

DELIVERED BY HAND

May 4, 2018

Board of Commissioners  
of Public Utilities  
P.O. Box 21040  
120 Torbay Road  
St. John's, NL A1A 5B2

Attention: G. Cheryl Blundon  
Director of Corporate Services  
and Board Secretary

Ladies and Gentlemen:

**Re: Newfoundland and Labrador Hydro (“Hydro”) – 2017 General Rate Application (the “2017 GRA”) – Consumer Advocate Application requesting Clarification of the Jurisdiction of the Board (the “Motion”)**

#### **A. Background**

Hydro’s 2017 GRA proposes that rates for Newfoundland Power’s customers should be increased by over 13% by January 1, 2019.<sup>1</sup>

Hydro’s 2017 GRA proposes that rates for the 2018 and 2019 test years (the “Test Years”) reflect the costs of the continued supply of power to the Island Interconnected System from existing island generation, despite the fact that Hydro anticipates that less expensive energy will be available during the Test Years via off-island power purchases (the “Deferral Account Scenario”).<sup>2</sup>

The off-island power purchases which Hydro anticipates being available during the Test Years will primarily be derived from the recapture energy which Hydro has the ability to purchase from CF(L)Co. This electricity is expected to be delivered to the Island via the Labrador Transmission Assets (the “LTA”) and the Labrador-Island Link transmission assets (“LiL”). The LTA and LiL are both components of the Muskrat Falls Project and are anticipated to be available to deliver off-island purchased energy prior to the full commissioning of the Muskrat Falls Project.<sup>3</sup>

Hydro’s 2017 GRA includes a proposal to establish an off-island purchases deferral account (the “OIPDA”) to include any difference between the actual costs attributable to off-island power purchases and the costs that would have been incurred if the same amount of energy had been

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<sup>1</sup> Hydro’s specifically proposes that customer rates be increased by 6.6% effective January 1, 2018 and by a further 6.4% effective, January 1, 2019 for a cumulative increase of 13.4% ( $1.066 \times 1.064 = 1.134$ ). This is in addition to a forecast July 1, 2018 customer increase associated with Hydro’s Rate Stabilization Plan (“RSP”).

<sup>2</sup> Hydro Evidence, July 28, 2017, Page 1.9.

<sup>3</sup> Hydro Evidence, July 28, 2018, Page 1.9.

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supplied from the Holyrood Thermal Generating Station based on the approved Test Years' unit cost of No. 6 fuel. The difference is net of operating and maintenance costs for the LTA and LiL during the Test Years (the "LiL and LTA O&M Costs") and is to be set aside in the OIPDA to mitigate the rate impacts of Muskrat Falls.<sup>4</sup>

In the Motion, the Consumer Advocate claims that Hydro's 2017 GRA includes "*a request for the recovery of ... costs arising from components of the Muskrat Falls Project, including the LTA and the LiL costs*" and claims that the Board's jurisdiction to allow the recovery of such costs has been "purged" by the combined effect of two Orders in Council, being OC2013-342 and OC2013-343 (collectively, the "Orders in Council").

The Consumer Advocate further claims that these costs were imprudently incurred and that the OIPDA offends regulatory standards as its approval will result in ratepayers paying more than the costs of service.

The Motion requests that the Board issue an order "*declaring whether*" the Orders in Council "*restrict its jurisdiction to allow Hydro's Application to recover any costs relating to components of the Muskrat Falls Project or not.*"<sup>5</sup>

## **B. Statutory Framework and Legal Principles**

### **Jurisdiction**

The Motion is primarily framed as a question of true jurisdiction or *vires*. The nature of such an inquiry was discussed by the Supreme Court of Canada as follows:

*"[59]... 'Jurisdiction' is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be ultra vires or to constitute a wrongful decline of jurisdiction."*<sup>6</sup>

A question of true jurisdiction is separate and distinct from a question of how that jurisdiction should be exercised. This distinction was discussed by the Newfoundland and Labrador Court of Appeal in the Stated Case as follows:

*"[143] In answering the foregoing questions, it is worth emphasizing that the answers are given in terms of the jurisdiction of the Board. The fact that the Board*

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<sup>4</sup> Hydro Evidence, July 28, 2018, Page 1.1.

<sup>5</sup> Motion, Paragraph 12.

<sup>6</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9.

*may have jurisdiction, in the sense of legal power, to do something does not mean that, in a particular case, the power ought to be exercised.*

...

