

# Office of the Consumer Advocate

PO Box 23135  
Terrace on the Square  
St. John's, NL Canada  
A1B 4J9

Tel: 709-724-3800  
Fax: 709-754-3800

April 5, 2018

Board of Commissions of Public Utilities  
120 Torbay Road, P.O. Box 2140  
St. John's, NL A1A 5B2

**Attention: G. Cheryl Blundon, Director of  
Corporate Services / Board Secretary**

Dear Ms. Blundon:

**RE: Newfoundland and Labrador Hydro ("Hydro")  
2017 General Rate Application (the "2017 GRA")  
- Motion/Application re Board Jurisdiction ("Application")**

Further to the above-captioned, enclosed please find the original and thirteen (13) copies of an Application by the Consumer Advocate which we forward for filing with the Board.

Yours truly,



**Stephen Fitzgerald  
Counsel for the Consumer Advocate**

Encl.

/bb

cc **Newfoundland & Labrador Hydro**  
Geoff Young ([gyoung@nlh.nl.ca](mailto:gyoung@nlh.nl.ca))  
Alex Templeton ([alex.templeton@mcinnescooper.com](mailto:alex.templeton@mcinnescooper.com))  
NLH Regulatory ([NLHRegulatory@nlh.nl.ca](mailto:NLHRegulatory@nlh.nl.ca))  
**Newfoundland Power Inc.**  
Gerard Hayes ([ghayes@newfoundlandpower.com](mailto:ghayes@newfoundlandpower.com))  
Liam O'Brien ([lobrien@curtisdawe.nf.ca](mailto:lobrien@curtisdawe.nf.ca))  
NP Regulatory ([regulatory@newfoundlandpower.com](mailto:regulatory@newfoundlandpower.com))  
**Board of Commissioners of Public Utilities**  
Cheryl Blundon ([cblundon@pub.nl.ca](mailto:cblundon@pub.nl.ca))  
Jacqui Glynn ([jglynn@pub.nl.ca](mailto:jglynn@pub.nl.ca))  
Maureen Greene ([mgreene@pub.nl.ca](mailto:mgreene@pub.nl.ca))  
PUB Official Email ([ito@pub.nl.ca](mailto:ito@pub.nl.ca))

**Island Industrial Customers Group**  
Paul Coxworthy ([pcoxworthy@stewartmckelvey.com](mailto:pcoxworthy@stewartmckelvey.com))  
Dean Porter ([dporter@poolealthouse.ca](mailto:dporter@poolealthouse.ca))  
Denis Fleming ([dfleming@coxandpalmer.com](mailto:dfleming@coxandpalmer.com))  
**Iron Ore Company of Canada**  
Van Alexopoulos ([Van.Alexopoulos@ironore.ca](mailto:Van.Alexopoulos@ironore.ca))  
Benoit Pepin ([benoit.pepin@riotinto.com](mailto:benoit.pepin@riotinto.com))  
**Communities of Sheshatshiu, Happy Valley-Goose Bay  
Wabush and Labrador City**  
Senwung Luk ([sluk@oktlaw.com](mailto:sluk@oktlaw.com))

**IN THE MATTER OF**

the *Electrical Power Control Act, 1994* SNL 1994, Chapter E-5.1 (the “EPCA”) and the *Public Utilities Act*, RSNL 1990, Chapter P-47 (the “Act”), as amended; and

**IN THE MATTER OF** a General Rate Application by Newfoundland and Labrador Hydro to establish customer electricity rates for 2018 and 2019.

**To: The Board of Commissioners of Public Utilities**

**The Application of the Consumer Advocate requesting clarification of the jurisdiction of the Board of Commissioners of Public Utilities to determine certain aspects of the foregoing General Rate Application.**

1. The Board of Commissioners of Public Utilities (the “Board”) is an independent administrative tribunal constituted under the *Public Utilities Act*, RSNL 1990, c. P-47 (the “Act”). The Board is responsible for, among other things, the regulation of and general supervision of public utilities in the Province and approves utility rates and capital spending. In carrying out its responsibilities the Board is required to implement the power policy set out in the *Electrical Power Control Act, 1994* SNL 1994, c. E-5.1 (the “EPCA”).

The Board does not regulate Nalcor Energy (“Nalcor”) which is exempt from the provisions of the *Public Utilities Act*, and the authority of the Board under s. 17(2) of the *Energy Corporation Act*, SNL 2007, c. E-11.01. Newfoundland and Labrador Hydro (“Hydro”) is a subsidiary of Nalcor and, as a public utility, is regulated by the Board under the Public Utilities Act.

