

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 Rural Customers.

SUBMISSIONS OF THE INDUSTRIAL CUSTOMERS

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INTRODUCTION

The Industrial Customers are Abitibi-Consolidated Company of Canada, Grand Falls Division, Aur Resources Inc., Corner Brook Pulp and Paper Limited, North Atlantic Refining Limited and Voisey's Bay Nickel Limited (the "Intervenors"). Each of the Industrial Customers, with the exception of Voisey's Bay Nickel Limited, presently own and operate on the Island of Newfoundland substantial industrial operations, each of which is a major consumer of power purchased from the Applicant. Voisey's Bay Nickel Limited has joined with the other Industrial Customers as an intervenor by reason of its intended operations in the Province and its anticipated significant future power demands.

GENERAL RATE APPLICATION IN 2006

Hydro's 2006 General Rate Application was filed in August 2006. However, Hydro had previously anticipated filing its Application in early 2006, and engaged the parties, including the Industrial Customers, at that time in discussions in anticipation of the earlier filing. From the Industrial Customers' perspective, the review of issues arising from Hydro's 2006 General Rate Application commenced in early 2006, and the scope and intensity of that review starting from early 2006 reflected the Industrial Customers' understanding that they would be addressing an Application that would seek substantial increases in the rates charged to Industrial Customers.

When Hydro did file its 2006 General Rate Application in August 2006, Hydro was seeking an 8.2% increase in rates charged to the Industrial Customers. However, it was also reasonably clear, from the discussions amongst the parties which had commenced earlier in the year 2006, that all parties were willing to engage in discussions to explore the possibility of settling issues arising out of the Application, including Hydro's revenue requirement and consequent required rates to be charged to its customers.

THE SETTLEMENT PROCESS

The Settlement Agreements achieved by the parties in the course of the 2006 General Rate Application process have been ably summarized in Hydro's presentation to the Board at the outset of the January 2007 hearing, and the Industrial Customers do not feel it necessary to reiterate here in detail the terms of those Agreements, or their consequent rate impacts if they are accepted and ordered by the Board.

The Industrial Customers would note, with reference to the table "Comparison with Other Provinces" for Industrial Rates as included in Hydro's January 2007 hearing presentation, that by virtue of the Settlement Agreements and the Provincial Government's intervention in relation to the historical RSP balance, the rates applicable to Industrial Customers will have been made more competitive with those applicable in other Canadian jurisdictions. The Industrial Customers would submit that this is of benefit not just to the Industrial Customers, but to the citizens of the Province as a whole, by enhancing the prospects for stability and growth of the Province's industrial sector.

The Industrial Customers also wish to highlight the reference made in Hydro's January 2007 hearing presentation to the parties' participation in settlement process in the 2006 General Rate Application being responsive to the Board's direction, as expressed in previous proceedings, that the parties should seek to be proactive and cooperative in achieving more timely and efficient conclusions of General Rate Applications.

As noted in Hydro's January 2007 hearing presentation, the negotiated settlement process was conducted in the context of a thorough and rigorous review of the 2006 General Rate Application by all of the parties. From the perspective of the Industrial Customers such scrutiny was a necessary part of the negotiation process, so that the Industrial Customers could reasonably be

satisfied that proposed settlement terms were consistent with the principle of power being delivered to consumers, including the Industrial Customers, at the lowest possible cost consistent with reliable service.

Finally, the Industrial Customers wish to state clearly that it is their view that the settlement process model developed in this proceeding should be encouraged for use in future proceedings, and that the rates and other results consequent upon the Settlement Agreements in this Application are supportable based on the due diligence and due process exercised by the parties and the Board through the settlement process and by the January 2007 hearing.

LONG RANGE SYSTEM PLANNING/INTEGRATED RESOURCE PLANNING

One of the issues arising from the 2006 General Rate Application, not addressed by the Settlement Agreements, but in which the Industrial Customers have a continuing interest is in Hydro's long term system planning, and in the larger context of Integrated Resource Planning (IRP).