*[144] The question of whether the Board should in fact exercise powers within its sphere of jurisdiction and the question of the manner in which those powers should be exercised raise very different considerations. It must always be remembered that, as has been emphasized throughout this opinion, the Board is charged with balancing the competing interests of the utility and the consumers of the service it provides. Neither set of interests can be emphasized in complete disregard of the interests of the other. Thus, in choosing to exercise a particular power within the Board's jurisdiction, the Board must always be mindful of whether, in so acting, it will be furthering the objectives and policies of the legislation and doing so in a manner that amounts to a reasonable balance between the competing interests involved.”<sup>7</sup>*

As a creature of statute, the Board’s jurisdiction to deal with matters before it must be found, either expressly or impliedly, within the *Electrical Power Control Act, 1994* (the “EPCA”) and/or the *Public Utilities Act* (the “PUA”).

The PUA confers on the Board its general supervisory powers including the powers to establish public policy and set rates. The EPCA confers on the Board the obligation to implement the power policy of the province when setting rates.<sup>8</sup> In setting rates, the Board is to apply tests which are consistent with generally accepted sound public utility practice. While generally accepted regulatory principles dictate that rates be established on a prospective basis, the Board does have the power to approve deferral accounts as a way of ensuring that rates are reasonable. Deferral accounts permit a utility to recover, or rebate, amounts in a future period where there is a difference between actual and forecast costs.

The Board’s powers under the PUA and the EPCA may be circumscribed by the Lieutenant-Governor in Council who may exempt a public utility from the application of all or part of either the PUA or the EPCA.<sup>9</sup> Moreover, in respect of the Muskrat Falls Project, s.5.1(2) of the EPCA provides that the Lieutenant-Governor in Council may direct the Board “*to implement policies, procedures and directives*” in respect of, *inter alia*, “*the costs, expenses and allowances that are to be included in the rates, tolls and charges approved for a public utility.*”

Orders in Council should be interpreted in accordance with the modern principle of statutory interpretation. This requires that the ordinary and grammatical sense of the words be read in the

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<sup>7</sup> *Reference Re Section 101 of the Public Utilities Act* (Nfld.) (1998), 164 Nfld. & P.E.I.R. 60 (Nfld.C.A.) (“Stated Case”), paragraphs 143 & 144.

<sup>8</sup> *Public Utilities Act*, RSNL 1990, c.P-47 s. 16; *Electrical Power Control Act, 1994*, SNL 1994, c.E-5.1 ss.3 & 4.

<sup>9</sup> *Public Utilities Act*, RSNL 1990, c.P-47 s. 4.1; *Electrical Power Control Act, 1994*, SNL 1994, c.E-5.1 s. 5.2.

entire context and in the grammatical and ordinary sense harmoniously with the scheme and object(s) of the Act under which it was passed.<sup>10</sup> Further, as with all legislation in this province, Orders in Council should be interpreted in accordance with s.16 of the *Interpretation Act*,<sup>11</sup> which reads:

*16. Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation, or provision according to its true meaning.*

### **The Orders-in-Council**

OC2013-342 (the “Muskrat Falls Exemption Order”) was issued and under s.4.1 of the PUA and s. 5.2 of the EPCA. It purports to exempt Hydro from the application of the PUA and the EPCA in respect of certain expenditures, payments, obligations and activities relating to the Muskrat Falls Project (the “Muskrat Falls Project Costs”).<sup>12</sup>

OC2013-343 was issued under s. 5.1 of the EPCA and provides direction to the Board in relation to the recovery of Muskrat Falls Project Costs in Hydro’s rates. In particular, the Board is directed to adopt a policy for inclusion of the Muskrat Falls Project Costs in “*Hydro’s cost of service calculation in any rate application and rate setting process, so that those costs, expenses or allowances shall be recovered in full by Newfoundland and Labrador Hydro in Island interconnected rates charged to the appropriate classes of rate payers.*” Further to OC2013-342, these costs are to be included “*without disallowance, reduction or alteration*”.<sup>13</sup>

The directions in OC2013-343 are subject to the following caveat:

- 3) *Notwithstanding sections 1 and 2, no amounts paid by Newfoundland and Labrador Hydro described in those sections shall be included as costs, expenses or allowances in Newfoundland and Labrador Hydro’s cost of service calculation or in any rate application or rate setting process, and no such costs, expenses or allowances shall be recovered by Newfoundland and Labrador Hydro in rates:*
  - a) *where such amounts are directly attributable to the marketing or sale of electrical power and energy by Newfoundland and Labrador Hydro to persons located outside of the province on behalf of and for the benefit of Muskrat Falls Corporation and not Newfoundland and Labrador Hydro; and*

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<sup>10</sup> *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 CarswellNS 888 (S.C.C.), Paragraph 36.

