IN THE MATTER OF the Electrical Power Control Act, 1994 and the Public Utilities 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

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SUBMISSION OF COUNSEL TO THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

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LAW

The purpose of this section of the submission is to provide the Panel with some guidance on matters of law as it applies to rules of evidence and the resulting decision making process. It is not meant to be an exhaustive exploration of these evidentiary issues, but instead, to provide the Panel, as the trier of fact, with a basic understanding of how the rules of evidence are applied in an administrative setting.

Administrative tribunals have always been governed by a system of evidence that is adjusted to take in to account the administrative setting. Administrative rules of evidence are based on the principles of natural justice, however they are not as homogenous as those that apply to a court of law. The sources for administrative rules of evidence are more varied. Moreover, tribunals typically have a great deal of independence under their enabling acts and regulations to adapt evidentiary rules to the particular context.

Theoretically, due to the principle of the independence of administrative evidence and procedure, administrative tribunals are not bound by the strict rules of evidence applicable in criminal or civil courts and they may, therefore, receive and accept hearsay evidence.

Nature and Burden of Proof

Evidence plays a crucial role in the administration of administrative justice. If a tribunal makes a decision without having heard or considered evidence, its decision will be quashed on the grounds that it denied natural justice or exceeded its jurisdiction.

To make a decision based on the evidence means to use reliable information that tends logically to show the existence or non-existence of facts relevant to the issue to be determined. An administrative tribunal has not based its decision on the evidence if, for example, it has relied solely on a policy manual and has not considered the evidence given “from the docket” (i.e. the witness stand).

A tribunal is "statutory." This means that a statute sets out what must be proven through documents and testimony that expresses facts (events or situations observable through senses) or opinions. Whereas facts are objectively observable, opinions are subjective. Evidence can include either, and the distinction between fact and opinion is important because of its impact on probative value.

Information conveyed to, or obtained by, a tribunal in the ordinary course is not necessarily evidence. For example, the explanations of support staff, a legal opinion obtained by a tribunal or one of its members, or the pleadings a solicitor of record, are not considered evidence in administrative law.

The other important issue in this area is the requisite standard of proof in administrative tribunals. The civil standard is proof on a “balance of probabilities”. It has always been

felt that administrative proceedings are civil and that unless otherwise specified, the applicable standard is proof on a balance of probabilities.

The balance of probabilities standard means that the existence of a fact is more likely than its non-existence, and that the issue to be determined is not only possible, but probable, rather than improbable. If the evidence is such that the tribunal can say: we think it more probable than not, the burden is discharged; if the probabilities are equal, it is not discharged.

Theoretically, a person who is seeking an authorization or benefit must satisfy the tribunal as to his or her right or eligibility. In this case, the burden of proof is on Newfoundland and Labrador Hydro ("Hydro") as the applicant. Hydro bears the burden of proof and must take the initiative to persuade this tribunal and "bear the consequences of any gap in the evidence".

Types of Evidence

It is not easy to categorize the kinds of evidence tendered in tribunals or admitted or considered by them. However, evidence can be classified either according to its form or according to the purpose for which it is adduced.

Evidence classified as to its form includes the following:

1. Testimonial Evidence

Testimonial evidence can be sub-classified as follows:

a. Direct Evidence

When a witness testifies to what they observed by their senses (sight, hearing, touch, or smell).

b. Hearsay Evidence

Hearsay is evidence (testimonial or written) of a statement made out of court, the statement being offered to show the truth of the matter asserted therein, and thus relying for its value on the credibility of the out-of-court assertion. Hearsay is commonly understood as "a statement of a fact made by a person who did not personally witness the fact, but was told about it by someone else".

Hearsay evidence given to a tribunal is indirect evidence; the person who is giving it is conveying what direct witnesses of the event have said. Since administrative tribunals are in charge of evidentiary matters, they may allow any evidence, even if it is indirect. As a general rule, hearsay

evidence is admissible before quasi-judicial tribunals provided they comply with the rules of natural justice.

It is generally recognized that senior managers of a company can provide hearsay evidence. It is unrealistic to expect senior managers to have first hand knowledge of all matters under their operational responsibility and to which they may be questioned, and therefore, are allowed to familiarize themselves with issues by consulting with staff and then testifying as to the facts.

c. Opinion Evidence

Opinion evidence is evidence that is based on the personal belief or opinion of a witness, not on what that witness observed by their own sight, smell, touch, or hearing. Generally it is not evidence when given by an ordinary witness, but there are exceptions. An expert witness, however, can give opinion evidence.

d. Real evidence

Real Evidence is evidence (other than testimony) of persons, objects, or places that are observed by the trier of fact either in or out of the hearing room. It enables the decision-maker to make direct findings with regard to the state of a thing, place, or person. Evidence may be real or representative: photographs or recordings are representative evidence.