The Industrial Customers wish to simply refer the Board to the Pre-Filed Testimony of Patrick Bowman and Andrew McLaren, on behalf of the Industrial Customers,¹ where the case for more coordinated and transparent long range system planning by Hydro is discussed. The Industrial Customers believe these issues are best addressed in the context of an appropriate Integrated Resource Planning model.

¹ Pre-Filed Testimony of Patrick Bowman and Andrew McLaren dated October 23, 2006, pp. 39-42

The Industrial Customers note that the opening submissions of the parties at the January 2007 hearing, and the evidence at that hearing of Mr. Jim Haynes, Hydro's Vice-President, Regulated Operations,² reflected a consensus that any party should have leave to bring, after a reasonable period of time subsequent to the General Rate Application hearing, an application for the Board's directions on how to proceed with addressing the Integrated Resource Planning (IRP) issue. What would be a "reasonable period" of time within which to bring such an application was predicated on the expectation that the Provincial Energy Plan would be released in the very near future, and that therefore it would be of some advantage to consider the Energy Plan before proceeding with the IRP process.

While the input of a Provincial Energy Plan may very well be of benefit to the IRP process, it is not a necessary precondition to taking reasonable steps towards advancing that process. The Industrial Customers believe that the larger concern should be that meaningful steps towards long range system planning and an IRP model be taken in 2007. Therefore, the Industrial Customers request that the Board order in this Application that any party shall have leave to bring an application for directions of the Board, on how to proceed with the IRP process, sixty (60) days or later after the public release of the Provincial Energy Plan if released before the end of the second quarter of 2007, or at any time after it is apparent that the Plan will not be publicly released before the end of the second quarter of 2007.

INDUSTRIAL CUSTOMERS' COSTS OF HEARING

Section 90 of the *Public Utilities Act* provides as follows:

² Transcript of Hearing Testimony of Mr. Jim Haynes, Vice-President, Regulated Operations, NL Hydro, pp. 113-

“(1) The costs of or incidental to a proceeding before the Board shall be in the discretion of the Board and may be fixed at a definite amount or may be taxed and the Board may order by whom they are to be taxed, to whom they are to be allowed, and the Board may prescribe a scale under which costs shall be taxed.”³

The Industrial Customers submit with respect that this Board has the jurisdiction and ought to exercise its discretion to award the Industrial Customers their costs of participation in the General Rate Application, including their costs of participation in the settlement process as it developed through 2006. The Industrial Customers submit that their participation in the settlement process contributed to a conclusion of the General Rate Application which was less costly to all parties, and which was consistent with the Board’s direction that the parties seek opportunities to achieve a more timely and efficient Rate Application process.

It should be recognized that the Industrial Customers already face a disincentive to full participation in the Application process, due to their prospects of cost recovery being considerably less certain than that of other parties.

As a regulated utility, Newfoundland Power is entitled to include in its rate the costs of regulatory hearings.

The Consumer Advocate, who has been appointed to represent consumers in the Province, is entitled by virtue of order-in-council to be paid his taxed hearing costs.

Hydro will also recover its hearing costs through its rates.

³ Public Utilities Act, s. 90(1).

While it might be said that the Industrial Customers can simply pass on their regulatory costs by pricing their products accordingly, the reality is that in the competitive market place imposing regulatory costs directly onto the customers of the Industrial Customers creates an incentive for those customers to seek lower cost sources for these products.

The leading case which is supportive of the Board's broad jurisdiction and discretion with respect to costs is the Supreme Court of Canada's 1986 decision in *Bell Canada v Consumer's Association of Canada et al.*⁴ That case established the principle that costs will be available to interveners who have participated in a responsible way and contributed to a tribunal's better understanding of the issues before it.