<sup>11</sup> RSNL 1990, c.I-19.

<sup>12</sup> OC2013-342, filed November 29, 2013.

<sup>13</sup> OC2013-343, filed November 29, 2013.

- b) *in any event, in respect of each of Muskrat Falls, the LTA or the LiL, until such time as the project is commissioned or nearing commissioning and Newfoundland and Labrador Hydro is receiving services from such project.*<sup>14</sup>

## C. Hydro's Submission

### C.1 General

Hydro sets out a contextual framework which it submits is relevant to the interpretation of the Orders in Council. This framework includes the concurrent execution of the following commercial agreements; (i) the Federal Loan Guarantee; (ii) the Muskrat Falls Power Purchase Agreement (the "MF PPA"), and (iii) the Transmission Funding Agreement (the "TFA").<sup>15</sup>

Hydro takes the position that the "scheme, object and intent" behind the issuance of the Orders in Council was "*to achieve financial close of the Muskrat Falls Project, and specifically to ensure lenders that the Muskrat Falls Project costs will be recovered in rates, and that Hydro's payments in respect of such costs will be accepted by the Board without adjustment.*"<sup>16</sup>

Hydro submits that the Orders in Council raise two principal issues concerning the OIPDA<sup>17</sup>:

- (i) Whether the costs of the Deferral Account Scenario are exempt from the requirement of Board Approval pursuant to OC2013-342; and
- (ii) If so, whether the recovery of the costs of the Deferral Account Scenario in rates as directed by OC2013-343 has been triggered.

### C.2 Are the Costs Exempt?

Hydro submits that the LiL and LTA O&M costs are "*costs exempted from the Board's review and approval pursuant to OC2013-342.*" Further, these payments "*are prima facie required to be included as costs in Hydro's cost of service calculation, for recovery in rates, subject to the timing set out in section 3 of OC2013-343.*"<sup>18</sup>

In the alternative, Hydro submits that the Board's jurisdiction to approve the Deferral Account Scenario would be unencumbered by the Orders-in-Council in the event these payments are not payments to which OC2013-342 applies.

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<sup>14</sup> OC2013-343, s.3.

<sup>15</sup> Hydro Submission, Page 16, lines 23-28.

<sup>16</sup> Hydro Submission, Page 16, lines 28-33.

<sup>17</sup> Hydro Submission, Page 16, Line 41- 6.

<sup>18</sup> Hydro Submission, Page 23, Lines 35-40.

*C.2 Has the recovery scheme been triggered?*

Hydro submits that the OIPDA, as proposed, does not trigger the recovery scheme as set out in s.3 of OC2013-343.

Hydro submits that the MF PPA and TFA contemplate that Hydro's obligation to pay Muskrat Falls Costs, including the LiL and LTA O&M Costs, will not arise until the full Muskrat Falls Project is "*commissioned or near commissioning.*" This will not occur until the First Power Date under the MF PPA. Hydro submits, that OIPDA will not offend OC2013-343 as "*Hydro is not including Muskrat Falls Project costs in its cost of service calculation, nor seeking to recover payments in respect of such costs in rates at the present time.*"

Hydro submits that the 2017 GRA proposes that the LiL and LTA O&M Costs will be "*paid for from savings from off-island purchases*". Further, Hydro submits that the approval of the OIPDA would result in such costs being "*treated as deferred regulatory expenses*" which will not be recovered in rates from customers "*until after commissioning of the Muskrat Falls Project*".<sup>19</sup>

**D. Newfoundland Power's Submissions**

*D.1 General*

A plain and general reading of the Orders in Council suggests that they were issued for the purposes of (i) exempting Muskrat Falls Project Costs from Board review; and (ii) directing the Board on policies to be adopted for recovery of Muskrat Falls Project Costs. It may not be possible for the Board to make findings regarding the context in which the Orders in Council were issued without additional evidence being examined in the hearing.

*D.2 Are the Costs Exempt?*

The costs and expenditures of Hydro would normally be reviewable by the Board pursuant to its general rate setting powers. The Muskrat Falls Exemption Order purports to restrict the Board's power to make such inquiries. This raises a question of true jurisdiction. While the Board's powers to make such inquiries is not a primary focus for the Motion, the exempt status of the LiL and LTA O&M Costs is relevant to the second issue raised in Hydro's submissions.