2. Documentary evidence – Business Records

A document can be tendered as proof of its contents or simply as original evidence.

At common law, a business record made at or near the time of the event described by someone with personal information of the event, whose duty required them to note such an event as part of the ordinary course of carrying out their duties, can be tendered by another person as an exception to the hearsay rule. In a non-administrative setting, the best evidence rule would normally be invoked to prevent a litigant from tendering a secondary document generated from information sourced from the original.

However, administrative tribunals are not bound by the best evidence rule. In administrative law, the tribunal is free to accept and admit such proof based on the balance of probabilities. This Board is, therefore, free to accept as evidence those documents generated during the hearing in response to requests for information ("RFI") or undertakings, despite their

having been generated from other information taken from other documents.

Purpose and Use of Evidence

Evidence can be offered for many purposes, and used by the trier in as many ways. The purpose and use of the evidence is dependent on the nature of the evidence itself, and can be classified as follows:

1. **Direct Evidence**

Direct evidence is evidence adduced to prove the fact itself.

2. **Indirect or Circumstantial Evidence**

Circumstantial evidence is any item of evidence, testimonial or real, other than the testimony of an eyewitness to the material fact. It is any evidence from the existence of which, the tribunal may infer the existence of another fact.

3. **Presumptive Evidence**

Proof by presumption must involve relevant facts that make it possible to infer the existence of a disputed fact by inductive reasoning. A presumption is an inference established from a known fact to an unknown fact. It is often established by operation of law or from facts left to the discretion of the trier.

Direct evidence differs from circumstantial evidence in the number of inferences which must be drawn to connect the evidence to the material fact that the party adducing it seeks to prove by its introduction.

Circumstantial evidence requires that the trier of fact draw one or more additional inferences from the evidence to the material fact, beyond the inference that the testimony is true.

Factual presumptions are consequences a tribunal draws from one or more known facts to an unknown fact. A single fact is often enough to trigger a presumption. That is, known facts are employed to get to unknown facts.

4. Original Evidence

This is evidence adduced to prove the fact that a statement was made orally or in a document, rather than the truth of the statement.

5. Judicial Notice

Judicial notice is a tribunal's personal recognition of certain generally known facts whose accuracy cannot be reasonably questioned. In other words, they need not be proven. The tribunal should take notice of such facts on their own.

The first kind of facts of which notice are taken are facts generally known to the public. The second, noticed by specialized tribunals, are generally known facts, and information and opinions that fall under the tribunal's area of expertise.

Considering the Evidence

Admissibility, Relevance and Weight

Admissibility, relevance and weight are distinct issues. Inadmissible evidence is evidence that cannot be considered, but often the admissibility of evidence and its relevance are confused.

Evidence is relevant if it is directly or indirectly related to a fact to be determined, and is capable of advancing the inquiry and making the existence or non-existence of a fact more probable. The weight or probative value of that evidence is a matter for the tribunal to decide. In administrative justice, questions of admissibility are not often raised. The main concern is the probative value of the evidence, provided that it is relevant.

Hearsay and Opinion

The personal belief or opinion of a witness not qualified as an expert or not based on what a person observed by sight, smell, touch, or hearing is generally not evidence, but there are exceptions.

Lay Witnesses

A lay witness should generally give evidence of facts, not inferences or opinions, however a strict application is unworkable. In administrative tribunals, ordinary witnesses may be allowed to state an opinion, or even testify about facts or situations of which they have no personal knowledge (i.e. hearsay).

The test used to determine the admissibility of such evidence is one of "helpfulness", although there is resistance to allowing such evidence where it approaches the ultimate issue to be decided by the trier. Generally, it is for the trier of fact to determine the weight to be given to such evidence.

Expert Evidence

An expert, on the other hand, is a person qualified by some special skill, training or expertise who can be asked about their opinion on a matter in issue.

An expert is one who has, by experience, acquired special or peculiar knowledge of the subject about which they undertake to testify. It is immaterial whether such knowledge was acquired by a course of study or by practical experience. Experts may draw upon books, lectures, and studies by others as sources of knowledge, not just their own personal experience or observation

Normally, the trier of fact must qualify the witness as an expert as a prerequisite to their giving opinion evidence. However, it is not the custom of this Board to do so.

Typically, witnesses testifying as to the cost of capital, or cost of service methodology, and whose resumes, under the rules of procedure established by the Board's regulations (s. 9), are to be provided beforehand, are *de facto* treated as experts and allowed to render opinion evidence freely. Nonetheless, it is submitted that many of the other witnesses testifying during the Application were, even if not expressly referred to as experts, treated as such, and allowed to give opinion evidence. Based upon the requirements as described above, it is clear that these lay witnesses were qualified to act as experts in their field.

