

Office of the Consumer Advocate

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September 22, 2021

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 Power and NL Hydro Applications for Approvals
of Electrification Programs and Expenditures - 2021 Supplemental
Capital Expenditures for Utility-Owned EV Charge Infrastructure**

1. BACKGROUND

On December 16, 2020 Newfoundland Power (“NP”) submitted to the Public Utilities Board (the “Board”) its *2021 Electrification, Conservation and Demand Management Application* (the “NP Application”). On June 16, 2021 Newfoundland and Labrador Hydro (“Hydro”) filed an *Application for Approvals to Execute Programming Identified in the Electrification, Conservation and Demand Management Plan 2021-2025* (the “Hydro Application”). The NP and Hydro Applications relate to a jointly developed electrification, conservation and demand management plan (the “ECDM plan”) in the period 2021-2025.

The NP and Hydro Applications have proceeded through the request for information (“RFI”) process. In an August 30, 2021 letter the Board advised that it had determined that the NP and Hydro Applications should be joined and proceed as one matter to improve efficiency and consistency “*in terms of required regulatory approvals and oversight*”. In its letter the Board directed the parties to make submissions by September 13, 2021.

On September 7, 2021, the Island Industrial Customer Group (“IIC Group”) wrote the Board concerning the Hydro Application. The IIC Group submitted that a number of Hydro’s RFI responses

are insufficient and requested that “*a technical conference be convened to provide Hydro with the opportunity to further address the above issues, as well as such other issues as the Board and the other parties may wish to have addressed.*” In a September 9, 2021 email, the Board requested comments from the parties concerning the IIC Group request, and coincidentally delayed the date for submissions on the NP and Hydro ECDM Applications.

In a letter dated September 17, 2021 and an email dated September 16, 2021, the Board determined that a technical conference would be beneficial, and indicated that the issues to be addressed and scheduling would be forwarded to the parties in the coming weeks. The Board went on to say that in an effort to maintain the ability of the utilities to access federal funding, it had accepted Hydro’s proposal to “*separate the supplemental capital expenditures for the charging stations from the other issues that have been raised.*” The Board requested comments from the parties addressing the following areas:

- i) Whether the Board has the jurisdiction to order that the costs of the EV charging stations will be borne by ratepayers;
- ii) Whether the 2021 capital expenditures proposed by Hydro and Newfoundland Power for public EV charging stations should be approved by the Board; and
- iii) Whether there should be recovery of the associated costs from ratepayers.

This submission documents the Consumer Advocate’s comments on the NP and Hydro Applications respecting 2021 supplemental capital expenditures for utility-owned electric vehicle (EV) charging station infrastructure.

2. OPENING REMARKS

In general, the Consumer Advocate favours rate mitigation initiatives that provide a proper balance of ratepayer costs and risks. Electrification has rate mitigation potential, but we do not believe the electrification plan proposed by the utilities provides this proper balance. We welcome the Board’s decision to hold a Technical Conference on the ECDM applications. Ideally, there could be a series of Technical Conferences to develop an electrification plan that reflects the input of all parties and provides a proper balance of ratepayer costs and risks.

The review and approval of any aspect of the proposed electrification program in a rushed manner is inappropriate when the Board Order is likely to establish regulatory precedent for many years to come. The Board has segregated off the component of the ECDM Applications related to utility construction and ownership of charging station infrastructure at Hydro’s request. Apparently, this is because currently available federal government incentives for EV charging infrastructure are scheduled to expire soon. It is concerning that the possible loss of fairly limited one-time federal government assistance should be the impetus for making a decision with long-term implications.

In the following section, the Consumer Advocate comments on the component of the proposed electrification plan relating to 2021 supplemental capital expenditures for utility construction and

ownership of charging station infrastructure. At the start, we emphasize that we support electrification that is beneficial to ratepayers. However, achieving that goal does not require construction and ownership of charging station infrastructure by provincial utilities. Their role is to supply electricity to such stations. Providing the electricity is a public utility service but the construction and ownership of EV charger stations, which can be done by other entities, is not. Therefore, we are opposed to allowing capital cost recovery from ratepayers.

