electricity be supplied by IPPs. It puts forward Oxford and Minas as bidders. To this end, the Term Sheet further provides that the legal structure of the agreements between the parties with respect to the Projects will be such so as to allow the entirety of the energy output of the Projects to qualify as IPP produced energy:

> In the event the Proposals are selected by the Renewable Energy Administrator, MBPP, OFF and NSPI shall negotiate a structure or arrangement mutually acceptable to the Parties that will allow them to carry out the Projects and ensure the full energy output will qualify as RES compliant [under] the Renewable Energy Standards ("RES") Regulations. …

[13] The Term Sheet also required (1) that both Oxford and Minas were to be responsible for the preparation of their respective bids; (2) NSPI personnel would not be involved in setting the energy price in the respective bids; (3) if the Proposals were accepted, Oxford and Minas will execute the Power Purchase Agreements within the time prescribed by the RFP (i.e., 10 days); and (4) Oxford and Minas would be solely responsible for the obligations under each of their respective RFPs.

[14] Also on June 27, 2012, Oxford submitted a bid for a 78-megawatt wind farm ("South Canoe 1"). In its bid application, Oxford listed itself as the sole proponent of the project – consistent with the Term Sheet. It listed a "projects team" that included Oxford, NSPI and Minas. Minas submitted a separate application for a 24-megawatt wind farm on adjoining lands ("South Canoe 2"). Minas also listed itself as the sole proponent of the bid. The Minas bid described a project team that included Minas, NSPI and Oxford.

[15] CBEx also submitted a bid in response to the Request for Proposals but was unsuccessful. It does not challenge the Request for Proposals process or its outcomes.

[16] Oxford and Minas succeeded in their bids, as determined by the Renewable Energy Administrator.

[17] Oxford and Minas executed Power Purchase Agreements on July 18, 2012. Under its Power Purchase Agreement, Oxford is listed as the "Seller" of 78 MW

(241,000 MWh/year) of renewable wind generated electricity. This represents the entire output of South Canoe 1. Under the terms of the Oxford Power Purchase Agreement, NSPI is to buy the electricity sold by Oxford.

[18] Minas, under a separate Power Purchase Agreement, is listed as the "Seller" of 24 MW (70,000 MWh/year) of renewable wind generated electricity. This represents the entire output of South Canoe 2. As with the Oxford Power Purchase Agreement, NSPI is to buy the electricity sold by Minas.

[19] The South Canoe Wind Projects were structured such that NSPI has a 49% interest in each. The two projects totalled 34 wind turbines. In return for an investment of $93M, NSPI would directly own half of the turbines on each project.

[20] On December 10, 2012, NSPI filed an Application for Review and Approval (pursuant to s. 35 of the **Public Utilities Act**) to the UARB seeking approval to include its investment in the South Canoe Wind Project in its rate base.

[21] The matter came on for hearing on February 20, 2013. The participants before the UARB were NSPI, the Consumer Advocate, the Small Business Advocate, and CBEx. Bruce Outhouse Q.C. appeared as the UARB counsel.

[22] The UARB, in a decision dated April 26, 2013 (reported as 2013 NSUARB 92), and by Order dated April 30, 2013, approved the expenditure.

[23] In its initial application, NSPI claimed confidential treatment for certain parts of its application. The UARB agreed, with the exception of two documents. NSPI subsequently refiled its application on December 20, 2012, withdrawing its request for confidentiality with respect to one of the documents and the other being partially redacted.

[24] The UARB in a letter dated January 14, 2013, said:

> Therefore, in response to NSPI's request in its letter of December 20th, 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 reconsider this issue pursuant to Board Rule 12.

[25] None of the participants filed an objection in response to the confidentiality request prior to the hearing nor was any objection voiced during the hearing. It was not until its closing arguments that CBEx objected to the confidentiality of certain documents.

[26] The UARB concluded that it would not entertain a request to adjudicate the claim for confidentiality after the hearing was concluded.

[27] By an Amended Notice of Appeal dated June 25, 2013, CBEx appealed the UARB decision.

[28] One of the grounds of appeal alleged that the UARB erred in treating as confidential the large volume of documents submitted by NSPI.

[29] This led to a number of appearances before this Court to address procedural issues relating to the confidentiality of the Appeal Book to be filed.

[30] The issue first arose on June 19th, 2013, at a telechambers motion to set hearing dates. The matter was adjourned to July 17, 2013 for further submissions on the contents of the Appeal Book. On July 18, 2013, the Chambers judge ordered that the issue of confidentiality of the Appeal Book would be heard before a panel of the Court on September 20, 2013. The Court also ordered that two separate Appeal Books were to be filed by July 31, 2013; one with the confidential information redacted and, the other being, an unredacted version to remain confidential.

[31] On August 23, 2013, NSPI formally filed its motion seeking an order for confidentiality of the Appeal Book returnable on September 20th, 2013. On September 9, 2013, Oxford and Minas filed a motion to allow it to present evidence and participate in the September 20, 2013, confidentiality motion.

[32] The Court provisionally accepted the evidence and arguments of Oxford and Minas.

[33] At the conclusion of argument on September 20, the Court reserved its decision.

[34] The panel also requested the parties to make supplementary written submissions on the possibility that the confidentiality issue may be remitted to the UARB. NSPI and CBEx filed supplementary submissions on September 25, 2013. In the meantime, on October 3, 2013, NSPI filed a motion to sever the grounds of appeal dealing with confidentiality from the other three grounds of appeal. That motion was heard on October 10, 2013. By decision dated October 15, 2013 (reported at 2013 NSCA 116), the Chambers judge denied the motion to sever and to abridge the Appeal Book.

[35] On November 26, 2013, this Court released its decision on confidentiality (reported at 2013 NSCA 134). It was determined that the matter of the confidential treatment of the NSPI documents should be remitted to the UARB so that this Court could receive the benefit of its analysis in reaching its confidentiality decision.

[36] In a supplemental decision dated January 14, 2014 (reported as 2014 NSUARB 5), the UARB provided additional reasons for considering the documents confidential.

[37] This led to another motion by NSPI for a confidentiality order with respect to the Appeal Book. That motion was heard on May 20th, 2014, by the same panel hearing the present appeal, and by decision dated June 3, 2014 (reported at 2014 NSCA 53), NSPI's motion was granted and a confidentiality order was issued. The decision provided that the ground of appeal relating to confidentiality would be addressed on the appeal proper.

Issues

[38] In its Notice of Appeal, CBEx raises four grounds. They are as follows:

> 1. The Board erred in law in finding that s. 35 of the *Public Utilities Act* gave the Board jurisdiction to require the ratepaying public to pay for, and guarantee the profits of, Nova Scotia Power Incorporated's ("NSPI") minority financial investment in a renewable electricity project to be controlled and operated by third party independent power producers (the "South Canoe Wind Project");
>
> 2. The Board erred in law in finding no conflict between the inclusion of the costs in the rate base of NSPI's investment in the South Canoe Wind Project and the process established by the *Electricity Act* for procurement of renewable electricity by the Renewable Electricity Administrator and payment for the procured electricity.
>
> 3. The Board erred in law in finding that NSPI was legally permitted to directly own some of the assets of the South Canoe Wind Project;
>
> 4. The Board erred in law in agreeing to treat as confidential from the public a large volume of documents submitted by NSPI to support its application requesting that the ratepaying public pay for its investment and profits in the South Canoe Wind Project; and
>
> 5. Such further and other grounds as may be permitted.

[39] During oral argument, CBEx made one submission on the first two grounds of appeal, and made very brief submissions on the third ground. In my view, the

first three grounds of appeal are really one ground and can be summarized as follows:

1. The UARB erred in determining that NSPI could include in its rate base its investment in the South Canoe Wind Project.

The fourth ground of appeal will remain and will be addressed as the second ground of appeal.

Standard of Review

[40] Although the parties disagree somewhat on the application of the standard of review to the circumstances of this case, they agree that the standard of reasonableness applies to both grounds of appeal. I agree.

[41] The reasonableness standard requires us to read the UARB's reasons, together with the outcome, to determine whether the result falls within the range of possible outcomes (**Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)**, 2011 SCC 62).

Issue 1 The UARB erred in determining that NSPI could include in its rate base its investment in the South Canoe Wind Project.

[42] NSPI made its application for UARB approval pursuant to s. 35 of the **Public Utilities Act** which provides:

> 35 No public utility shall proceed with any new construction, improvements or betterments in or extensions or additions to its property used or useful in finishing, rendering or supplying any service which requires the expenditure of more than two hundred and fifty thousand dollars without first securing the approval thereof by the Board.

[43] This provision only applies if NSPI wishes to include a capital item in its rate base, upon which it is entitled to earn depreciation and a rate of return (UARB decision, p. 16).

[44] Although CBEx, in its factum, suggests this is a jurisdictional issue, its oral arguments focused on the interpretation of the legislative scheme. In my view, whether the capital expenditure can properly be included in NSPI's rate base is a matter of statutory interpretation, not a question of jurisdiction.

[45] In **Canadian National Railway Co. v. Canada (Attorney General)**, 2014 SCC 40 the Court held:

> 61 To the extent that questions of true jurisdiction or *vires* have any currency, the Governor in Council's determination of whether a party to a confidential contract can bring a complaint under s. 120.1 does not fall within that category. This is not an issue in which the Governor in Council was required to explicitly determine whether its own statutory grant of power gave it the authority to decide the matter (see *Dunsmuir*, at para. 59). Rather, it is simply a question of statutory interpretation involving the issue of whether the s. 120.1 complaint mechanism is available to certain parties. This could not be a true question of jurisdiction or *vires* of the Governor in Council -- the decision maker under review in this case.