Admitting Opinion Evidence

Generally, an expert may offer an opinion within an area of expertise necessary to assist the trier of fact, notwithstanding that the opinion is based in whole or in part on secondary or hearsay source. However, where hearsay evidence is the basis of the expert opinion, it is inadmissible as proof of the truth of the facts asserted, but admissible as the basis upon which the expert formed his opinion and proper to be considered in assessing the weight of the opinion. Stated another way, the opinion rendered is evidence, but the hearsay upon which the expert relied is not, unless specifically tendered in to evidence by the author.

It is not necessary for the expert to have knowledge of the underlying facts in order to render an opinion, although the factual foundation for the opinion should be established. The extent to which opinion rests on hearsay evidence effects the weight of the opinion, not its admissibility.

The weight to be attached to the opinion is determined by the trier of fact. If the facts on which the opinion are based are not found to exist, then no weight can be given to the

opinion. The trier of fact should consider that the weight to be assigned to the opinion is related to the amount and quality of admissible evidence upon which it is founded.

Deficiencies in expertise that do not render the expert witness incompetent to give expert opinion evidence also go to weight. When weighing an expert's evidence, the trier of fact should consider the following:

> What were the expert's qualifications?
> Was the expert's testimony understandable?
> How did the expert respond to weaknesses in their opinion evidence?
> Who were they trying to help - the trier of fact or an interested party?
> Were they impartial or an advocate for a certain point of view?

The tribunal should consider the nature and purpose of the expert testimony, the qualifications and impartiality of the expert, the scope and seriousness of their research and the relationship between the opinions expressed, the evidence relied upon and the issues at hand.

Relevance of Evidence

Even if otherwise admissible, evidence must be relevant.

Evidence is relevant if it pertains, directly or indirectly, to a fact or issue to be determined and it moves the inquiry forward. The evidence must tend to make more or less probable the existence or non-existence of a fact or situation that must be proved.

Relevance is a matter for the tribunal to decide. The tribunal must consider the extent of its jurisdiction, the object of the proceedings and the powers of redress or reparation granted by the law.

There is no precise definition of relevance. This has occasionally caused relevance to be confused with weight. Facts that are not relevant have no real connection with the issues and tend to give rise to confusion, or to unduly prolong the debate or prejudice the opposing party. This is what some call logical relevance, whereas insufficient probative value is called legal relevance.

It is best to limit the use of the term "relevance" to situations in which the tribunal is excluding evidence because it is unrelated to the issues to be determined. But even the Supreme Court has assimilated the two concepts. According to Sopinka J. of the Supreme Court of Canada, "all relevant evidence" means "all facts which are logically probative of the issue."

Weight or Probative Value

Administrative tribunals have the difficult task of assessing the weight, credibility and sufficiency of various elements of evidence. When considering a decision and the

associated reasons, it must be possible to verify whether there is intelligible evidence that rationally supports the tribunal's inference or conclusion.

In order to discharge their burden and satisfy the tribunal, a party must show that the existence of a fact is more probable than its non-existence. The requisite degree of evidence is a matter of quality, not quantity. For example, testimonial evidence is not assessed in terms of the number of instances of testimony but rather, on the credibility of testimony and persuasiveness.

This does not mean that corroboration should be neglected, because it serves to reinforce testimony and make it more likely for the tribunal to believe it. Corroboration can be made by the testimony of another person, a writing, physical evidence, or a set of circumstances that cause the statement to be more believable.

Tribunals must also take care to know whether or not an element of evidence has been contradicted. This also applies to corroboration.

Direct evidence is generally preferred to indirect evidence. For example, direct testimonial evidence is better than hearsay and proof by presumption. But this rule is not absolute, and a tribunal may prefer highly credible indirect or secondary evidence to doubtful direct evidence.

Submissions of Counsel

A distinction must be drawn between evidence and argument. The evidence is used to prove facts, whereas counsels' submissions and argument are the interpretation of the evidence and facts.

Evidentiary or factual summaries provided by counsel in submissions are summaries only, and do not constitute evidence or fact.

Similarly, submissions by counsel as to the law, or to the application of the evidence to a particular issue, while of persuasive value, do not have probative value. It is the sole and exclusive domain of the trier to determine what is the evidence, to make findings of fact and to apply the facts to the issues to be decided.

Board Decision

In making a decision, tribunals take notice of their enabling statute, general laws and regulations and previous orders and decisions, and may do their own legal research without depending on the parties. However, if a tribunal intends to rely on cases that the parties have not cited, the cases should be disclosed to the parties so they have the opportunity to comment on them. This would not apply to previous orders of the Board, as they would be part of the public record.

It is not uncommon for tribunals to consult general dictionaries and manuals. However, a clear distinction should be drawn between situations where such works are consulted to gain an understanding of expert evidence and situations in which they are used to refute it. In the latter cases, tribunals should be very careful. They should advise the parties and even reopen the case if necessary. A tribunal should not conduct a personal or private investigation into a case before it.