The Board's broad jurisdiction and discretion with respect to the awarding of costs of parties, including interveners, in Board hearings is also supported by the decision of the Supreme Court of Newfoundland and Labrador, Court of Appeal in *Newfoundland and Labrador Hydro v Newfoundland and Labrador Federation of Municipalities*⁵. In that case, Hydro challenged the Board's award of costs to the Newfoundland and Labrador Federation of Municipalities partly on the ground that the costs amount was excessive and partly on the ground that the costs should have been taxed on a party and party basis. The Court of Appeal ultimately found that the Board had the jurisdiction and discretion to make the costs award in question. Subsequently, the Newfoundland and Labrador Federation of Municipalities was regularly awarded its costs of participating in Hydro's rate referrals.

⁴ *Bell Canada v Consumers Association of Canada et al* [1986] 1 S.C.R. 190 (S.C.C.). [Tab A]

⁵ *Newfoundland and Labrador Hydro v Newfoundland and Labrador Federation of Municipalities* (1979) 24 Nfld. & P.E.I.R. 317 (Nfld. Sup. Ct., Ct. of Appeal). [Tab B]

The Board has not issued guidelines setting forth the parameters within which it will exercise its discretion with respect to costs. However, in its Order P.U. No. 14 (2004) in conclusion of the 2003 Hydro General Rate Application, the Board recognized and acted upon an approach to costs consistent with that established in *Bell Canada* to make an award costs to the Industrial Customers in that proceeding.⁶

The Industrial Customers constitute a distinct group of Hydro's customers with a discrete but significant set of issues meriting the Board's consideration. The Industrial Customers submit with respect that they have participated in the Application process, to which the settlement process was integral, in a responsible and meaningful way, and contributed to the Board's understanding of the issues in contention. The Industrial Customers submit that they should accordingly be entitled to receive their costs of that participation. Given the means of cost recovery available to all other major participants in the process, the Industrial Customers submit that a refusal to grant their costs of participation would be unfair. In the wider context, the Industrial Customers would respectfully submit that the denial of costs associated with settlement processes could act as a disincentive to parties' investment of the time, costs and other resources necessary to full and meaningful participation in future alternate dispute resolution.

CONCLUSION

The Industrial Customers submit that the Board should issue an order making final the interim rates ordered in P.U. No. 41 (2006) and P.U. No. 3 (2007), thus implementing the Settlement Agreements which the parties have filed with the Board. The Board can be confident that issues not finally resolved by these Agreements will be addressed in the review processes to which the

⁶ Order No. P.U. 14 (2004) 2003 Newfoundland and Labrador Hydro General Rate Application, pp. 153-154. [Tab C]

parties have agreed. All parties are committed to pursue these processes and keep the Board advised as to progress with a view to requesting the Board at a later date to make orders implementing future understandings reached through these processes. While there can be no guarantee of total agreement on the various issues, the history to date is cause for optimism that additional issues can be resolved without the necessity of contested proceedings before the Board. This is consistent with the basic philosophy of the Industrial Customers relative to all such regulatory proceedings that the most economical path to a fair result should be taken in all cases.

The Industrial Customers also request that they be kept on a level playing field with the other participants in the hearing by the award of their full out of pocket costs of participating in the proceedings. The Industrial Customers have never requested reimbursement of the costs of the time and travel expenses of the employees of the various customers who spend time participating in negotiations or attending at hearings, although all such costs for all other parties to the current hearing will be recovered in rates. Fairness demands that the Board make an appropriate cost award and, so far as this issue is concerned, there is no distinction to be made between costs of the settlement process and costs of a contested hearing.

Industrial Customers stand committed to the principle that they should pay their fair share of the cost of electricity produced in the Province, but no more than their fair share. They have signed on to the Settlement Agreements as a fair compromise consistent with that principle. We ask the Board to respect and approve the process which has led us to these Agreements by issuing the orders requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON BEHALF OF THE INDUSTRIAL CUSTOMERS.

DATED at St. John's, this 9th day of February, 2007.

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