IN THE MATTER OF the *Public Utilities Act*, R.S.N. 1990 Chapter P-47 (the "Act"); and

IN THE MATTER OF an Application by Newfoundland and Labrador Hydro for approvals of (1) Under Section 70 of the Act, changes in the rates to be charged for the supply of power and energy to its Retail Customer, Newfoundland Power, its Rural Customers and its Industrial Customers; (2) Under Section 71 of the Act, its Rules and Regulations applicable to the supply of electricity to its Rural Customers; (3) Under Section 71 of the Act, the contracts setting out the terms and conditions applicable to the supply of electricity to its Industrial Customers; and (4) Under Section 41 of the Act, its 2002 Capital Budget.

Submission of December 5, 2001

Gillian Butler, Q.C. and Peter Alteen
Counsel to Newfoundland Power Inc.

December 5th, 2001

NEWFOUNDLAND POWER
A FORTIS COMPANY

The Rules

1. This Board's Procedural Rules for all hearings are established in Regulation 39/96.

   In particular: s 3(2) In any application……the Board may dispense with, vary or supplement any provisions of these Regulations……(it) considers necessary

   s. 9 An intervenor's submission shall be signed and contain…(iii) a concise statement of the facts the intervenor's proposes to show in evidence (iv) the reasons why the intervenor believes the Board should decide in the manner advocated and (vi) a list of information as may be useful in explaining the intervenor's representation.

   (See Appendix A).

The Board's Orders

2. P.U. Orders No. 7 (2001-2002) July 11, 2001
   8 (2001-2002) September 7, 2001
   22 (2001-2002) September 21, 2001
   23 (2001-2002) September 24, 2001

   set out the specifics of the procedure to be followed in **this** hearing.

Purpose of the Rules and Orders

To its credit, this Board has conducted a controlled and orderly hearing of a very complex application. For the most part, the parties have been co-operative and courteous and the rules have been followed. This is required in an expensive process of this nature. Hydro has provided evidence that this proceeding will cost Hydro alone between $3 ½ and 4 million (Roberts, November 15, page 1, line 40).

One purpose of the Rules and Procedural Orders is to minimize these costs through control of the administrative process. The overriding legal doctrine is procedural fairness but this doctrine calls into play many rules. Two of the most obvious and well known are that "justice must not only be done but seen to be done" and "parties are not taken by surprise – this is not trial by ambush."

Until yesterday, this was being achieved in a complex matter.

The Facts

Mr. Browne's expert Mr. Bowman filed testimony on August 17, 2001. In the 3 ½ months since that time, other Cost of Service witnesses have filed supplementary evidence responding to other experts. The purpose of the Prefiled Evidence including supplementary evidence of course is, (in keeping with Regulation 39/96, section 9), to provide the facts and information the intervenor relies upon, to the Board. In accordance with administrative law principles, this prevents surprise and ultimately avoids undue delay which, until yesterday, were successfully avoided.

Mr. Browne should have filed supplementary evidence on behalf of Mr. Bowman. The document he provided yesterday only after Mr. Bowman had read it into the record should have been in all parties' possession in advance and should have been in the same format as the other Cost of Service Experts' testimony.

The contents of Mr. Bowman's opening remarks contain hearsay, and often amount to little more than argument. And that's what is so troubling about all this. Recommendations on the RSP touch issues at the very heart of this Application and are being provided at a time when Mr. Brickhill, Mr. Osler and Mr. Brockman have already testified and one of them (Mr. Brickhill) has gone home. This is unfair and that inequity has to be addressed.

The practical solution to this is to require Mr. Bowman to file his new recommendations and give the parties who may wish time to respond, time to do so. Parties who wish to file supplementary evidence in reply are entitled to do so.

The difficulty is that this involves delay, the responsibility for which lies directly and solely at the Consumer Advocate's feet.

If this problem was presented by any other party to this hearing, I would be recommending an order of costs against the party but the Consumer Advocate is protected by s 117(3) of the *Public Utilities Act* so that is not a practical solution.

The Issues before the Board

As a result of Mr. Browne's actions yesterday, this proceeding has been delayed by at least a half a day and the Board has indicated that it wishes to hear the parties on 3 matters. They are: (1) Admissibility (2) How it should deal with the matters raised in Mr. Bowman's 17 page "opening remarks"; and (3) How the matter affects Scheduling. I will address each.

1. Admissibility

The evidence of Mr. Bowman yesterday contains hearsay, unqualified opinions, and argument which nevertheless relates to issues arising in this hearing, particularly the RSP. As such, while it may not be "inadmissible" in the strict legal sense, as this Board has exercised judgement in such matter in the past, there are questionable portions, which Newfoundland Power feels the Board must address, at the end of the day.

One way for the Board to address this matter is as follows:

1. allow the evidence on the record; allow the evidence to be tested through cross-examination and, (if necessary or requested) allow, reply evidence;

2. give such weight to the evidence as the Board thinks it is worth based upon the experience of the witness and the quality of the evidence; after it has been tested through cross-examination.

3. disallow any argument in the testimony; and

4. allow counsel for all parties to address matter of weight in final argument.

This course of action is not new to the Board. It was adopted by the Board in a 1998 ruling in Newfoundland Power's Cost of Capital hearing.