It is not sufficient to state that one has considered the testimony, exhibits and submissions of the parties. The trier must study the evidence and identify the relationship between that evidence and the findings and conclusions and possibly explain why certain evidence was rejected or accorded little credibility.

The Tribunal should include a statement of the questions of fact material to the decision. It should also set forth sufficient legal grounds, in the sense that the grounds must show that all the criteria that must be considered under the Act and Regulations were indeed considered. The legal grounds should be brief, but should not consist of boilerplate provisions that have little meaning.

Finally, the reasons must be clear in the sense that they must enable the interested parties not only to know why they won or lost, but also to determine whether they have serious grounds to challenge or appeal the decision.

The reasons may contain an error in law if the Board wrongly interpreted a law or regulation, applied a principle or rule of law it should not have applied, refused or neglected to apply a principle or rule of law it should have applied, or contains grounds unrelated to the purpose of the law.

PROCESS

The purpose of this section is to provide the Board with some advice concerning the processes and procedures employed in conducting future rate hearings.

Role of Board Counsel

While the courts have provided some guidance on appropriate roles that can be taken by a counsel acting for an administrative tribunal, most of the case law is derived from the review of administrative tribunals that are disciplinary in nature, or are otherwise entrusted with the duty to enforce provisions of their Act that are penalizing in some manner. There are few tribunals have the same duty as those responsible for regulating utilities as here. For this, and other reasons, it is suggested that the existing legal precedents provide only general guidance to this Board when determining what role its counsel should undertake during hearings.

The Newfoundland Court of Appeal has examined the jurisdiction of this Board in carrying out its duties under the Public Utilities Act. The Court of Appeal recognized that this Board in entrusted with the "general supervision of all public utilities" in the Province, and in carrying out this function has the general authority to "make all examinations and inquires and keep itself informed as to the compliance by public utilities with the law" and, as well, that it has the right to "obtain from a public utility all information necessary to enable the Board to fulfil its duties". These duties are derived directly from the operation of its enabling statute. (see: *Public Utilities Act* s.16 (General Powers), s.17 (Inquiry by Board), s.58 (Form of Records may be Prescribed), s.60 (Inspection of Records), s.61 (Audit), s.62 (Information to be Supplied), s.66 (Information to be Provided), and s.67 (Accounts etc. to be Provided))

Ultimately, the role of counsel to the Board, is as established and directed by the Board, having regard to the law.

General Rate Application – Speed v. Efficiency

As has been referenced throughout the hearing, this was the first General Rate Application taken by Hydro in ten years, and the first such Application since it became subject to the Board's jurisdiction under the Public Utilities Act.

Accordingly, and as expected, the Application took a considerable amount of time to complete, a significant portion of which was expended on what can be described as a process of "familiarization".

For instance, many hearing days were spent learning about Hydro's Rate Stabilization Program, including how Hydro has implemented the program during the past ten years. Similarly, a significant amount of documentation was generated, and hearings days expended, examining the methodology employed by Hydro in setting its hydraulic and thermal generation projections for a given year.

Hydro is a large, complex organization. It has close to one thousand employees, owns four non-regulated subsidiaries, and generates in excess of three hundred and eighty million dollars in annual revenue. While similar to Newfoundland Power is some aspects, operationally, Hydro, as the principal generator of electrical energy in the Province, has characteristics that are unique to itself and its industry. Consequently, a significant portion of this hearing was spent gaining an understanding of Hydro's operations.

The examination of these underlying issues and procedures has provided a context for not only the current Application, but future applications as well. It is, therefore, reasonable to expect that subsequent rate applications by Hydro will take less time to hear then the current one.

Nonetheless, having regard to the level of complexity of the issues and the period of operations under review, it is suggested that the hearing took no longer then was reasonable in the circumstances.

Some public utility commissions, in an effort to shorten the length of time taken to process a rate application, have limited the amount of time provided for cross-examination, or employed alternative means of dispute resolution. It is suggested however, that changes to the hearing process aimed at shortening the period of time required to process an application should only be undertaken as part of a reasoned, thoughtful approach. Efficiency and speed are not synonymous. Generalized efforts to increase the speed at which a hearing proceeds, without more, may have a negative impact on the right to due process. "Cherry picking" mechanisms used by other Boards to shorten the process, or employing alternative methods to resolve disputes should be part of a broad plan, one that takes in to account the level of resources available to the parties, and which suits this Board.

Notwithstanding this cautionary approach, there are some procedures which can be identified now that, if implemented, may improve the efficiency of future rate hearings without negatively impacting on the due process that must be afforded to the parties.

Use of Panels

The current process may have benefited at certain stages from having witnesses testify as a panel. It is noted that the Board already employs this mechanism during Newfoundland Power's capital budget applications.