2. Section 4.1 of the Act may exempt a public utility from the Act's application where the public utility is engaged in activities as a matter of public convenience or general policy and in the best interest of the province.
3. By Order-in-Council OC2013-342, the Muskrat Falls Project Exemption Order was declared, exempting the Board from exercising its jurisdiction over Hydro in respect of any activity and any expenditures, payments or compensation, *inter alia*, related to the constructions and operation of Muskrat Falls and the transmission facilities of the Muskrat Falls Project (the "LTA"). This Exemption Order also applied to related Hydro companies enterprised in the Muskrat Falls Project.

(See: Schedule "A" annexed hereto)

4. Further, by OC2013-343 it was declared by Order-in-Council as follows:
  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 allowance 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 the province on behalf of and for the benefit of Muskrat Falls Corporation and not Newfoundland and Labrador Hydro; and,*
    - b) *In any event, in respect of each of Muskrat Falls, the LTA or the LiL, until such time as the projected is commissioned or nearing commissioning and Newfoundland and Labrador Hydro is receiving services from such project.*

(See: Schedule "B" annexed hereto)

5. Hydro's current General Rate Application before the Public Utilities Board includes, *inter alia*, a request for recovery of its costs of service in relation to various undertakings and specifically those costs arising from components of the Muskrat Falls Project, including the LTA and the LiL costs.
6. General rate-making principles allow a utility to recover costs insofar as they are prudent. It is our position that the costs incurred pertaining to the Muskrat Falls Project were imprudently incurred. Hydro has not provided evidence to demonstrate otherwise and has not provided justification enabling the Board to deal with costs and rates which are not under the Board's jurisdiction.
7. In J. T. Browne Consulting's Expert Report dated December 4, 2017, the following statement was made regarding the cost of service standard:

***Cost of Service Standard***

*At the heart of rate regulation is the Cost of Service Standard, sometimes referred to as the Revenue Requirement Standard. Under this standard, a regulated entity is permitted to set rates that allow it the opportunity to recover its costs for regulated operations, including a fair rate of return on its investment devoted to regulated operations – no more no less.*

This standard was recognized in a recent decision of the Supreme Court of Canada:

*In order to ensure that the balance between utilities and consumers' interests is struck, just and reasonable rates must be those that ensure customers are paying what the Board expects it to cost to efficiently provide the services they receive, taking account of both operating and capital cost. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and utilities may be assured of an opportunity to earn a fair return for providing these services.*

(Ontario (Energy Board) v. Ontario Power Generation Inc.  
2015; SCC 44; para. 20)

8. The above principle is clear. However, the effect of the aforementioned Orders in Council and the Muskrat Falls Exemption Order purged the Board of its legislated jurisdiction relating to these matters. Hydro's Application to recover any costs relating to components of the Muskrat Falls Project therefore has no jurisdictional basis before the Board.
9. The Orders in Council and the Muskrat Falls Exemption Order create a circumstance which prohibits recovery of costs relating to the Muskrat Falls Project pending certain conditions. These have not been met.
10. Furthermore, Hydro's proposed Off-Island Purchase Deferral Account clearly offends the regulatory standards, since the justification behind the Deferral Account unequivocally states that the proposed current rates that consumers of electricity in the province will be expected to pay will not reflect payment for "what is necessary for the service they receive" but will significantly exceed those rates.
11. Finally, the Nalcor Energy and Emera Inc. Newfoundland and Labrador Development Agreement at 5.12 states:

5.12 PUB Regulation

Nalcor shall use commercially reasonable efforts to cause the Partnership to be a public utility regulated by the PUB or other Authorized Authority allowed to recover costs associated with the LiL on a cost of service basis.


Hydro has not provided evidence concerning these requirements.

(See: Newfoundland and Labrador Development Agreement dated July 31, 2014, between Nalcor Energy and Emera Inc. et. al.)

12. Based on the foregoing, the Consumer Advocate seeks an Order of the Board declaring whether the aforementioned 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.

**DATED** at St. John's, Newfoundland and Labrador, this 5<sup>th</sup> day of April, 2018.

Per:



**Dennis Browne, Q.C.**

**Consumer Advocate**

Terrace on the Square, Level 2, P.O. Box 23135  
St. John's, Newfoundland & Labrador A1B 4J9

Telephone: (709) 724-3800

Telecopier: (709) 754-3800

**SCHEDULE "A"****Orders in Council Database**

---

**Order Details****Order Number:**

OC2013-342

**Order Date:**

2013-11-29

**Department:**

Natural Resources

**Authority:**

Electrical Power Control Act, 1994; Public Utilities Act

**Order Text:**

Under the authority of section 5.2 of the Electrical Power Control Act, 1994 and section 4.1 of the Public Utilities Act, the Lieutenant Governor in Council is pleased to make the Muskrat Falls Project Exemption Order, a copy of which is on file with the Clerk of the Executive Council.