[46] Similarly, the UARB, here, was simply considering a matter of statutory interpretation. That is whether the capital expenditure, under the legislative scheme, could be included in the rate base. There can be little doubt that they have the jurisdiction to make that determination. The question is whether its interpretation of the legislation falls within the range of reasonable outcomes.

[47] For reasons that I will develop, it is my view that the UARB made two errors, the first relates to the interpretation of s. 4B(13) of the **Electricity Act** and the second concerns the interpretation of service in s. 2(f) and s. 35 of the **Public Utilities Act**. I will address each of these in turn.

1. Section 4B(13) of the Electricity Act

[48] It is well-settled that the words of the statute or regulation are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the legislative scheme, its purposes, objects, and, importantly, the intention of the Legislature (see: **Bell ExpressVu Ltd. Partnership v. Rex**, [2002] 2 S.C.R. 559 at ¶26 citing Driedger's, *Construction of Statutes* (2d), 1983).

[49] The **Electricity Act** came into force on February 1, 2007. It was amended in May 2010 [2010, c. 14]. As the then Minister of Energy described, there were three key elements in the 2010 amendments:

> These amendments establish the legal foundation for the province's new renewable electricity plan. These will help Nova Scotians gain access to a clean, secure and locally-produced energy at more stable prices over the long run.
>
> These amendments provide for three key elements of the renewable energy plan and I'd like to highlight those three now, if I could, Mr. Speaker. Firstly, the appointment of a renewable electricity administrator who will have the

> responsibility of awarding contracts for large- and medium-scale energy purchases by independent power producers. This renewable electricity administrator is an important position and will ensure fairness in competition among producers who wish to sell renewable electricity to Nova Scotia Power.
>
> Secondly, the establishment of feed-in tariffs or fixed prices for community-based renewable energy projects, and I emphasize community-based renewable projects, developed and operated by co-ops, First Nations, municipalities or community development groups. […].
>
> Third, and finally, an enhanced net-metering component that will credit consumers for renewable energy that they produce.
>
> (Nova Scotia, House of Assembly, Official Report of Debates (Hansard), 61th Assembly, 2d Sess. No. 10-29 (May 6, 2010) at 2100-2101 (Hon. William Estabrooks)

[50] Section 4B of the amended **Electricity Act** is entitled "Procurement of Renewable Low-Impact Electricity." As the Minister described, s. 4B provides for the appointment of the Renewable Electricity Administrator and the process by which the Renewable Energy Administrator would award contracts to IPPs to ensure fairness in competition among producers who wish to sell renewable electricity to NSPI.

[51] For the purpose of this appeal, the critical provision is s. 4B(13). It states:

> (13) The Board shall allow a public utility to recover from its ratebase the costs of the public utility's contracts referred to in subsection (12) on the basis approved by the Board under the Public Utilities Act.

[52] In its reasons, the UARB concludes:

> [79] The provisions of s. 4B(13) of the ***Electricity Act*** state that the public utility is to recover "...from its rate base..." its costs "...on the basis approved by the Board under the [***Public Utilities Act***]". The Board does not consider that NSPI could participate, as permitted, in an IPP, and at the same time, be unregulated by the Board. Allowing NSPI to do so would mean that it could earn unregulated profits on investments in IPPs. Those profits would be paid by NSPI customers and, potentially, could exceed NSPI's allowed rate of return. In the Board's view, this would substantially erode a fundamental principle of public utility regulation. As already stated, the Board does not interpret the **Electricity Act** as requiring such a result. [Emphasis added]

[53] In fact, s. 4B(13) allows a public utility to recover from its rate base "the costs of the public utility's contracts referred to in subsection (12) on the basis approved by the Board under the **Public Utilities Act**". The UARB omitted the words "of the public utilities contracts referred to in subsection (12)". The omission of these words completely alters the meaning of the subsection.

[54] Section 4B(12) is critical to the interpretation of s. 4B(13). Section 4B(12) states:

> (12) Where a renewable electricity administrator has selected one or more independent power producers for the supply of renewable low-impact electricity to a public utility, the public utility shall enter into the agreements necessary to evidence the procurement. [Emphasis added]

[55] Section 4B(12) is clear that a public utility must enter into the agreements necessary to evidence the procurement. What does "necessary to evidence the procurement" mean? To fully appreciate this phrase, it is helpful to examine the following provisions of s. 4B of the **Electricity Act**:

> 4B (1) Where
>
> (a) a public utility intends to procure renewable low-impact electricity, from one or more independent power producers with generation facilities located in the Province, under a long-term power-purchase agreement; or
>
> (b) the Governor in Council directs a procurement of renewable low-impact electricity from one or more independent power producers with generation facilities located in the Province under a long-term power-purchase agreement,
>
> the Governor in Council may appoint a person to act as a renewable electricity administrator to conduct the procurement.
>
> * * *
>
> (7) Where the Governor in Council appoints a renewable electricity administrator for a procurement under subsection (1), the administrator, instead of the public utility, shall issue a request for proposals and award the contract or contracts for the procurement.
>
> * * *
>
> (9) A public utility shall procure all renewable low-impact electricity under a request for proposals that contains the requirements set out in the regulations.

> (10) A renewable electricity administrator shall evaluate and choose successful independent power producers and provide a written decision to the public utility and to each bidder in the manner and within the time prescribed by the regulations.

[56] These subsections shed considerable light on the procurement process. The Governor in Council may appoint a renewable electricity administrator; the government appointed Power Advisory LLC to serve as the Renewable Energy Administrator in July 2011. Pursuant to s. 4B(7), the Renewable Energy Administrator issued a RFP in February 2012. The RFP process is established pursuant to s. 35B of the **Regulations**. The Renewable Energy Administrator then awarded the contract for procurement to three IPPs, including Oxford and Minas in accordance with s. 4B(7) and (10) of the **Electricity Act** as well as ss. 35C and 35D of the **Regulations**. Under s. 4B(9) of the **Electricity Act**, NSPI, defined as a public utility under s. 2(1)(ab) of the **Electricity Act**, is obliged to procure all renewable low-impact electricity from the IPPs.

[57] Section 37 of the **Regulations** specifies that the Renewable Energy Administrator must prepare a standard form power purchase agreement "to be used for procuring renewable low-impact electricity". The Power Purchase Agreement represents the agreement between the purchaser of power, NSPI and the sellers of power, the IPPs. The UARB must first approve the Power Purchase Agreement which it did on May 3, 2012 (see 2012 NSURB 49). In addition, the Renewable Energy Administrator is under a duty, pursuant to s. 35A of the **Regulations**, to ensure that the "power purchase agreement executed by the bidder with the public utility is consistent with the request for proposals." The public utility shall enter into the agreements necessary to evidence the procurement in accordance with s. 4B(12) of the **Electricity Act** which means that the public utility, NSPI, and the IPPs determine the price that NSPI will pay for the electricity supplied by the IPP to the utility.

[58] In summary, the procurement process deals only with the selection of the IPP and NSPI's requirement to enter into a Power Purchase Agreement to procure the electricity from the IPP at a fixed price. A plain language interpretation of s. 4B(13) leads only to the conclusion; namely, that "the costs of the public utility's contracts referred to in subsection (12)" refers only to the public utility's ability to include in its rate base the cost of all renewable low-impact electricity procured from the IPPs. Put another way, the reference to subsection (12) in s. 4B(13) means that the public utility can only recover from its rate base its costs for procuring the electricity from the IPPs under the PPA. There is absolutely no

suggestion that s. 4B(13) enables NSPI to recover any costs in its rate base other than the costs of procuring renewable energy, and it certainly does not permit NSPI to recover its capital costs for any investment it makes in an IPP. With respect, the UARB's interpretation that the public utility may recover "…from its rate base…" its costs "…on the basis approved by the Board under the [**Public Utilities Act**]" is unreasonable.

2. Section 2(f) and Section 35 of the Public Utilities Act

[59] NSPI argues that the Board did not err in its interpretation of s. 4B(13) of the **Electricity Act**. In the alternative or perhaps in addition, NSPI submits that it is a public utility providing a service and so it must apply to the UARB under s. 35 of the **Public Utilities Act** to approve the capital expenditures of its investment in the IPPs. NSPI contemplates that approved capital expenditures will be added to NSPI's rate base and recovered through its regulated revenue requirement in accordance with ss. 42 and 45 of the **Public Utilities Act**. With respect, I disagree with this submission. To address it, it is necessary to outline a number of defined terms in the **Electricity Act** and the **Regulations**.

[60] NSPI must meet the Renewable Energy Standard in the **Regulations**. Sections 6(1) and (2) of the **Regulations** state:

> **6** **(1)** Each year beginning with the calendar year 2015 until 2020, each load-serving entity must supply its customers with renewable electricity in an amount equal to or greater than 25% of the total amount of electricity supplied to its customers as measured at the customers' meters for that year.
>
> **(2)** To meet the renewable electricity standard in subsection (1), NSPI must
>
> (a) continue to supply at least 5% of its total annual sales from independent power producers; and
>
> (b) acquire at least 300 GWh from independent power producers in addition to the renewable low-impact electricity required to meet the requirements of Sections 4 and 5.

[61] NSPI partnered with both Oxford and Minas on the South Canoe Project to try to meet the requirement in s. 6(2)(b).

[62] IPP is defined in s. 3(1) of the **Regulations**, which states:

> (1) In the Act and these regulations,

. .

"independent power producer" means a renewable low-impact electricity generator

(i) of which no more than 49% of the securities entitling the holders to vote for the election of its directors are held by a public utility in combination with any affiliate of the public utility, and

(ii) that sells electricity

(A) in the Province to public utilities for retail sales to the utilities' customers, or

(B) for export outside of the Province.