In the present hearing, other then the evidence provided by the two witnesses for Abitibi, each witness took the stand individually. In response to the question of whether it would have been beneficial to provide testimony as a panel, one Hydro witness responded that he would "like to have about 100 people here behind me" (Budgell, Transcript - November 9, 2001, pg. 26, line 88).

Clearly, there are efficiencies to be gained from having, in some instances, witnesses testify as a panel and the Board should explore this option for use during subsequent general rate hearings. Rules of procedure will need to be established to ensure that the effectiveness of a cross-examination is not negatively impacted by having more then one witness testifying at a given time, and to ensure that an individual witness can be held accountable for their testimony.

Motions

Pre-selected dates were established for hearing Motions. Procedures similar to those governing Interlocutory Applications before the Supreme Court were also implemented to encourage the orderly filing of briefs and replies.

This process worked well. It encouraged all counsel to formalize their arguments, place before the Board their stated objection in a concise and coherent fashion, and generally discouraged ad hoc motions and undue procedural wrangling.

This, or a similar process, should be utilized in all future hearings. However, so long as the Board's rules of procedure under the Board of Commissioners of Public Utilities Regulations, 1996 remain in their current form, it will require an order of the Board to implement such a process.

This procedure may be improved by setting additional dates for hearing Motions during the scheduled hearing. While, in the present application, dates for Motions were established for the period prior to the hearing, no such dates were set for during the hearing.

Electronic Documentation

The electronic filing procedure was implemented on an experimental basis by Board Order P.U. 7 (2001-2002).

The electronic filing procedure, and subsequent utilization of the electronic documentation during the hearing, generated operational efficiencies, the most obvious evidence of which was the apparent saving of time taken to access documents during the hearing. Accordingly, this approach should be encouraged in all future hearings.

There are further efficiencies that can be gained from utilizing electronic document management systems.

It is recognized that until all parties are completely comfortable with using this medium, it may be necessary to maintain a paper record of any documentation filed in relation to a matter before the Board. It is noted however, that there is no impediment in either the Public Utilities Act, or its subordinate regulations to adopting an electronic version of a document as part of the Board's official record. In fact, during the hearing, the Province of Newfoundland and Labrador adopted new e-commerce legislation (*Electronic*

Commerce Act, S.N.F., 2001, c. E-5.2, assented to December 6, 2001), which, among other things, expressly provides for electronic documentation to have the same effect at law as a paper document.

Accordingly, many of the requirements for service and distribution of filings as directed by the Public Utilities Act and its subordinate regulations can be achieved through electronic means. In addition to saving trees, the electronic distribution of filings will generate efficiencies inherent with the technology.

A significant portion of the documentation filed with the Board each year is generated by either Hydro or Newfoundland Power. As a "next step" the Board should explore the implementation of an electronic work flow system. An electronic work flow system would allow users to conduct many aspects of their job duties from their Web browser, allowing Board staff, the regulated utilities, and any party who may have an interest in a particular matter, to review, jointly modify, discuss and distribute any electronic documentation in a seamless and effortless manner. This effort will bleed in to the rate application process itself.

By integrating an electronic work flow system with the utilities, the Board would be able to review process with the utilities, allowing for the utilities to "converse" directly with the Board, and its staff, in real time, and in electronic form. Such a process will, in effect, further encourage the use of electronic documentation, and generate operational efficiencies – both for the Board and the regulated utilities.

Internet Access

The Board may also wish to explore whether to install a wireless Internet access hub in the hearing room. This would allow individuals in the hearing room, both participants and selected utility staff, to access the Internet.

There were several instances where counsel for an Intervenor could not provide an update on the filing of additional documentation, when in fact their own staff had already filed the document with the Board electronically. Key employees of the utility were unable to stay in contact with their offices while sitting through lengthy portions of the hearing.

Providing access to the Internet, and providing consequent email capabilities, would enable Hydro employees to maintain contact with their office, allowing them to monitor developments while also being able to attend the hearing – which should be encouraged. It would also allow counsel for the Intervenors and Board staff to receive communication from their offices during the hearing, as well as access the Internet, both of which would have proved useful.

New Category for Participants

Under the current procedure, and as directed by the regulations, there are three opportunities for interested parties to participate in a hearing. Under the *Board of*

Commissioners of Public Utilities Regulations, 1996, a party may file a "Letter of Comment" with the Board (s. 13) or seek formal status as an Intervenor (s. 9). In addition, it has been customary during general rate applications for the Board to set aside sitting days to hear public presentations.

It is submitted that there is a significant difference between securing status as an Intervenor and being invited to provide a letter of comment. An Intervenor is typically represented by counsel, although this is not required per se, and participates fully in the hearing process – issuing and replying to RFIs, cross-examining witnesses and making submissions to the Board.

By comparison, while the Board may take statements made in letters of comment in to consideration, under generally accepted rules of evidence, those same statements cannot be accepted as evidence of the truth of their contents, unless allowed to do so as a Board made exception to the hearsay rule.