Newfoundland Power submits that it is unclear at this stage whether the LiL and LTA O&M Costs are wholly exempt from review. The evidence on the record is unclear with respect to the entity or entities which would receive payments in respect of these costs. It is possible, therefore, that a full review of the evidence in the public hearing could lead the Board to conclude that some of the costs are not captured by the Muskrat Falls Exemption Order.

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<sup>19</sup> Hydro Submission, Page 22, Lines19-29.



In the event that all, or part, of the LiL and LTA O&M Costs are not exempt from review, it could be open to the Board to review any agreements which Hydro enters into regarding the use of the LiL and LTA assets to ensure they comply with least cost principles.

*D.3 Has the recovery scheme been triggered?*

The primary issue for the Motion is whether or not OC2013-343 restricts the Board's ability to allow Hydro to recover Muskrat Falls Project Costs. Assuming for the purposes of this question that the LiL and LTA O&M Costs are exempt from review by the Board, the question of recovery largely turns on the Board's exercise of its jurisdiction in accordance with the EPCA, the PUA and the directions provided in the OC2013-343. This is not a question of true jurisdiction. Issues for the Board to consider, in respect of the OIPDA in particular, would include:

1. Whether the LiL and LTA O&M Costs are included in Hydro's cost of service calculation or Hydro's 2017 GRA by virtue of their being offset against savings in the OIPDA.
2. Whether the proposal to offset the LiL and LTA O&M Costs against savings in the OIPDA would constitute recovery by Hydro in rates.
3. Whether the "commissioning or nearing commissioning" requirement referenced in s.3(b) of OC2013-343 is meant to refer to the Muskrat Falls Project in its entirety, as defined in s.2.1 of the *Energy Corporation Act*, or to the Muskrat Falls plant, the LiL and the LTA as individual projects.
4. Whether an energy, capacity, or other threshold applies to the determination of when Hydro is considered to be "receiving service" within the meaning of s.3(b) of OC2013-343.

In Newfoundland Power's submission, it is difficult to accept Hydro's logic that the rates proposed under Hydro's Deferral Account Scenario do not include the LiL and LTA O&M Costs. The OIPDA, as proposed, includes assumptions for off-island purchases, as well as for LiL and LTA O&M Costs. Whether recovery of these costs is deferred to a later date, the costs themselves appear to be provided for in amounts proposed to be collected from customers in the Test Years.

On the question of timing, Hydro's submission that the intent of OC2013-343 was to prohibit recovery of Muskrat Falls Costs until the full Muskrat Falls Project achieved "commissioning or near commissioning" appears to be based on a narrow interpretation of the Order in Council. While Hydro references various concurrent commercial agreements as being informative of the contextual framework behind this intent, the agreements are not on the record in this proceeding. In any event, by applying a broad, liberal and purposive approach to the interpretation of this Order, the Board could come to a conclusion that is more in line with Hydro's alternative submission.

**Newfoundland Power Inc.**

Ultimately, it is Newfoundland Power's view that the Board's consideration of whether or not Hydro's OIPDA proposal triggers the recovery scheme may be more informed by evidence adduced during the remainder of the public hearing of Hydro's 2017 GRA. The hearing is still at an early stage and it is conceivable that additional evidence relevant to the Board's analysis of the Motion may be forthcoming.

#### **E. Concluding**

In Newfoundland Power's submission, deferral accounts are acceptable regulatory tools which the Board has the power to approve. Deferral accounts are generally utilized for the purposes of collecting, or refunding, differences between actual and forecast costs. The OIPDA is not framed in this fashion, and may violate the cost of service standard.<sup>20</sup> That said, the question of whether the Board should approve such a deferral account is not a question of *vires*. Rather, it is a question of whether, and how, the Board should exercise its jurisdiction. Such a question should be considered by the Board on the basis of a complete evidentiary record which, at this preliminary stage of the proceeding, is not available.

It is Newfoundland Power's position that the Motion seeks a review of the Board's exercise of jurisdiction as conferred upon it by the PUA, EPCA and the Orders in Council. For the foregoing reasons, Newfoundland Power submits that a declaratory Order on the Consumer Advocate's question is premature.

We trust this is in order.

Yours very truly,



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<sup>20</sup> The cost of service standard includes the principle that regulated utilities are permitted to charge rates that allow recovery of costs that, among other things, are prudent, assigned based on causality, and incurred and recovered during the same period. (See Order No. P.U. 32 (2007), Appendix A, page 7 of 11.)