[63] As the appellant pointed out before the UARB, there are three elements to this definition. First, a supplier of renewable energy must be "a renewable low-impact electricity generator" defined in s. 2 of the **Regulations** as "a person" – i.e. an individual or corporation – "who owns or operates a renewable low-impact electricity generation facility in the Province." Second, a public utility is only permitted to own 49% of the voting shares of the corporation. Third, the generator must "sell" its electricity to public utilities for "retail sales to the utilities' customers," or sell electricity for export, which is not relevant in this case.

[64] Under s. 4B(10) of the **Electricity Act**, the Renewable Energy Administrator "shall evaluate and choose successful independent power producers" and the Renewable Energy Administrator selected two IPPs in July 2012, one led by Oxford and the other led by Minas[*]. NSPI has a 49% investment in both of these IPPs. Furthermore, the Minister of Energy, under s. 13 and 14 of the **Regulations**, sent letters to Oxford and Minas approving South Canoe in November 2013 as a renewable energy generation facility "owned and operated by an independent power producer". I will discuss the Minister's role and the aforementioned letters in greater detail below.

[65] With this background, I return to the UARB's error.

[66] In my view, the UARB erred in its interpretation of service in s. 2(f) of the **Public Utilities Act**. As a result, s. 35 of the **Public Utilities Act** should not have been triggered in this case. There are three separate components to this error:

[*] The REA actually selected three IPP's in total, but the third IPP, the Sable Wind Project proposed by the Municipality of the District of Guysborough is not relevant to this appeal.

a) The UARB erred by concluding that it is "immaterial" whether the power is generated by the IPP or the public utility; it cannot be both IPP power for the purpose of the **Electricity Act** and utility power for the purpose of the **Public Utilities Act**.

b) The UARB did not read the **Electricity Act**, the Regulations and the **Public Utilities Act** harmoniously but adopted an unreasonable interpretation of the **Public Utilities Act** by ignoring the Legislature's intentions under the 2010 amendments.

c) The UARB erred by finding that electricity producing assets cannot be held outside of rate base.

[67] Before discussing each of these errors, I will examine s. 35 of the **Public Utilities Act**.

[68] Section 35 of the **Public Utilities Act** states:

> 35 No public utility shall proceed with any new construction, improvements or betterments in or extensions or additions to its property used or useful in furnishing, rendering or supplying any service which requires the expenditure of more than two hundred and fifty thousand dollars without first securing the approval thereof by the Board.

[69] As the appellant pointed out before the UARB, s. 35 has four components: (1) there must be new construction, improvements or betterments, (2) by a public utility, (3) which requires the expenditure of more than $250,000, and (4) the new construction must be used or useful in supplying a service.

[70] There is no doubt that the first and third components of the test are fulfilled by the South Canoe project. NSPI is constructing wind turbines and the expenditure is far in excess of $250,000. It is also common ground that NSPI falls within the definition of public utility in s. 2(e) of the **Public Utilities Act**:

> 2(e) "public utility" includes any person that may now or hereafter own, operate, manage or control
>
> . . .
>
> (iv) any plant or equipment for the production, transmission, delivery or furnishing of electric power or energy, water or steam heat either directly or indirectly to or for the public

[71] The key provision is the fourth component and revolves around the definition of service, which is defined in s. 2(f) of the **Public Utilities Act**:

> 2(f) "service" includes
>
> . . .
>
> (iii) the production, transmission, delivery or furnishing to or for the public by a public utility for compensation of electrical energy for purposes of heat, light and power, [Emphasis added]

[72] NSPI states that there is no distinction in law between electrical power produced as a public utility and power produced as a minority participant in an IPP. Conversely, the appellant argues that s. 35 of the **Public Utilities Act** is not triggered because the definition of service includes the phrase "by a public utility" and NSPI is not acting as a public utility in the South Canoe project, but as part of an IPP. This leads to its second submission which is that NSPI was under no obligation to make an application under s. 35 because it is possible for NSPI to hold assets outside of rate base.

[73] The UARB agreed with NSPI's interpretation. It reasoned:

> [89] It is clear that if this Application is approved, and the Project proceeds as planned, the electricity generated will be provided as a service "to or for the public by a public utility". A public utility may "own, operate, manage or control" plant or equipment which provides electric power "either directly or indirectly to or for the public". The fact that the electricity is generated by an IPP, or that OFF manages or controls the project as a whole is, in the view of the Board, immaterial. [Emphasis added]

[74] The UARB therefore adopted NSPI's submission that there is "no distinction between the production of electrical energy as a public utility or as a minority participant in an IPP; all such electricity is produced, transmitted, delivered or furnished to or for the public." (¶84)

a) Is it "immaterial" how the electricity was generated?

[75] As noted above, s. 35 of the **Public Utilities Act** has four components, but the only element at issue on this appeal is whether the new capital improvement is used or useful in supplying a service. To repeat, s. 2(f) of the **Public Utilities Act** defines service as including "the production, transmission, delivery or furnishing to

or for the public by a public utility for compensation of electrical energy for purposes of heat, light and power".

[76] For NSPI's interpretation of s. 35 to be sustainable, the power generated at South Canoe must be "production … to or for the public by a public utility for compensation of electrical energy". With respect, a plain reading of the provision, the overall legislative scheme and the supporting documents all point to the opposite conclusion; the IPP, rather than NSPI, is providing a service so that NSPI's application does not fall within the scope of s. 35 of the **Public Utilities Act**.

[77] In adopting NSPI's interpretation, the UARB failed to address a number of issues.

[78] NSPI's argument – and the one that the UARB appears to have adopted – puts an emphasis on the definition of public utility in the **Public Utilities Act**. As set out above, public utility is defined as "any person that may … own, operate, manage or control any plant or equipment for the production, transmission, delivery or furnishing of electric power or energy, water or steam heat either directly or indirectly to or for the public." NSPI submits that since it is a public utility and its assets at South Canoe will produce electricity for the public indirectly through an IPP, the generation of such power is a service.

(i) NSPI wants it both ways

[79] NSPI is wearing two hats in this process. It requires the power produced by the wind turbines at South Canoe to be defined as IPP power so that it can meet the 2015 Renewable Energy Standard and the 300 GW/h renewable energy target under the **Regulations**. On the other hand, it is a 49% investor in the project and wants to be able to "rate base" the assets it owns in this project under s. 35 of the **Public Utilities Act**.

[80] As the appellant points out, NSPI wants it both ways. NSPI maintains that the assets it owns at South Canoe means that the electricity generated by those assets is a service to or for the public by a public utility under s. 2 of the **Public Utilities Act**. NSPI is therefore arguing that 49% of the output is public utility produced, which NSPI (not the IPP) is supplying indirectly to the public. Conversely, for the purpose of the **Electricity Act** and the **Regulations**, NSPI says that the electricity generated by South Canoe is IPP power that counts towards the 300 GW/h requirement under s. 6(2)(b) of the **Regulations** to enable NSPI to meet

the 2015 Renewable Energy Standard. In a response to an undertaking, NSPI noted:

> Pursuant to the definitions under section 3(1)(i) of the RES, an IPP means "a low impact generator" "of which no more than 49% of the securities of the holders to vote for the election of its directors is held by a public utility in combination with any affiliate of the public utility." As such, an IPP with up to a 49 percent interest held by a public utility qualifies as an IPP. Energy produced by such an IPP is not considered to be in part produced by the utility for the purpose of interpretation under the regulations. All energy produced by an IPP eligible under the definition qualifies for meeting the RES target of acquiring 300 GWh annually from IPPs. [Emphasis added]

[81] I agree with the appellant's submission that "having deliberately structured its participation in the IPP to ensure that all of the project's production is IPP production and none is utility production, NSPI cannot simultaneously assert that these are utility assets providing a utility service." If the power generated by South Canoe is produced by a public utility, NSPI should have submitted an application under s. 48(3) of the **Public Utilities Act** "to increase its capacity to produce power". It has not done so. In addition, as the appellant points out, whether the power is utility produced or IPP produced is not "immaterial" but is critical to the Renewable Energy Standard. If the power produced at South Canoe is not IPP power, NSPI would not meet the 2015 Renewable Energy Standard.

[82] Furthermore, NSPI faces a more practical difficulty in maintaining before this Court that the 17 wind turbines that it owns out of a total of 34 are utility assets providing a utility service. This is caused by the structure of its Project Construction and Operating Agreement (PCOA) with Oxford and Minas. The appellant makes this point clearly:

> It is not just a function of the regulatory definition of renewable targets that South Canoe electricity output is 100% IPP produced. That is also an accurate reflection of the contractual and commercial structure of the project. Under the provisions of the PCOA, the production from the NSPI-owned turbines is not metered and delivered to the South Canoe project, and then on-sold to NSPI as transmitter. To the contrary, the entire project output is pooled, and each participant is paid based on its percentage ownership of the project. As a result, the actual output of the turbines owned by a particular participant is irrelevant to the economic model governing the project. NSPI gets paid for 49% of the South Canoe output, whether or not any turbine actually owned by NSPI generates a single KWh of power. (Appellant's Factum, ¶99)

[83] A closer look at the structure of the PCOA reveals additional difficulties. The commencement of the agreement shows the challenge that NSPI faces in wearing two hats since it states that the PCOA is between NSPI "in its capacity as a participant in the Project pursuant to this Agreement, not in its capacity as a purchaser of power under the [Power Purchase Agreements] PPAs". Although NSPI retains title to its 17 wind turbines, the PCOA reveals that NSPI made the following covenants:

> **4.1 Obligations and Covenants of NSPI**
>
> NSPI covenants and agrees to and with OFF and MBPP as follows:
>
> * * *
>
> (a) to make the NSPI Assets available for this Project;
>
> (b) to grant OFF the exclusive right to manage and operate the Project and the NSPI Assets in accordance with the terms of this Agreement and to manage the revenues from the NSPI Generators during the Term pursuant to the provisions of the PPAs;
>
> (c) to make available and grant access to the NSPI Assets to OFF in order for OFF to perform the Services;

[84] Oxford's covenants in the PCOA reveal a similar story:

> 5.1 Obligations and Covenants of OFF
>
> OFF covenants and agrees to and with NSPI and MBPP as follows:
>
> * * *
>
> (g) to operate and maintain the Facilities and to provide financial and management services for the Project and the other services described in Article 7 […]
>
> (l) to generate and sell Energy from the Facilities in order to meet its obligations under the PPAs provided, however, that OFF does not guarantee the production of energy as contemplated by the PPAs and any shortfall in such production shall be shared by the Parties as contemplated by Section 9.1;

[85] Clauses 6 and 7 of the PCOA highlight Oxford's full power and authority to manage the project and to perform a list of management services.