During this hearing, certain persons submitting letters of comment were in a unique position to that of other customers of Hydro, and therefore could have benefited from representation during the hearing. The Iron Ore Company of Canada, and 5 Wing Goose Bay are two examples, and while the latter group ultimately secured counsel, it did so at such a late stage in the proceeding that the rate issue unique to this customer was not fully explored during the hearing.

It is recognized that any party has the opportunity to participate in the public presentation process, and, although the evidence provided in these public presentations is given as sworn testimony, and therefore not subject to the same limitations as would apply to letters of comment, it still did not provide an effective means to explore issues that were technical in nature. This can only be achieved by participating in the RFI process, and securing a means to cross-examine witnesses on the issue.

One possible solution would be to establish a new category for interested parties who, because of the impact of specific aspects of the application, fall between those who warrant status as an Intervenor, and those whose views are sufficiently explored through a letter of comment.

A procedure could be struck that allowed for a party to participate in the hearing process on a narrow issue. This could be accomplished by implementing a document management process that tracks specific issues so that parties given special status would receive only those documents that directly impact on their issue. If implemented electronically, the subsequent distribution of relevant documents to the correct party would take place automatically.

However, it would still be necessary to also establish a mechanism that would provide representation to these special issue parties in order to ensure that their issue is fully explored during the hearing. If directed, this is a function that could be fulfilled by Board Counsel.

Participation of Newfoundland Power

There were several instances during the hearing where the process could have benefited from the direct participation of Newfoundland Power.

Providing Relevant Evidence

For example, one of the issues examined during the hearing was the apportionment of Hydro's demand related energy costs between Newfoundland Power and its industrial customers. This apportionment is dependent on, among other things, the relative forecasts of demand for the test year as estimated by each party. These forecasts were revised during the hearing.

The current practice of Hydro is to accept these forecasts as fact, and adjust their apportionments of demand related costs accordingly. This necessarily will have a negative impact on one party and a corresponding positive impact on another.

It is submitted that this issue could have benefited from having Newfoundland Power give direct evidence on the issue. This would have avoided the situation of Hydro relying on the hearsay evidence of Newfoundland Power, or that of its industrial customers.

Similar benefits could have been achieved by having Newfoundland Power witnesses provide direct testimony concerning the methodology used by them when forecasting energy production.

Combining the Flow Through Application

The Board may also wish to explore the possibility of combining Hydro's general rate applications with the expected "flow through" application of Newfoundland Power.

The current custom is for Newfoundland Power to wait until the Board's final decision is made, however, this creates a situation where the Board is asked to approve wholesale rates without having received direct evidence on the resulting impact it will have on retail rates. This is particularly problematic where Hydro's retail rural customer rate is tied to Newfoundland Power's retail rate, constituting, in effect, a feed back loop, the final result of which, without Newfoundland Power's direct evidence on the matter, can only be estimated.

It would seem reasonable for the Board to take a holistic approach on these matters. If Newfoundland Power was directed to provide direct evidence on these issues, the Board would be in a position to set final rates for both customer classes at once. Clearly, Newfoundland Power would be free to take a separate application should it feel that it is entitled to a full rate review, but such applications are likely to be rare in light of Newfoundland Power's automatic adjustment formula.

Adoption of Direct Pre-filed

It has been the custom of the Board to allow witnesses to adopt their pre-filed testimony.

It has also been the custom to allow witnesses, where appropriate, to provide an update of their testimony when they take the stand. Although used at times to correct any errors that may have been identified since the filing of the direct testimony, generally, this procedure is used by witnesses to update their pre-filed evidence with the latest available economic or financial data.

Unlike the pre-trial process used by the courts, there is no opportunity during the pre-hearing process to conduct examinations of witnesses other then through the RFI process. Accordingly, parties must rely heavily on the pre-filed testimony of a witness when defining the issues which the individual will address and developing their corresponding line of questioning.

There is an old saw that parties should not be allowed to conduct a “trial by ambush”, meaning that parties should not use the element of surprise to spring upon the other litigants, and the trier, never before seen issues or evidence. The adopted process should encourage parties to share information in an open and forthright manner. To allow otherwise, may cause unnecessary delays and undue procedural wrangling.

This can be achieved in part by strongly discouraging the adoption of new direct evidence by a witness when they take the stand. The Board may wish to consider adopting a rule that, with the exception of updating existing evidence with new data, or correcting identified errors, no new direct evidence will be accepted by a witness on taking the stand unless they are able to demonstrate the existence of exigent circumstances to explain why it was not tendered earlier.

Role of Staff

As has been referenced earlier, the Board has an obligation to monitor the regulated utilities as part of its general, and ongoing role to provide supervisory oversight. This, it cannot accomplish without the assistance of its staff. The staff, in turn, cannot fulfill their duties to provide the necessary monitoring of the utilities without remaining fully informed on all aspects of their operations.

