

IN THE MATTER OF the
Public Utilities Act, (R.S.N. 1990, Chapter P-47 (the “Act”))

AND IN THE MATTER OF a General Rate Application
(the “Application”) by Newfoundland and Labrador Hydro
for approvals of, under Section 70 of the Act, changes
in the rates to be charged for the supply of power and
energy to Newfoundland Power, Rural Customers and
Industrial Customers; and under Section 71 of the Act,
changes in the Rules and Regulations applicable to
the supply of electricity to its Rural Customers.

**APPLICATION RELATIVE TO EVIDENCE OF
EES CONSULTING AND LEN WAVERMAN**

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TO:

The Board of Commissioners of Public Utilities (the “Board”)

THE APPLICATION of Abitibi-Consolidated Company of Canada (Grand Falls - Windsor), Abitibi-Consolidated Company of Canada (Stephenville), Corner Brook Pulp & Paper Limited, North Atlantic Refining Limited and Voisey’s Bay Nickel Company Limited says:

1. The Applicant Intervenors seek an order that the expert’s reports from EES Consulting and Len Waverman proposed to be filed by Counsel to the Board in this Application be excluded from evidence.
2. The grounds for this Application are as follows:
 - (a) The role of Board Counsel is limited to providing advice to the Panel. It is inappropriate for Board Counsel to become a party to the proceeding by calling witnesses who advocate for particular positions on the substantive issues before the Panel. Board Counsel has no client with a position to defend before the Panel. His role is to prevent procedural error and to ensure that the Board is sufficiently familiar with the applicable legal principles to act judicially within its jurisdiction. The substance of the issues before the Panel are beyond the purview of Board Counsel.
 - (b) Where witnesses file reports, such as the EES Consulting report which has been distributed to counsel, which state that the evidence “is being presented on behalf of the Board of Commissioners of Public Utilities of Newfoundland and

Labrador”, there is an obvious concern with respect to apprehension of bias. It is not reasonable to expect the informed objective observer of these proceedings to think that the Board can view “its own witnesses” in exactly the same manner as witnesses called by parties, but that is the Board’s obligation inherent in the principles of natural justice. A witness produced by the person whom the Board relies on to give it professional advice will necessarily be perceived as being something different from witnesses produced by parties who are naturally and necessarily partisans attempting to advance their own interests. Board Counsel is intended to be independent counsel to the Board; witnesses called by Board Counsel will inevitably be endowed in the minds of the objective observer with that degree of independence and hence not be seen to be on a level playing field with witnesses produced by parties with a real, pecuniary interest in the proceedings. The process is by law adversarial; a person held out as being above the controversy has an unfair advantage in the adversarial process which demeans the status of the actual parties.

- (c) While there is room for the presentation of reports by consultants retained by the Board to conduct specific investigations, such as those regularly presented by Grant Thornton on accounting related issues, the evidence proposed to be offered by EES is different in kind. The attached Table of Contents shows that these witnesses are discussing the substantive points at issue among the parties here and making specific recommendations as if they had been retained by a party to the proceeding. Issues of classification, allocation, plant assignment and rate design are all dealt with, even issues which all the parties had essentially regarded as concluded in earlier proceedings and had not addressed in their filings at this hearing. The substantive positions taken by the witnesses are not relevant for present purposes; some of them would affect a variety of parties to a greater or lesser extent, some positively, some negatively. To the extent that old issues are raised again, all parties will be adversely affected by the necessity to file further information requests, file further evidence, take additional hearing time and make further arguments to address these points, since no party can assume what position the Board may take in respect of any of these issues.
- (d) This is not a situation where there is a lack of expertise before the Board produced by parties to the proceeding. Hydro, the Industrial Customers, Newfoundland Power and the Consumer Advocate, as well as the Towns of Labrador City and Wabush as to issues which affect them, have all filed expert’s reports dealing with Cost of Service issues. There is no gap in the evidentiary record which needs to be filled by witnesses called by Board Counsel. The issues addressed are the same ones addressed by the other experts, either at this hearing or in previous hearings. In such circumstances, the perception that the Board itself has an agenda, separate from that of the parties, which may impact its impartiality is enhanced. Any “Board” witness raises this concern; an unnecessary “Board” witness simply amplifies the concern.

- (e) The Board is clearly bound by the rules of natural justice. Its evidence is taken “as in the Supreme Court” (Act, s. 96). There is a direct appeal to the Court of Appeal on questions of law as well as jurisdiction (Act, s. 99). Parties before the Board are entitled to a full and fair hearing by an independent tribunal, not tainted by the apprehension of bias. All persons making submissions to the Board must be regarded equally and objectively by the Board; the inherent position of trust in which the Board must hold Board Counsel disqualifies such Counsel from being an advocate for, or offering evidence in connection with, the substantive issues before the Board. These actions are incompatible with the independence and objectivity which the Board must constantly display in order to conform to the rules of natural justice.
3. In connection with this Application, the Applicant Intervenors will refer to Chapter 8 of Administrative Law: Issues and Practice authored by Richard Steinecke, a copy of which is attached.
4. The Applicant Intervenors suggest that this Application be heard by way of oral hearing at the earliest convenient time in light of the established schedule for filing of information requests, mediation and hearing commencement.

Dated at Corner Brook, Newfoundland and Labrador, this 5th day of September, 2003.

**POOLE, ALTHOUSE/
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STIRLING SCALES
Solicitors for the Applicant Intervenors**