[86] In addition, the Power Purchase Agreement (which governs in the event of a conflict with the PCOA) between Oxford and NSPI clearly states:

> 3.1 (a) During the Interim Period and the Term, the Seller [OFF] shall have, through ownership, leasehold interest, easement or right of way, all land tenure or land tenure agreements in respect of the Site which are required to carry out its obligations under the Agreement.
>
> (b) Subject to the Seller's rights to divest the Facility and any restrictions thereon provided in the Agreement, during the Interim Period and the Term, the Seller shall own the Facility and shall ensure that the Facility is operated and maintained in a manner consistent with the Electricity Standard Approval, using Good Utility Practice, and in compliance with Laws and Regulations and the applicable provisions of the Agreement (including the Project Description).

[87] Thus, while NSPI may own seventeen wind turbines, it has delegated management, control and operating authority over the South Canoe project to Oxford. Even if NSPI hoped to leave the impression that 49% of the South Canoe Wind Project owned by it supplied a service, this is impossible for the reasons set out above. As well, the Power Purchase Agreement specifically provides that NSPI measures the amount of energy at the "Delivery Point" where it "take[s] delivery [of] … the entire Net Output of the Facility". Thus, there is no possibility of measuring the energy generated by NSPI's wind turbines.

(ii) NSPI can only make an application under s. 35 because of its tortured interpretation of an IPP.

[88] The ownership structure contemplated by the definition of IPP in s. 3(1) of the **Regulations** that allows public utility involvement only permits the public utility to own 49% of the voting shares of the corporation. As I will explain below, NSPI relied upon the old definition of IPP in the **Electricity Act** and the interpretation of that old definition by the Administrator to establish a precedent of 49% ownership of assets that it used when bidding for the IPP process in 2012. It appears that 49% ownership of assets has, at least, two significant advantages for NSPI rather than 49% ownership of shares. First, there are significant tax benefits to installing and owning the wind turbines, as the UARB outlines in its decision. Second, and more importantly, it permits NSPI to argue that its ownership of the assets necessarily triggers an application under s. 35 of the **Public Utilities Act** since the construction of the wind turbines is used or useful in supplying a service.

[89] If NSPI had invested in the IPP in the manner that the definition of IPP envisaged (e.g. up to 49% of the voting shares of the IPP), it would be impossible for NSPI to apply to the UARB under s. 35 of the **Public Utilities Act**. Unlike tangible assets such as wind turbines, voting shares in a corporation can never be included in rate base and NSPI could not apply to the UARB under s. 35. I agree with the appellant's position that there can be no public policy justification for an entirely different outcome based upon how NSPI has legally structured the IPP:

> The flaw in the UARB's reasoning can be laid bare by changing one small fact in the case at bar. Assume that NSPI's involvement in the project had been by way of a 49% share ownership in South Canoe. Indeed, this is the structure that is expressly contemplated by s. 3(1) of the *RES Regulations*. In that scenario, for the purposes of the definition of "service", NSPI would not be "owning", "operating", "managing" or "controlling" anything, other than its share ownership. In that scenario, none of the output of the project could be said to be "generated" by a public utility, allegedly qualifying the capital investment for inclusion in rate base.
>
> However, NSPI has structured its participation in the IPP by way of direct ownership of 49% of the assets of the IPP. The fundamental question is: Can there be any public policy justification for an entirely different outcome based upon minor differences in the legal structure? There is no justification, particularly in circumstances where for the purposes of the renewable energy targets, NSPI insists that 100% of the power produced from South Canoe will be IPP produced. (Appellant's Factum, ¶97-98)

[90] NSPI stressed on numerous occasions in its written and oral submissions before this Court that the Minister approved these IPPs in letters dated November 2013 and that this Court has no jurisdiction to challenge either the Minister or the Renewable Energy Administrator's view that the IPPs are in accordance with the law.

[91] I will make two points about this submission. First, the Minister does not determine what is or is not an IPP. The Renewable Energy Administrator selects the IPPs and the Minister's role is prescribed in ss. 9 and 11-16 of the **Regulations**. Other than calculating the total amounts of electricity for the purpose of the Renewable Energy Standard under s. 9, the Minister's role appears limited to receiving and approving applications for an "electricity standard approval". Section 13 of the **Regulations** provides that the Minister must approve an application if the generation facility is located in Nova Scotia and it will produce renewable low-impact electricity. Electricity standard approval is defined in s. 2 of the Regulations as "an approval issued under Section 14 to approve a generation

facility as a renewable low-impact electricity generation facility for the purposes of the renewable electricity standards." As noted above, "renewable low-impact electricity generation facility" is defined as "a facility in the Province that generates renewable low-impact electricity and has received all approvals and permits required under these regulations or any other applicable enactment." One of these approvals would be the electricity standard approval so we come full circle as South Canoe requires the Minister's approval. Thus, with respect, while the Minister's letters (which were not before the UARB) may purport to confirm that both South Canoe projects are "owned and operated by an independent power producer", the Minister has no authority to make that determination.

[92] The fact that the Minister does not determine what is or what is not an IPP represents a change from the **Renewable Energy Standard Regulations** ("**RES Regulations**"), which were in force from 2007 until their repeal in October 2010. Under s. 7 of the *RES Regulations*, a renewable energy generator or its designated representative applied to the Administrator for certification of a facility as a renewable energy generation facility. The Administrator is defined in s. 2 as "a person designated by the Minister under Section 4 of these regulations and includes an acting administrator"; thus, the Administrator used to be a public servant. Pursuant to s. 7(2), the Administrator must certify a facility if five conditions are met, including, in subsection (b), that "the facility is owned or operated by an independent power producer". Thus, until 2010, the Administrator designated by the Minister determined what constituted an IPP, but for the reasons expressed above, this is not the case under the new **Regulations**.

[93] Second, although I accept that this Court has no jurisdiction to change the Renewable Energy Administrator's decision, this does not mean that the Renewable Energy Administrator's decision is completely shielded from scrutiny. The arrangement between Oxford/Minas and NSPI certainly stretches the definition of IPP to a breaking point.

[94] To recall, the definition of IPP in s. 3(1) of the **Regulations** includes the requirement that "no more than 49% of the securities entitling the holders to vote for the election of its directors are held by a public utility in combination with any affiliate of the public utility". Instead, NSPI and Oxford/Minas construed the definition of IPP to enable NSPI to hold no more than 49% of the assets of the IPPs with Oxford and Minas. There are no securities involved at all in their joint ventures. As the appellant pointed out, the definition of IPP is silent on the percentage ownership of assets that a public utility may hold and therefore, there is

actually nothing to prevent NSPI from owning 99% of the assets as long as it does not own more than 49% of the securities of the IPP. To justify a 49% ownership in the IPPs, NSPI points to the fact that the Administrator approved the same ownership structure for the Point Tupper wind farm project:

> The South Canoe ownership structure is based upon the same ownership structure as the Point Tupper Wind Farm. As described in the Point Tupper wind farm capital application and as documented by the information provided in Appendix D of that application, this structure was confirmed by the RES Administrator to be consistent with the facility being owned by an independent power producer.

[95] With respect, NSPI's reliance on the Point Tupper example is flawed for two reasons. NSPI relies upon the Administrator's January 2010 decision about what constituted an IPP whereas the Renewable Energy Administrator now makes this decision. In addition, the Administrator assessed whether NSPI's ownership interest in Point Tupper constituted an IPP based on the definition of IPP under the RES **Regulations**, which is completely different to the current definition of IPP under the **Regulations**.

[96] The UARB appropriately found that it had no jurisdiction to review the Renewable Energy Administrator's decision that selected Oxford/NSPI and Minas/NSPI as IPPs. Nor does this Court. This does not mean though that the Renewable Energy Administrator's decision is immune from any type of review. The Renewable Energy Administrator's report does not explain how it concluded that NSPI's ownership of 49% of the assets met the definition of IPP under s. 3(1) of the **Regulations** and I have already explained why the Minister's stamp of IPP approval, which was not before the UARB, adds no weight to NSPI's position.

[97] In summary, NSPI's explanation for how a 49% ownership stake of the assets in South Canoe satisfies the current definition of IPP in s. 3(1) of the **Regulations** is that a) the Renewable Energy Administrator approved it; (b) the Minister approved it; and (c) an administrator, appointed by the Minister under the **RES Regulations** and whose position no longer exists, determined that the structure satisfied the former definition of IPP under the **RES Regulations** which have since been repealed.