In many instances, the nature and level of understanding required by the staff to fulfill this role is distinctly different from what is generally of interest to Intervenors. The Board should encourage those aspects of the hearing process which provide an opportunity of staff to participate in the hearing. This includes authorizing staff to retain experts where appropriate.

For example, the total combined annual capital budgets of the two regulated utilities exceed, in an average year, seventy million dollars. While these budgets receive a fair degree of scrutiny during a full rate hearing (I have provided comments below suggesting that the Board may wish to examine whether this aspect of general rate applications should be treated separately), it is left to staff to scrutinize these budgets in between rate applications.

Staff should be authorized to retain independent engineering expertise to assist in reviewing the capital budgets. Board Counsel could then call this expert evidence during a capital budget application to provide an independent assessment of the proposed expenditures. It would also provide staff with the ability to monitor the utilities on a consistent, multi-year basis, in effect, matching the approach taken by the utilities themselves when formulating their capital budgets.

Staff should also be encouraged to retain other experts on an ad hoc basis, wherever it is deemed advisable or necessary to examine a specific aspect of the utilities' operations that is technical in nature. This again, will provide staff with the ability to conduct an independent assessment.

These measures will be of limited use unless staff are encouraged to work with the Board's counsel to ensure that they obtain representation during the hearing.

ISSUES

Consistent with the role of Board Counsel as established during the hearing, it would be premature to provide specific comments concerning Hydro's application. These will be reserved for final argument, after reviewing the submissions of the Applicant and the Intervenors and determining what, if any, issues have not be addressed or which have received incomplete treatment.

It was also felt that there was little utility in providing a summary of the evidence. Counsel for the Applicant and the Intervenors are likely to provide their own summaries, and any summary provided by Board Counsel would need to be exhaustive, lest it appear, through pure inadvertence, that Board Counsel was favouring the position of a particular party.

In any event, the Board is ultimately responsible for determining the evidentiary record. As referenced earlier in the discussion on the law, summaries by counsel, while helping to marshal the evidence, do not constitute evidence, and should be used with that caution in mind.

The purpose of this section, therefore, is to provide some general comments related to specific aspects of Hydro's application.

Regulation of Hydro – Setting a Framework

Perhaps one of the most difficult challenges facing any Board entrusted with regulating a utility is striking a workable balance between implementing rules that will allow it to fulfill its duty to monitor the utility as required under the relevant Act and at the same time avoiding procedures that encourage a micro-managing of the utilities affairs.

Several of the Intervenors, and perhaps the Applicant itself, likely will draw attention to the fact that this is the first opportunity of the Board to regulate Hydro. As such, this is the first opportunity to establish a regulatory framework for Hydro's operations in future years.

In determining what that framework should be, the Board will need to consider the fact that its decision will have long-term implications. For instance, Hydro has indicated its near term intention to apply for a market rate of return consistent with what is earned by an investor owned utility and to eventually move, over the long term, towards a 60/40 debt to equity ratio.

A fundamental, and underlying issue to be determined by the Board is whether Hydro should be regulated as "an investor owned utility". Commencing with the testimony of William Wells, and continuing with Hydro and Intervenor expert witnesses, the Board was repeatedly encouraged to treat Hydro as if it was investor owned.

It is noted however, that neither the *Public Utilities Act* nor the *Electrical Power Control Act, 1994* provide a statutory basis for regulating Hydro as "investor owned utility". It is a creation of the evidence used to determine a "just and reasonable return" (PUB Act, s.80) and rates that "provide sufficient revenue…[for Hydro] to achieve and maintain a sound credit rating in the financial markets of the world".

Whatever regulatory framework the Board determines is appropriate for Hydro, it should remain cognizant of the fact that the framework will be used for a number of years in to the future. If the Board were to determine that Hydro should be treated as an investor owned utility, it will need to establish financial targets consistent with this approach, provide a time period for Hydro to move toward them, and establish a structure to guide Hydro during the intervening period.

It will also need to provide Hydro with some guidance on how it should account for its policy based initiatives as directed by Government. Foremost, the Board will need to establish a definition of what constitutes a "policy initiative" so that Hydro is better able to account for these efforts. The Board should provide direction to Hydro on what impact, if any, the continued implementation of these policy initiatives will have on how they are regulated.

Marginal Cost Methodology

Dr. Wilson has provided opinion evidence that "Marginal cost considerations should receive greater attention when designing rates". (Dr. Wilson, Pre-Filed, pg. 7, lines 9-18). Dr. Wilson also suggested that utilizing marginal cost theory would simplify the rate design process, in effect avoiding much of the subjectivity inherent in embedded cost rate design.

A considerable amount of time was expended during the hearing on matters involving the interpretation of various definitions used in embedded cost rate making, and their subsequent application to derive cost allocations among the various rate classes. It is submitted that few people outside of regulatory process would understand the application of the embedded cost methodology.