A copy of the transcript of May 29, 1998 which contains the arguments and Board's ruling is attached as Appendix B. The Board's ruling is found at page 21, line 77 and following.

2. How the Board should deal with the matters revised in Mr. Bowman's "Opening Remarks:

In determining how to deal with the specific proposal for a negotiation contained in Mr. Bowman's evidence of yesterday pages 16-17, we first must examine the proposal itself.

The essentials which Mr. Bowman proposed on Dec. 4, 2001 are that:

1. One member with rate design expertise should be proposed by each party.

2. They meet for one negotiation session on December 5, 2001 of a duration of 2 hours.

3. A second negotiation session on December 6, 2001, if necessary.

4. With an agreement to be presented by December 11, 2001 if a majority can agree.

The proposal presented by Douglas Bowman on behalf of the Consumer Advocate on Dec. 4, 2001 is impossible to reconcile with the position expressed by Mr. Bowman on behalf of the Consumer Advocate on August 17, 2001.

Up until yesterday, Mr. Bowman and the Consumer Advocate advocated the elimination of the RSP. Yesterday, they changed their minds. This proposal certainly delay or defer the testing of Mr. Bowman's evidence which was supposed to be ongoing during the negotiations he proposes and comes as a complete surprise to the other parties who are supposed to go into the good faith negotiations in the spirit or co-operation. What reasonable expectation can the Board have that 4 representatives with "rate design experience" to adequately assess and evaluate, much less agree on the future of, a $50 to $100 million dollar fund with very substantial possible consumer impacts in the space of 2 hours or even 2 days?

Three expert witnesses have already commented on the RSP and been cross-examined in some detail. While their views were not necessarily consistent, their evidence does form a significant basis for the Board to evaluate what do with the RSP currently in place.

The proposal of Mr. Bowman for "off the record" meetings without the Board but during the Board's hearing delays the public hearing of Mr. Bowman's evidence which (until yesterday), called for the abolition of the RSP with no proposal for a replacement scheme. In short, the proposal contravenes the Regulations and Procedural Orders governing this proceeding.

On October 5th , 2001, the Consumer Advocate said:

> "…..I think at some point we're going to feel the wrath of consumers if this hearing starts to approach the Christmas season. People need to have an answer as to what's happening in reference to their electric bills and to plan accordingly" (p. 41, lines 45-49).

Now on December 5th, 2001, with the official "on record" position of the Consumer Advocate having changed (on December 4th) the Consumer Advocate advocates that, we stop this proceeding to negotiate this complex issue in 2 hours or, at the most over 2 days.

In determining how to deal with this matter, the Board must consider whether Mr. Bowman's proposal will be helpful to the Board in fulfilling its mandate regarding the cost of service issues arising from Hydro's application.

In making this determination the Board should be mindful that during the past 7 days it has heard the evidence of Mr. Brickhill, Mr. Hamilton, Mr. Osler and Mr. Brockman.

This evidence has been thoroughly tested through cross examination. Only Mr. Bowman and Dr. Wilson remain to be heard on cost of service. So, 7 days are invested in the public hearing of cost of service matters, including the RSP. Given this, the essential question for the Board is whether raising the proposal of a 2 hour or 2 day private "off the record" negotiation during the course of the hearing at this late date is "fair" to the parties required to participate and likely to yield results which will assist the Board in any material way in its resolution of cost of service matters?

The proposal submitted yesterday by Mr. Bowman lacks credibility, has already disrupted the Board's schedule and threatens to disrupt the schedule further. Neither Mr. Bowman nor the Consumer Advocate refer the Board to authority to order such a negotiation.

The Board should give this last minute proposal the weight it deserves in the circumstances of this proceeding, including its lack of timeliness and complete disregard for the rights of the other parties by lack of notice. The Board should ignore the current proposal and proceed with the cross examination of Mr. Bowman on his evidence.

3. Scheduling

Given Newfoundland Power's position on how the Board should deal with this matter, Newfoundland Power has only a few points on the issue of scheduling.

First, given the lack of notice of the change of evidence in this matter the Board is practically required to give any party that requires it, time to respond reasonable accommodation.

Newfoundland Power is not requesting any additional time and is proposing Mr. Bowman's cross-examination commence tomorrow morning.

Second, even with this delay it is Newfoundland Power's assessment that the schedule agreed to by counsel a few weeks ago is still achievable. Subject to other parties' views on their need for time, we should continue on that schedule.

Concluding

Newfoundland Power is in favour of Alternative Dispute Resolution mechanisms of any kind. If the Board concludes that it has the power to order such mecha nisms particularly under Regulation 39/96, section 3 (2), Newfoundland Power would be interested in any form of process that shortens, simplifies or eliminates an otherwise expensive, time-consuming and adversarial hearing.

However, such processes must be assessed against this goal of improved regulatory efficiency.

The process proposed by the Consumer Advocate and Mr. Bowman in this Application on December 4, 2001 after months of hearing and, in particular, after the Board has heard most of the evidence on the specific subject matter (i.e. cost of service, and RSP) cannot be expected to achieve this goal. In fact, it has already had the opposite effect. By coming to late and without notice, it only disrupts the proceeding and adds additional costs.