[98] While the UARB had no jurisdiction to review the Renewable Energy Administrator's decision, it could – and perhaps should – have reviewed NSPI's request under s. 35 based on the legal structure of the IPP approved by the Renewable Energy Administrator versus the legal structure of the IPP

contemplated by the **Regulations**. Had it done so, it would have necessarily reached the conclusion that had NSPI held 49% share ownership of the IPP, a s. 35 application to the UARB would have been unsuccessful. What contributed to this error was interpreting the **Public Utilities Act** in a vacuum rather than harmoniously with the **Electricity Act** and the **Regulations**. This is discussed further below.

(iii) A closer look at the Definitions of Public Utility and Service

[99] NSPI's interpretation of these provisions is relatively simple. NSPI says that it is undoubtedly a public utility as defined in s. 2(e) of the **Public Utilities Act**, that it is providing a service to the public under s. 2(f) and so that it falls within the scope of s. 35. I have concerns with NSPI's interpretation of service and public utility.

[100] My first set of concerns relate to the definition of service, which, to repeat, is defined as "the production, transmission, delivery or furnishing to or for the public by a public utility for compensation of electrical energy for purposes of heat, light and power."

[101] It is clearly the IPP rather than the public utility that is providing the service. If one examines the definition of IPP in s. 3(1) of the Regulations, "independent power producer" means a renewable low-impact electricity generator … that sells electricity … in the Province to public utilities for retail sales to the utilities' customers". Thus, it is the IPP which provides electricity to the public utility for compensation (under the price agreed pursuant to the Power Purchase Agreement) and the public utility subsequently delivers this energy to the public for compensation. Through a series of contortions, NSPI attempts to bring itself within the definition of service under s. 2(f) of the **Public Utilities Act**, but the **Public Utilities Act** does not contemplate an intervening event, namely the energy will first be bought from the IPP before being sold by the public utility to the public. Put another way, the **Public Utilities Act** is based on the utility cost of service model where the public utility produces the electricity from its assets, not a competitively procured model where the public utility is required to purchase the electricity from the IPP and then sell that energy to customers.

[102] NSPI says it does not matter whether the energy is produced by the IPP rather than NSPI, because these are NSPI's assets or because the definition of public utility permits the production of electric power either directly or indirectly.

I have already explained above in the context of NSPI wanting to have it both ways, why the first argument cannot be sustained.

[103] I agree with NSPI that the words "directly or indirectly" in the definition of public utility can only refer to the direct or indirect production, transmission, delivery or furnishing of electric power or energy. However, my concern with the definition of public utility refers to the first part of the definition: "public utility" includes any person that may now or hereafter own, operate, manage or control … any plant or equipment". With respect to South Canoe, as I have outlined above, the PCOA clearly contemplates that Oxford operates, manages and controls the South Canoe project. Counsel for NSPI was asked during oral submissions what does "independent" mean in "independent power producer?" His answer was "not controlled by". Thus, NSPI is relying upon the fact that it owns equipment (49% of the wind turbines) at South Canoe to bring itself within the definition of public utility. This leads to three points.

[104] First, if NSPI falls within the definition of public utility because it owns 49% of the wind turbines, does this mean that it is only providing a service with respect to the energy produced by the equipment that it owns? NSPI has to say no because, as pointed out above, the Power Purchase Agreement does not permit calculation of the energy produced by each wind turbine but only the cumulative energy generated by all the wind turbines at South Canoe. But how can the public utility be providing a utility service if there is no evidence whether the public utility's asset generated the electricity?

[105] Second, it is clear that the definition of public utility in the **Public Utilities Act** does not contemplate bifurcated ownership of a plant or equipment. Public utility is defined as "any person", which means one person or corporation. What does the Court do when the public utility may own equipment but does not own the facility since article 3.1(b) of the PPA gives ownership to Oxford?

[106] This leads to my final point, which is whether the IPPs fall within the definition of public utility under the **Public Utilities Act**. The IPPs in this case operate, manage and control a plant and equipment for the production, transmission, delivery or furnishing of electric power or energy indirectly to or for the public.

[107] Section 2(1)(ab) of the **Electricity Act** defines public utility and the IPPs would not fall within that definition because an IPP would fall under the definition of "retail supplier" which is expressly excluded. Thus, an IPP would fall within

the definition of public utility under the **Public Utilities Act** but would not under the **Electricity Act** and s. 2A of the **Electricity Act** states that the **Electricity Act** definition governs in the case of a conflict between the **Electricity Act** and the **Public Utilities Act**. This brings us full circle, it is the IPP which produces the energy, and although NSPI may own assets as part of the IPP, the IPP is excluded from the definition of public utility. Therefore, it cannot be regulated under the **Public Utilities Act**.

[108] It should also be noted that no party is suggesting the IPPs needed to make an application to the UARB; the parties appear to agree that an entity that is an IPP under the **Electricity Act** and the **Regulations** is not subject to rate regulation by the UARB on a cost of service basis under the **Public Utilities Act** because this would defeat the entire object and purpose of the scheme established under the **Electricity Act**.

b) The UARB adopted an unreasonable interpretation of the *Public Utilities Act* by ignoring the Legislature's intentions under the 2010 amendments.

(i) Ignoring the 2010 Amendments

[109] The parties went to great lengths to persuade this Court about the effect of the 2010 amendments on the **Electricity Act** and the **Regulations** and whether these represented a radical change to the legislative scheme.

[110] The appellant's submissions on the 2010 amendments are two-fold. First, it suggests that the amendments created two distinct tracks for renewable electrical power: (1) the traditional utility-owned cost of service regulated model and (2) a non-monopolistic competitive activity model. It states that s. 4B of the **Electricity Act** constitutes a complete code for the second model. In a succinct summary of its position before the UARB, CBEx submitted:

> As a result of the May 2010 amendments, there are now two distinct Acts (the **Public Utilities Act** and the **Electricity Act**) governing two distinct processes (self-supply vs. third-party procurement), administered by two distinct authorities (the UARB and the Administrator), for the supply of renewable electricity by two distinct generators – NSPI and IPPs.

[111] Conversely, NSPI suggests that the 2010 amendments did not represent a radical change and were simply "a refinement" of the scheme established when the **Electricity Act** and the **RES Regulations** came into effect in 2007.

[112] With respect, the 2010 amendments were far more than a "refinement". I have already described the three goals of the 2010 amendments: the appointment of a Renewable Energy Administrator, the establishment of feed-in tariffs or fixed prices for community-based renewable energy projects and an enhanced net-metering component that will credit consumers for renewable energy that they produce. It is only necessary to concentrate on the first goal.

[113] There are clearly significant differences between the pre-2010 amendments and the post-2010 amendments. The selection of IPPs through the Request for Proposals is now done by an independent Renewable Energy Administrator. Prior to 2010, NSPI negotiated with IPPs directly and an Administrator appointed by the Minister certified whether the project met the definition of a renewable energy generation facility. The **Electricity Act** and **Regulations** now prescribe an entire code in s. 4B about how the Renewable Energy Administrator should select the successful IPPs. Prior to 2010, the **Electricity Act** and the **RES Regulations** were silent on how IPPs were chosen. Finally, as noted above, the government amended the definition of IPP in 2010 and prescribed, in 2010 and 2013, amendments detailing how a public utility could recover its costs in rate base. Prior to 2010, the definition of IPP was different and there was no guidance about rate base.

[114] NSPI's position is that the UARB's direction to include its revenue from South Canoe in its service revenues and offset it against its operating and capital costs is a matter governed solely by the **Public Utilities Act** and not the **Electricity Act**. With respect, this cannot be the case for several reasons.

[115] First, the **Public Utilities Act** is silent on renewable energy. The **Electricity Act** and the **Regulations** provide guidance to the UARB about what may or may not be included in rate base. There are several relevant provisions. In the first question above, I have already reviewed the UARB's error at para. 79 of its reasons regarding its interpretation of ss. 4B(13) of the **Electricity Act** which omitted the reference to s. 4B(12). Section 4B(13) states "the Board shall allow a public utility to recover from its rate base the costs of the public utility's contracts referred to in subsection (12) on the basis approved by the Board under the *Public Utilities Act*." Thus, it would clearly be an error, in determining NSPI's application under s. 35 of the **Public Utilities Act**, to ignore s. 4B(13), which

mandates that the UARB should allow NSPI to recover the PPA price in the utility's rate base but which nevertheless gives a residual discretion to the UARB "under the *Public Utilities Act*".

[116] In oral submissions, the appellant suggests that this residual discretion would be limited to cost allocation or the timing of the recovery of costs. This would appear to be a reference to s. 7(3) of the **Regulations**, which came into effect in January 2013 and which was in force when the UARB made its decision. Section 7(3) certainly restricts the UARB's discretion under the **Public Utilities Act**. It states:

> (3) The Board must allow a public utility to recover the costs of the public utility's own renewable generation assets on the basis approved by the Board under the *Public Utilities Act*, together with the recovery of the costs of tariffs allowed under subsection 4A(6) of the Act and the costs of the public utility's contracts allowed under subsection 4B(13) of the Act, to a maximum of costs in relation to a supply of renewable low-impact electricity of no more than the following:
>
> (a) 133% of the minimum renewable electricity standard in Section 5;
>
> (b) 125% of the renewable electricity standard in Section 6.

[117] Thus, the **Regulations** provide that the public utility can recover the costs of its own renewable generation assets, but prescribes that the public utility can only recover up to a maximum of 125% of the costs of the renewable energy that it obtains pursuant to s. 6 of the **Regulations**. Put another way, the Renewable Energy Standard in s. 6(1) of the **Regulations** imposes an obligation on NSPI to supply its customers with renewable electricity in an amount equal to or greater than 25% of the total electricity supplied. There is no limit or cap on the percentage of renewable energy that it can supply above the 25%, but s. 7(3) restricts the recovery of costs under PPAs with IPPs to 125% of the standard.