Marginal cost based rate design holds the promise of establishing a much simpler rate design process. Marginal cost based rates would be simpler to apply, simpler to understand, and, perhaps most importantly, simpler to monitor.

In order to conduct an assessment of the appropriateness of marginal cost rate design, it is necessary to first conduct a marginal cost study of both utilities. This, as described by Dr. Wilson (Transcript December 7, 2001, pg. 8 lines 12-39) is a task within the competency of Hydro's own employees. It is not a process that need take long. However, it is a prerequisite to utilizing marginal cost theory in rate design.

If this Board feels it appropriate to explore the adoption of marginal cost rate design, it may wish to order Newfoundland Hydro and Newfoundland Power to conduct a joint

marginal cost study, and to file a report with the Board by the Fall of 2002. Specifications for the study could be drafted by Dr. Wilson.

In this way, it would be possible to actually put forward a marginal cost based rate design during Hydro's next application, expected in early 2003. Without it, there would be no alternative but to use the embedded cost methodology.

Government's Policy Review

Reference was made during the hearing to the Province's energy policy review. However, other then the fact that a draft of the policy paper was apparently provided to Hydro, there is no evidence on the record of what, if any, impact the policy review may have on Hydro's current application, or the policies to be established by the Board in its decision.

Accordingly, the Board has no evidence upon which to form any rational conclusions concerning the policy review and should therefore ignore it during the decision making process.

Capital Budget Applications

Each utility must file an application with the Board seeking statutory approval of their capital budgets for the coming year (*Public Utilities Act*, s. 41). Capital budgets are usually processed as stand alone applications.

The Board may wish to consider directing the utilities to not exclude capital budgets from future general rate applications. It is submitted that including the capital budget process in a general rate application unnecessarily complicates both.

General rate applications should be filed early in each year, allowing ample enough time for a hearing to be conducted, a decision rendered and final rates approved in time for their implementation by January 1 of the relevant test year. The Board could set a date in its annual calendar, for example, April 30, after which the utilities would need special leave to file a general rate application.

Capital budget applications should be taken in early fall, again allowing ample time for a hearing and a subsequent decision by the Board. Again, the Board could set a date in its annual calendar, for example, October 31, after which leave would need to be obtained by the utility to file a capital budget application.

In the event a utility applies for a general rate application, any impact that the subsequently approved capital budget will have on the utility's rate base, and any consequent impact on its revenue requirement could be adjusted prior to the test year's January 1 commencement date.

Industrial Contracts

The industrial customer, North Atlantic Refining Limited ("North Atlantic") seeks relief from what it feels to be discriminatory practices by Hydro. Specifically, North Atlantic is seeking an amendment to the proposed industrial contract.

However, it is clear from the testimony of North Atlantic's Vice-President and Chief Financial Officer, Mr. Glenn Mifflin, that the contract at issue, which includes the offending clause, was the product of negotiations conducted between North Atlantic and Newfoundland Hydro (Transcript, January 10, 2002, pg. 37-38). A penultimate issue is whether the Board has the evidentiary basis upon which to render a rational decision on the matter.

If it determines that it does then it may proceed to decide the issue. If it determines that it lacks the evidentiary basis needed to proceed, then it must decide whether to dismiss the request of North Atlantic, or, alternatively, implement a process that would provide for a full examination of the issue.

Section 82 of the Public Utilities Act may provide the Board with the requisite jurisdiction to conduct a separate investigation in to this issue. In exploring this latter option, the Board would need to consider what resources it can commit to this effort.

Rate Stabilization Program

There was a great deal of evidence led concerning the Rate Stabilization Program ("RSP").

The RSP was established by the Board in the late 80s to address a specific issue. Principally designed to smooth out fluctuations in the price of No.6 fuel burned at the Holyrood generating station, the plan was introduced in direct response to public outcry over the impact changing oil prices were having on electrical rates in the Province.

Although, as originally conceived, the RSP was simple to describe and simple to monitor, it is clear that it has grown to become a separate construct within the regulatory framework. As its complexity has grown, so has the level of difficulty encountered in monitoring its operation, and in understanding the interdependence of its many elements.

It is recommended that the Board conduct a review of the RSP. The purpose of the review would be to identify how the RSP can be simplified. Since Board staff must have a full understanding of its operation, any such review should include their participation.

Ultimately, the success of the review, similar to all aspects of Hydro's operations, can be measured by whether the RSP is understandable to those individuals that it directly impacts – the customers of Newfoundland and Labrador Hydro.

As a general tenet, the regulation of Hydro, and its operations, should be intelligible to the people that are served by these efforts. Achieving this goal will ensure that the regulatory monitoring of Hydro's affairs can be carried out by the resources available to the Board.

Submitted this 21st day of January, 2002.

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