[Back to Search Results](#)

**Disclaimer**

The Orders in Council available through this website should not be considered official versions. They are provided for information purposes only. To obtain an official version of an Order in Council, please contact the Director of Information Management, Cabinet Secretariat, at (709) 729-6628.

---

Last Updated: April 5, 2018

This page and all contents are copyright, Government of Newfoundland and Labrador, all rights reserved.

SCHEDULE "B"

## Orders in Council Database

---

### Order Details

**Order Number:**

OC2013-343

**Order Date:**

2013-11-29

**Department:**

Natural Resources

**Authority:**

Electrical Power Control Act, 1994

**Order Text:**

Under the authority of section 5.1 of the Electrical Power Control Act, 1994, the Lieutenant Governor in Council is pleased to direct the Board of Commissioners of Public Utilities to adopt a policy, subject to section 3, that:

1) Any expenditures, payments or compensation paid directly or indirectly by Newfoundland and Labrador Hydro, under an agreement or arrangement to which the Muskrat Falls Project Exemption Order applies, to:

- a) a LiLParty,
- b) a system operator in respect of a tariff for transmission services or ancillary services in respect of the LiL, that otherwise would have been made to a LiLParty, or
- c) Muskrat Falls Corporation, in respect of:
  - i) electrical power and energy forecasted by Muskrat Falls Corporation and Newfoundland and Labrador Hydro to be delivered to, consumed by, or stored by or on behalf of Newfoundland and Labrador Hydro for use within the province, whether or not such electrical power and energy is actually delivered, consumed, or stored within the province,
  - ii) greenhouse gas credits, transmission services and ancillary services, and
  - iii) obligations of Newfoundland and Labrador Hydro in addition to those in paragraphs (i) and (ii) to ensure the ability of Muskrat Falls Corporation and Labrador Transmission Corporation to meet their respective obligations under financing arrangements related to the construction and operation of Muskrat Falls and the LTAshall be included as costs, expenses or allowances, without disallowance, reduction or alteration of those amounts, in Newfoundland and Labrador 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 ratepayers;

2) The costs, expenses or allowances of Newfoundland and Labrador Hydro described above, and the rates for Newfoundland and Labrador Hydro established by the Board of Commissioners pursuant to the direction under section 1, shall not be subject to subsequent review, and shall persist without disallowance, reduction or alteration of those costs, expenses or allowances or rates, throughout any processes for any public utility, including Newfoundland Power Inc., or any other process under the Electrical Power Control Act, 1994 or the Public Utilities Act;

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
- 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.



4) In this Order in Council, terms shall have the same meaning ascribed to them in the Muskrat Falls Project Exemption Order.

[Back to Search Results](#)

## **Disclaimer**

The Orders in Council available through this website should not be considered official versions. They are provided for information purposes only. To obtain an official version of an Order in Council, please contact the Director of Information Management, Cabinet Secretariat, at (709) 729-6628.

---

Last Updated: April 5, 2018

This page and all contents are copyright, Government of Newfoundland and Labrador, all rights reserved.

**IN THE MATTER OF**

the *Electrical Power Control Act, 1994*  
SNL 1994, Chapter E-5.1 (the “*EPCA*”)  
and the *Public Utilities Act, RSNL 1990*,  
Chapter P-47 (the “*Act*”), as amended; and

**IN THE MATTER OF** a General Rate  
Application by Newfoundland and Labrador  
Hydro to establish customer electricity rates  
for 2018 and 2019.

**AFFIDAVIT**

I, Dennis Browne, Q.C., of St. John’s, in the Province of Newfoundland and Labrador,  
make oath and say as follows:


1. That I am the Consumer Advocate, the Applicant named in the attached Application.
2. I have read and understand the foregoing Application.
3. I have personal knowledge of the facts contained therein, except where otherwise indicated, and they are true to the best of my knowledge, information and belief.

**SWORN TO** at St. John’s, in the  
Province of Newfoundland and  
Labrador, this 5<sup>th</sup> day of April,  
2018, before me:



---

STEPHEN FITZGERALD  
Barrister



---

DENNIS BROWNE, Q.C.