[118] While the parties made submissions to the UARB about the effect of s. 7(3), and the UARB commented on these submissions, neither party raised s. 7(3) in its submissions before this Court. Section 7(3) confirms that NSPI's own renewable generation assets can be recovered in rate base but refers back to s. 4B(13) to suggest that IPP electricity can only be paid for through a fixed price Power Purchase Agreement, the cost of which may be included in its rate base. One could speculate that the legislature could have easily (slightly) altered the wording of s. 7(3) had it intended for NSPI to be able to recover the costs of assets that it held in IPPs as well as its own renewable generation assets. Instead, the Legislature only

permitted the recovery of the costs of the PPA in accordance with s. 4B(13) of the **Electricity Act**.

[119] In summary, my point here is simple. In exercising its discretion under the **Public Utilities Act** pursuant to s. 4B(13) of the **Electricity Act**, it would be an error for the Board not to take into account both s. 4B(12) of the **Electricity Act** and s. 7(3) of the **Regulations**. Equally, given the guidance in these sections about what can be included in the rate base, it is difficult to agree with NSPI's submission that the **Public Utilities Act** exclusively governs what can be included in the rate base.

[120] Finally, the definition of IPP itself in the **Regulations** points away from NSPI's interpretation. Under s. 3(1), an IPP must sell electricity … to public utilities for retail sales to the utilities' customers. As the appellant points out, "the very definition of an IPP incorporates the requirement that its electricity must be sold to utilities for resale to the public rather than paid by the public through inclusion of the capital costs of producing the electricity in the rate base". This, again, contradicts the UARB's conclusion that it is "immaterial" whether the public utility or the IPP is supplying the service. The definition of IPP envisages that IPP electricity will be supplied to NSPI for resale to the public rather than any circuitous route that may permit an interpretation that this electricity is supplied by a public utility.

(ii) Ignoring the Supporting Documents

[121] The appellant's submissions that the amendments to the **Electricity Act** and the **Regulations** constitute a two-track approach for electricity generation in Nova Scotia, one based on the traditional cost of service model and the other based on the competitively procured model, are also supported by several government documents that outline the province's renewable electricity approach and provide background to the 2010 legislative amendments. The appellant referred to the following documents.

<u>The Nova Scotia Department of Energy Renewable Electricity Plan</u>

[122] Published in April 2010, this document states:

> Most of the new renewable energy needed to meet 2015 and 2020 goals will come from industrial-scale projects. The Renewable Electricity Plan calls for a minimum of 600 GWh of new medium to large-scale renewable electricity, produced in equal parts by NSPI and independent power producers. The UARB will evaluate, approve, and regulate projects proposed by NSPI in the traditional manner. Independent producers will compete for projects under their allocation. To promote fairness and efficiency, projects will be secured through competitive bidding in response to requests for proposals (RFPs). Most of the new renewable energy projects now under development or in operation resulted from competitive RFPs issued in 2007. Financing problems stalled several of these projects, but it's clear that some of the troubles stemmed from the world financial crisis rather than a shortcoming of the RFP model itself. Using the two methods – UARB regulation and competitive bidding – in parallel will help determine which model gives best value for ratepayers for future policy development. [Emphasis added]

[123] The emphasized sentence is a key point that the appellant stressed throughout its submissions; one of the drivers to the dual model approach for renewable energy introduced by the 2010 amendments was to determine which gives better value for ratepayers. NSPI rejects that this was one of the government's goals, but the emphasized sentence, plus the following quote from the same Plan, suggests the opposite:

> Government has decided not to let independent power producers build all the medium and large-scale renewable energy projects. In essence, there are two competing models for selecting new power projects: UARB regulation of an integrated utility and competitive bids by independent producers. However, Nova Scotia's lack of a robust connection to the North American grid limits competition. Without that element, competitive bids may not be the best model – that was the judgment in 2001. This plan allows the two models to operate in parallel. The results will allow government to determine the best way to balance the development projects in the future. [Emphasis added]

Update and Preliminary Guide on Renewable Electricity in Nova Scotia

[124] This December 2010 document provides an update on the government's Renewable Electricity Plan. The **Regulations** went out to consultation in May 2010 and the government held 15 public consultation sessions across the province. With respect to medium and large-scale projects, the document again notes the importance of testing both models:

> A number of proponents suggested the [300 GWh] cap be lifted or the share allocated to NSPI also be part of a competitive bid process. The division and limit was specifically designed to test the proposition of which system delivered best value. After seeing the results, the Province will decide which model to follow in the future.

[125] More recently, s. 4C of the **Electricity Act**, introduced in March 2014, provides for public consultation on future policy, which also lends weight to the suggestion that the government intended to review the new approach that it had introduced courtesy of the 2010 amendments.

(iii) Ignoring other sections of the Public Utilities Act

[126] NSPI made an application to the UARB under s. 35 of the **Public Utilities Act**. A public utility must obtain the UARB approval for capital expenditures that are "used or useful in supplying any service" over $250,000 under s. 35. The UARB submits that s. 35 "applies if the utility wishes to have the capital item included in its rate base, on which it is entitled to earn depreciation and a rate of return." Indeed, s. 42(1) mandates that the UARB "shall fix and determine a separate rate base for each type or kind of service furnished, rendered or supplied to the public by a public utility." Further, s. 45(1) of the **Public Utilities Act** states "every public utility shall be entitled to earn annually such return as the Board deems just and reasonable on the rate base as fixed and determined by the Board for each type or kind of service furnished, rendered or supplied by such public utility."

[127] The UARB quoted these paragraphs in its decision but did not analyze them. Just as s. 35 requires the UARB to contemplate whether the capital expenditures are used or useful in supplying any service, the necessity of the UARB fixing and determining a rate base and permitting the return under ss. 42 and 45 only applies where "each type or kind of service [is] furnished, rendered or supplied to the public by a public utility".

[128] The UARB had no difficulty in concluding that "It is clear that if this Application is approved, and the Project proceeds as planned, the electricity generated will be provided as a service "to or for the public by a public utility". But, respectfully, it made this determination without an examination of the **Electricity Act** and the **Regulations**, which clearly contemplate that the service is being provided by the IPP.

c) Owning Assets Outside of the Rate Base

[129] The parties disagree vehemently about whether NSPI can own assets outside of rate base. NSPI argues that it cannot and that it is obliged, under s. 35 of the **Public Utilities Act**, to seek the UARB's approval for capital expenditures in excess of $250,000 and then to include these expenditures in rate base pursuant to ss. 42 and 45. NSPI relies upon the UARB's previous decision in **Point Tupper #2** (reported as **Nova Scotia Power Incorporated (Re)**, 2010 NSUARB 128).

[130] Conversely, CBEx contends that there is nothing that prevents NSPI from owning assets outside of its rate base. It gives the example of a corporate jet and points out that assets not in the rate base are not paid for by ratepayers and so, as a result, if regulated ratepayers are not exposed to the costs and risks of the non-rate based asset, the asset is of no concern to the ratepayers or the UARB. CBEx relies upon two earlier decisions of the UARB, **Nova Scotia Power Inc. (Re)**, 2006 NSUARB 23, (General Rate Application (GRA) decision), and another Point Tupper case (**Point Tupper #1** – reported as **Nova Scotia Power Inc. (Re)**, 2008 NSUARB 74).

[131] I will review these cases in some detail to illustrate they do not support NSPI's position, nor the UARB's conclusion that NSPI cannot own assets outside the rate base.

[132] In **Point Tupper #2**, NSPI entered into a PPA with Renewable Energy Services Limited (RESL) in 2008 to supply renewable energy by November 2009. RESL was unable to meet this deadline and the project was in danger of failing financially. NSPI therefore executed a Project Operating Agreement (POA) with RESL to purchase and install 49% of the capital costs of the facility and applied for Board approval under s. 35 of the **Public Utilities Act** for the $27.8million capital expenditure. It was approved. In its factum, NSPI submits that the UARB's decision in this case is consistent with the UARB's decision in **Point Tupper #2** that revenue from services, which are not price regulated, must nevertheless be included in regulated revenues:

> NSPI's interest in the project was identical to its interest in the Projects in this case, in that it owned a portion of the physical assets representing 49% of its value. The UARB approved the investment by NSPI and directed that it be accounted for as in this case: the PPA price is included as a purchased power expense, and NSPI's revenue from the project is credited to the revenue requirement. NSPI's actual operating and capital costs are included in the

> revenue requirement with the effect that NSPI earns no more than its regulated rate-of-return on investment. (NSPI Factum, ¶63)

[133] The relevant sections of the **Point Tupper #2** decision are the following:

> [34] NSPI is proposing to charge the full cost of renewable energy as per the original PPA through the FAM. However, the revenues realized by NSPI are proposed to be part of its general revenues. NSPI has argued that the reason for this treatment of revenues is to cover the cost of NSPI's investment in this Project.
>
> [35] The Intervenors have objected to the treatment of revenues proposed by NSPI. It is their view that NSPI's share of the revenues from the 11 wind turbines should be included in the FAM. This is because all costs of the Facility, including investment costs for the 11 wind turbines (before NSPI's participation in the Facility) are included in the PPA price, and the full cost of the PPA is to be charged to the FAM.
>
> [36] The FAM currently allows NSPI to recover fuel costs and power purchase costs, but not capital costs. Capital costs are currently recovered under customer rates approved by the Board in a rate hearing. In order to meet the 2011 RES, NSPI is charging the full cost of the PPA, which includes capital costs, to the FAM. However, NSPI is proposing to include the revenues generated from the Project in its general revenues to cover its capital costs of the Project. The FAM model does not contemplate recovery of capital costs because it did not contemplate joint ownership involving NSPI.
>
> [37] The Board has considered the evidence and agrees with the Intervenors that NSPI's revenues from the Project should be included in the FAM to provide a clear picture of the expenses and costs. However, the Board shares NSPI's concerns and agrees that NSPI's capital cost of the Project should be specifically recovered from the revenues generated by the Project which will be credited to the FAM. The Board directs that NSPI and Board staff, by September 1, 2010, develop a mechanism to pay for NSPI's capital costs from the Project revenues credited to FAM, for approval by the Board.