3. COMMENTS OF THE CONSUMER ADVOCATE

The Consumer Advocate understands that the goal of the proposed electrification plan is to accelerate the penetration of EVs in the market and the realization of rate mitigation benefits. PUB-NP-037 states *“The 2021 Plan is forecast to more than triple the number of EVs in the province by 2034.”* All elements of the electrification plan are aimed at accelerating EV penetration in the market, including the component of the plan relating to utility investment in EV charging infrastructure.

The NP and Hydro Applications request approval of *“supplemental capital expenditures”* for construction of EV charging stations in 2021; Hydro is seeking approval for approximately \$1.58 million for 9 charging stations (6 for the island and 3 for Labrador) and NP is seeking approximately \$1.54 million for 10 stations for the island. These expenditures are subject to the same rules and guidelines as any other proposed capital budget expenditure. The burden of proof is on the utility to provide sufficient data, information and analyses to justify the expenditure. As stated by Newfoundland Power in its response to CA-NP-128 (Newfoundland Power’s 2021 Capital Budget Application) *“It is Newfoundland Power’s position that the onus is on the utility to fully support with evidence the expenditures proposed in its capital budgets.”*

It is from this perspective that the Consumer Advocate makes the following comments.

- 1) There is no need for the NL utilities to *“accelerate”* electrification by investing in an EV charging network themselves. Non-utility investment in EV charging stations can be expected in the near future:
 - Although EV purchase costs are significantly higher than internal combustion engine vehicle costs now (\$41,000 for EVs compared to \$22,000 for internal combustion vehicles), EVs are expected to reach price parity by 2025 (at \$26,000), only 4 years from now (PUB-NP-039). This equates to a 12% annual price improvement.
 - As Hydro notes in CA-NLH-025 *“It is important to recognize that EV adoption is being mandated by the Government of Canada.”*
 - Both the federal and provincial governments are already offering EV incentives to the public (PUB-NP-060). The provincial program began only a few months ago.
 - Due to federal government policy, carbon taxation/pricing is scheduled to progressively increase, which will drive up the cost of operating an internal combustion turbine engine vehicle.¹

¹ The federal backstop imposes carbon taxation whenever provincial governments do not do so; see <https://www.bennettjones.com/Blogs-Section/Federal-Carbon-Backstop-Ruled-Constitutional-by-the-Supreme-Court-of-Canada>.

Why is there a need for utility involvement beyond its traditional roles relating to load management/rate design and grid and customer connection enhancements? Adoption of EVs and the provision of public EV chargers will happen anyway. More utility owned EV chargers may serve only to crowd out future chargers that would have otherwise been installed by the private and non-for-profit sectors.

NL is currently lagging behind other provinces in EV adoption and charger availability. However, that is likely to change in the near term. Private capital will be attracted to the market to provide EV chargers. In other provinces many non-profit and for-profit entities are investing in public EV charging stations. For example, Petro-Canada is developing “*Canada’s Electric Highway*,” and currently has charging stations from Victoria BC to Halifax.² Just recently, Parkland Corp., which owns and operates Chevron, Fas Gas and Esso brand gas stations, announced plans to build up to 100 electric vehicle fast-chargers from Vancouver Island to Calgary. Canadian Tire has started investing in EV charging stations to be located at their retail outlets.³ Many other businesses, municipal governments, and educational institutions across Canada are installing EV charging stations. It is difficult to imagine that this phenomenon will not reach NL in the near future.

Whether investment in EV chargers by the utilities will accelerate EV adoption, or is simply premature, is an open question. It does however place the risk on ratepayers if any capital expenditure, or operating deficits for that matter, are to be recovered from ratepayers.

- 2) The utilities’ proposal to build and own charging stations is not fair to potential private sector developers of charging stations. In PUB-NP-002, Newfoundland Power states “*The British Columbia Utilities Commission noted that, when considering utility investments in EV infrastructure, careful consideration must be given to whether the investment would likely have been undertaken by the private sector.*” Further in the same response it is stated “*In regulating utility-provided charging services, the British Columbia Utilities Commission noted 2 principal concerns: (i) ensuring fairness in the EV charging market; and (ii) mitigating ratepayer risk.*” The electrification plan proposed by the utilities fails to adequately address these two concerns, and would effectively present a barrier to private sector entry to the charging station business while transferring all risk to ratepayers.