[134] In this case, the UARB agreed with NSPI's submission that revenues and expenses should be treated in the same fashion as the UARB approved in **Point Tupper #2**:

> [122] NSPI has proposed that the revenues and expenses from the Project be treated similar to that of the Point Tupper Wind Farm project in which it has a 49% interest.
>
> [123] The Board accepts and approves NSPI's proposal, as amended by this Decision, for this Project.

[135] **Point Tupper #2** was an NSPI initiated procurement approved under the old **RES Regulations** where NSPI made requests for proposals and negotiated with prospective IPPs. The 2010 amendments were not in effect when the UARB made its decision. Consequently, the UARB did not consider the new competitive activity model and the UARB has erred by following this precedent in this case.

[136] As noted earlier, the appellant references another Point Tupper decision which it says demonstrate that the UARB has previously held that NSPI can hold assets outside of its rate base. In its 2006 GRA Decision, the UARB addresses, in part, the Point Tupper Marine Terminal, a coal facility that NSPI built in 2004. NSPI constructed this asset outside of its rate base; the UARB explained NSPI's reasons for doing so as follows:

> [151] ….. NSPI advertised for parties interested in providing terminal services and/or bidding to develop a terminal at Point Tupper. NSPI determined the least cost strategy to be a terminal at Point Tupper, and selected a third party to own and operate it.
>
> As the Board is aware, NSPI's plan for the terminal faced certain challenges when it was not able to consummate an agreement with the selected third party. NSPI, following discussions with the Board, decided to go forward with the terminal outside of the traditional capital approval process in order for the terminal to be completed in a timely manner. NSPI estimated that it would incur $3 to $4 million in additional costs in 2005 if it delayed development of the facility. At the time, NSPI committed to attempt to divest the terminal once it was operational or return to the Board to ask that the cost of the facility be put into rate base.
>
> The Board, in a letter dated January 22, 2004 noted that "the Board has no objection to NSPI constructing the terminal outside rate base. At such time as NSPI applies to the Board to have the terminal included as part of rate base, or applies to the Board to have the terminal sold and leased back to NSPI the Board will determine whether or not the proposed transaction, and its related costs, is appropriate after performing its normal review procedures." NSPI proceeded with the terminal and completed construction in a timely manner such that the unloading of vessels destined for Trenton and Point Tupper was accommodated by PTMT upon the expiration of the Martin Marietta agreement.

[137] NSPI applied to the UARB in its GRA to permit a $2.3million fuel expense, which represents a recovery to NSPI for its capital related expenses in carrying the facility, despite not applying to the UARB for the asset to be approved to be put into the rate base. The UARB rejected this submission, reasoning:

> [170] To the Board's knowledge, NSPI's request for a capital recovery charge in relation to a non-rate base asset is extremely unusual and perhaps unprecedented. The

> **Public Utilities Act** clearly contemplates that all assets of a utility which are used and useful in supplying a regulated service shall be included in the rate base fixed by the Board with respect to that particular service. Furthermore, **s. 45** of the **Act** provides that a public utility is entitled to earn a just and reasonable return on the rate base fixed by the Board, and to recover reasonable and prudent operating expenses. There is nothing in **s. 45** or elsewhere in the **Act** which entitles a public utility to recover capital-related charges in relation to assets which it owns outside of its approved rate base. Accordingly, in the Board's view, it would be improper to allow the recovery of the $2.3 million in fuel expense. Otherwise, a utility could hold assets outside its rate base even though those assets were being used to provide a regulated service. It could recover the capital-related charges through rates even though the Board had never approved the value of the asset for inclusion in rate base, or for depreciation purposes. Having proceeded in this fashion, the utility could then sell the asset without having to allocate to its customers any of the profits realized on the sale. This would be an intolerable situation which, in the Board's view, is simply not compatible with the intent or express provisions of the **Act**.
>
> [171] The Board hastens to add that it is not suggesting any improper motive on the part of NSPI. The evidence clearly indicates that NSPI built the PTMT with the intention of selling it. In the meantime, it has entered into a contract with a third party to operate the terminal and the Board is satisfied that NSPI's customers are benefitting from the arrangement. Moreover, despite the evidence of Ms. Hennings, the Board is not persuaded that the terminal was designed to have excess capacity, although this question need not be definitively addressed unless and until NSPI applies to have the PTMT included in rate base. Should NSPI make such an application, the Board is prepared to consider at that time whether, in determining the amount to be included in rate base, an allowance should be made for deferred capital charges having regard to the fact that the terminal has, since the commencement of its operation, been devoted exclusively to the receiving and unloading of coal for NSPI's Trenton and Point Tupper generating plants.

[138] The appellant contends that paragraphs 170-171 demonstrate that NSPI can hold assets outside of the rate base:

> NSPI had no obligation to seek to put the assets into its rate base. However, unless and until it sought and obtained the UARB's permission to do so, it could not recover the costs associated with those assets from its regulated ratepayers, either directly, or indirectly. Notably, the UARB did not direct NSPI to bring such an application, but merely observed that should NSPI make such an application, it would have to determine what amount is properly within rate base. Moreover, while the UARB expresses concern about NSPI owning assets outside its approved rate base, it is clear that this concern is limited to assets (a) which are being used to provide a regulated service; and (b) for which NSPI is seeking payment, directly or indirectly, from ratepayers. That is not this case. (AF, ¶82)

[139] On the other hand, NSPI claims that the appellant has misapprehended paragraphs 170-171:

> CBEx misunderstands the effect of the 2006 GRA decision, which made findings with respect to the Point Tupper Marine Terminal. The UARB accepted that this facility had not been built as "an addition to its property", but was rather built for resale and that was later brought into use. The UARB did not indicate in this decision that prior approval of investments in property of this nature was unnecessary. On the contrary, it clearly emphasized that such approval was necessary, with the consequence that unless and until approval was sought and granted, no return would be allowed on the investment. The operative portion of the decision is as follows:
>
> > [170] To the Board's knowledge, NSPI's request for a capital recovery charge in relation to a non-rate base asset is extremely unusual and perhaps unprecedented. The *Public Utilities Act* clearly contemplates that all assets of a utility which are used and useful in supplying a regulated service shall be included in the rate base fixed by the Board with respect to that particular service... (emphasis added). (NSPI Factum, ¶48 [emphasis added in original])

[140] With respect, the sentence that NSPI emphasized is taken out of context. The context was whether the UARB should approve capital-related charges on assets outside of the rate base. NSPI submits that "the UARB accepted that this facility had not been built as 'an addition to its property' but was rather built for resale and that was later brought into use." The UARB did find that NSPI's intention was to build the terminal and sell it to a third party but it was brought into use immediately after it was constructed in 2005. In effect, the parties are arguing slightly different things; the appellant is pointing out that the UARB did not object when NSPI built an asset without a s. 35 ***Public Utilities Act*** application that was used or useful in supplying a service, whereas NSPI is insisting that the Board still has to approve the investment.

[141] A closer examination of **Point Tupper #1**, which the appellant relied upon in oral submissions, is necessary. This is the decision in which the UARB ultimately approved the inclusion of the Point Tupper Marine Terminal in NSPI's rate base. With respect, it demonstrates the UARB's lack of objection to NSPI constructing unregulated assets outside of the rate base. In its written submissions to the UARB, NSPI stated in part:

> NSPI's correspondence of January 8, 2004 to the Board advises that if the terminal could not be divested, NSPI would apply to the Board to have it included in rate base on a cost

> recovery basis. The Board accepted this approach to the construction of PTMT reserving the right to establish the valuation for inclusion into rate base at the time of NSPI's application. This approach was reinforced by the Board in its Decision in the 2006 general rate application. The Company now makes such a request. (¶34)

[142] The UARB allowed the Point Tupper Marine Terminal to be included in the rate base but made it clear its lack of opposition was not synonymous with its approval:

> The Board finds that it is appropriate to include PTMT in rate base. In coming to this conclusion, the Board wishes to make it very clear that it in no way considers its January 22, 2004 letter to NSPI regarding its plan to construct the PTMT as a 'precedent' for this approval, despite the apparent reference to that assumption in NSPI's May 16, 2008 written response, as noted earlier in this decision. In the Board's view, no acceptance or approval for the construction of PTMT by NSPI as an unregulated asset was given by the Board, either explicitly or implicitly, in its letter of January 22, 2004. <u>The Board had no authority to approve actions undertaken by the unregulated component of NSPI</u>. It indicated it did not "oppose" the project, but that can hardly be viewed as a future endorsement of same. (¶41) [Emphasis added]

[143] The emphasized sentence is key. The UARB understood that NSPI was willing to build an asset out of the rate base that it intended to sell in the future and that NSPI's shareholders were responsible for that risk. The UARB goes on to reject NSPI's attempt to have the fair market value of the PTMT ($42million) included in its rate base as well as the carrying costs since its construction five years previously. Its reasoning is very interesting, and is compelling:

> In the Board's view, the decision of NSPI to undertake this project can fairly be described as one which was a 'business venture' outside the ordinary scope of its business as a public utility. NSPI constructed a marine terminal for resale, built on a scale that could accommodate NSPI's fuel supply importation needs in addition to providing other possible business opportunities for a new owner, all without the approval of the Board that would be required under s. 35A of the ***Public Utilities Act*** for a capital expenditure of this magnitude by a public utility.
>
> The Board's clear understanding at that time was that it was NSPI's intention, not just a 'possible outcome' or 'option', to build the terminal and sell it to a third party who would then operate it and enter into a contract with NSPI to provide for its continued use of the facility. In the Board's view, NSPI must have believed it could realize a profit on the sale of PTMT, as it is unlikely that any reasonable

> person would construct and sell a multi-million dollar facility on any other basis. That plan, as has been pointed out, was unsuccessful. NSPI issued a Request for Proposals in mid-2004 seeking possible buyers but no sale occurred. As a result, NSPI continues to own PTMT as an unregulated asset. It has entered into an agreement with an unaffiliated third party to operate the terminal and, at present, NSPI is the sole user of the facility.
>
> As set out above, NSPI's decision to construct PTMT was a business venture. As is the norm with business ventures, shareholders bear the risk when making such decisions. There was no guaranteed fall-back position that if the project did not work out as planned, ratepayers would assume all of the costs associated with the risk taken by shareholders. The Board made it clear in its January 22, 2004 letter that the appropriateness of including PTMT in rate base in future would only be considered if and when an application was made.
>
> As noted earlier in this decision, NSPI, in large part, has justified its valuation of PTMT on the basis that the original project cost, and carrying costs, have been borne by shareholders since the terminal began operation in 2005. NSPI believes that since the ratepayers have benefited from this arrangement, all of the costs which have been borne by shareholders should now be included in rate base.
>
> The Board disagrees. It is not in keeping with long-established regulatory principles, or common sense for that matter, that ratepayers should 'pick up the tab' when a business venture undertaken by shareholders does not work out as originally intended. In the Board's view, this logic is clearly demonstrable by considering what would have occurred if the asset had been sold at a profit. Shareholders would have realized a financial benefit from the profitable sale of an unregulated asset owned by NSPI. None of these profits would have been shared with ratepayers as the shareholders would have had no responsibility to do so. If ratepayers are not entitled to a share of the profits from the sale of an asset, they should have no responsibility or obligation to bear the risk that the asset may not be sold, or to compensate shareholders for costs or losses which may have been incurred. As a result, the Board can see no justification in retroactively burdening ratepayers with inclusion of the 2005 original cost to construct PTMT, along with the corresponding carrying charges since then—totalling $42.13 million—in rate base. (¶47-51)

[144] With respect, despite the UARB's protestations, it is clear that it "did not object" when NSPI built an asset outside of the rate base. As the UARB pointed out, had NSPI sold the Point Tupper Marine Terminal when it was constructed outside of the rate base, shareholders, having born the risk of constructing the facility, would have realized a profit. The UARB found in 2008 that the construction of a facility for unloading solid fuel supply destined for the Point Tupper and Trenton generating plants constituted a reasonable and justifiable addition to NSPI's assets and was used and useful in supplying a service, but

characterized the 2004 decision to build the Point Tupper Marine Terminal outside of rate base as "a business venture outside the ordinary scope of its business as a public utility". With respect, although not included in the rate base, the Point Tupper Marine Terminal had been used and useful in providing a service since its construction five years earlier. it is not clear why the fact that NSPI was unable to resell Point Tupper Marine Terminal to a third party somehow made the construction of the asset to be outside the ordinary scope of NSPI's business.

[145] Applying the same logic to this case, it is difficult to see why the UARB did not consider whether NSPI's investment in an IPP would also not qualify as a "business venture outside the ordinary scope of its business as a public utility" or why NSPI could not continue to own the wind turbines as unregulated assets.

[146] Finally, I return to a point that the appellant stressed in oral submissions to the Court with respect to paragraph 79 of the UARB's decision:

> [79] The provisions of s. 4B(13) of the ***Electricity Act*** state that the public utility is to recover "…from its rate base…" its costs "…on the basis approved by the Board under the [***Public Utilities Act***]". The Board does not consider that NSPI could participate, as permitted, in an IPP, and at the same time, be unregulated by the Board. Allowing NSPI to do so would mean that it could earn unregulated profits on investments in IPPs. Those profits would be paid by NSPI customers and, potentially, could exceed NSPI's allowed rate of return. In the Board's view, this would substantially erode a fundamental principle of public utility regulation. As already stated, the Board does not interpret the ***Electricity Act*** as requiring such a result.

[147] CBEx pointed out that there was nothing wrong with allowing NSPI to earn unregulated profits on its investment in IPPs on the basis that it is not the ratepayer's money at stake; the ratepayers do not bear the risk of loss so they do not receive the benefit of any gains.

[148] The "fundamental principle" that the UARB refers to is presumably that a public utility operates on a cost of service basis, where the costs of providing electrical service are assessed and scrutinized by the UARB before any approval in relation to significant capital expenditures is granted. The difficulty with the UARB's interpretation is threefold; it requires an erroneous interpretation of s. 4B(13) of the **Electricity Act**; it ignores the previous occasion where the UARB did not object to NSPI's investment in a venture; and, it ignores a more harmonious interpretation of the **Electricity Act**, the **Regulations** and the **Public**

Utilities Act that service, under ss. 35 and 2(g) of the **Public Utilities Act**, does not include competitively procured renewable energy and that this type of power is not subject to cost of service regulation by the UARB, regardless of who produces it.

[149] The legislative scheme envisions two methods of acquiring renewable energy, NSPI and independent power producers. The amendments to the **Electricity Act** were intended to set forth the scheme upon which IPPs would operate. IPPs are overseen by the renewable energy administrator and not the UARB.

[150] For all of these reasons, the UARB's conclusion that NSPI's investment in the South Canoe Wind Project is properly included in the rate base is unreasonable. It does not fall within the range of possible outcomes.

[151] I would allow this ground of appeal.

Issue 2 The UARB did not err in law in deciding to treat as confidential from the public a large volume of documents submitted by NSPI to support its application requesting that the ratepaying public pay for its investment and profits in the South Canoe Wind Project. On this issue its decision was reasonable.

[152] I am substantially in agreement with the submissions of NSPI under this ground of appeal.

[153] CBEx's argument fails for two reasons:

1. CBEx's objection was not made in a timely manner; and
2. The UARB's decision to allow NSPI's motion for confidentiality was reasonable.

[154] I will address each of these separately.

Timeliness of the Objection

[155] Section 12 of the **Utility and Review Board Act**, S.N.S. 1992, c. 11 provides:

> 12 The Board may make rules respecting practice and procedure in relation to matters coming before it.

[156] Section 12 is a reflection of the legislative intent to make the UARB the master of its own procedure and to give it considerable latitude and authority to develop procedures as it deems fit. It has done so in this circumstance by adopting the **Board Regulatory Rules**, N.S. Reg. 235/2005 (Dec. 23, 2005) as amended. The Rules establish a detailed framework for consideration of confidentiality requests. In particular, Rule 12 establishes the following procedure for objecting to a request for confidentiality:

> (6) A party may object to a request for confidentiality by filing an objection and serving the objection on the parties.
>
> (7) The objection shall state the reasons (a) why the party requires disclosure of the documents and (b) why disclosure would be in the public interest.

[157] CBEx did not file an objection under Rules 12(6) and (7) nor did it suggest at any point before or during the hearing that NSPI's confidentiality request was improper or in any way impeded its ability to respond to the application. Its objection to the confidentiality of certain documents was not raised until its post-hearing submissions.

[158] Finally, CBEx did not suggest that the UARB's consideration of the request was an error. In fact, CBEx counsel obtained access to the confidential information by signing an approved confidentiality undertaking.

[159] In these circumstances, it was reasonable for the UARB to conclude, as it did, that it should not entertain a request to adjudicate the claim for confidentiality once the hearing had concluded. (¶44).

[160] For this reason alone, I would dismiss this ground of appeal.

The Board's Decision was Reasonable

[161] I am also of the view that the UARB decision to allow NSPI's confidentiality motion was reasonable.

[162] In its supplemental decision (reported 2014 NSUARB 5) the UARB sets out in detail its reasons for granting the confidentiality order (see ¶27-41 and ¶45-46).

[163] The UARB accepted that the information filed in confidence consisted of third party commercially sensitive information and that the UARB was concerned that disclosure and public discussion of that information could:

- Undermine its confidentiality obligation to third parties;
- Result in third parties being less willing to contract with NSPI in the future;
- Put NSPI at a competitive disadvantage during future courses of negotiations; and
- Generally harm (by resulting in higher costs) to NSPI's ratepayers.

[164] It is not for this Court to reweigh the policy considerations of the UARB or engage in our own analytical process or undertake our own page by page assessment of thousands of pages of documents, in considering this ground of appeal. It is sufficient for us to say, having reviewed the record and the UARB's reasons, that its conclusion falls within a range of acceptable outcomes.

[165] I would dismiss this ground of appeal.

[166] In light of my conclusion on this ground of appeal, it is not necessary to have regard to the evidence of Oxford and Minas or to resort to their arguments.

Conclusion

[167] The appeal is allowed, in part and (by agreement of the parties), without costs. The decision and Order of the UARB approving NSPI's Capital Expenditure in the South Canoe Wind Project is set aside.

Farrar, J.A.

Concurred in:

Saunders, J.A.

Bryson, J.A.