We note that in April 2019, the District of Columbia Public Service Commission (PSC) “*denied a request by Pepco to directly install and own charging stations and instead mandated Pepco to provide make-ready programs to accelerate the competitive marketplace to expand EV access to District residents. The PSC ruled that utility ownership was not needed, as there was sufficient charger buildout due to private investment and the existence of DC government incentives and rebates for charger installation. Pepco would be allowed to build chargers*

² See [Canada's Electric Highway – EV Fast Charge car charging stations | Petro-Canada](#)

³ Canadian Tire, with the aid of federal grants, has EV stations under construction in BC, Alberta, Saskatchewan, Manitoba and Ontario. See <https://www.nrcan.gc.ca/energy-efficiency/transportation-alternative-fuels/electric-and-alternative-fuel-infrastructure/electric-vehicle-alternative-fuels-infrastructure-deployment-init/applicants/21738>

through an affiliate but would not be allowed cost recovery from ratepayers.”⁴ Further, “In the PUC of Ohio’s (PUCO) PowerForward program, PUCO said in April 2018 that AEP Ohio could not own or receive a return on charging stations as part of the program, instead allowing AEP to create a rebate incentive program capped at \$10 million to reimburse the costs of hardware, network services, and installation of Level 2 and DC fast charging stations.”⁵ The Consumer Advocate similarly believes that utility ownership is not needed.

- 3) Public utility ownership of EV charging stations also has long-term market implications. The two provincial utility monopolies will have first entry into a new market. Hydro already has 14 stations on the Island. If the 2021 supplemental applications are approved then there will be a total of 16 more utility-owned stations on the Island. Their joint ECDM Plan 2021-2025 envisions more. From those Plans it appears that the utilities intend to share the market, coordinate the location of their stations, and set charging fees. They also are seeking recovery of capital costs (except for Hydro’s existing 14 stations) as well as recovery of any possible operating losses, which would be at the expense of ratepayers. In these circumstances, entry by others into the EV charging market may be deterred by the utilities’ advantaged and dominant position.

These plans raise issues regarding whether such cooperation by these two corporations is permissible under the federal Competition Act, 1986, which prohibits anti-competitive behaviour. That Act (Part IV, 45(1)) prohibits anti-competitive practices such as agreements among market participants to fix prices or allocate customers and sales territories among themselves. More generally, the Competition Act seeks to prevent the lessening of competition by market participants and the abuse of dominant positions in markets.

We also note that Hydro’s crown corporation status does not shield it from its actions in potentially competitive markets. The Competition Act 1986, (Part I, 2.1) states: *This Act is binding on and applies to an agent of Her Majesty in right of Canada or a province that is a corporation, in respect of commercial activities engaged in by the corporation in competition, whether actual or potential, with other persons to the extent that it would apply if the agent were not an agent of Her Majesty.*

Have the utilities assured the Board that their plans to enter the EV charging market are in accordance with competition law? Arguably, the two utilities are attempting to control the EV market to gain an unfair market advantage. Such non-competitive objectives should not be condoned by the Public Utilities Board.

- 4) The utilities are of the opinion that the private sector would not undertake investments in charger infrastructure because it is “*constrained by a weak business case*” (PUB-NP-002, page 6 of 7). This may well be true but is it not equally true for the utilities? Other entities would

⁴ See October 2019 report by NARUC entitled Electric Vehicles: Key Trends, Issues, and Considerations for State Regulators, page 22.

⁵ *Ibid*, page 23.

presumably face similar costs for the capital expenditures and related equipment and they would have access to the same federal funding.⁶ It appears the reason the utilities can take on the weak business case is that they assume the Board will agree to have ratepayers backstop it. The business case remains just as weak but, unlike other potential entrants, the utilities want the Board to give them access to ratepayers' pockets to support it.

There does not appear to be any evidence that the utilities sought private-sector or non-profit entities (e.g., gas stations and municipalities) to invest in for-fee public access EV charging stations. The utilities could have issued requests for proposals and offered incentives such as low electricity prices (but not less than opportunity cost) and/or top-ups on federal government grants to attract investment. Rather, it seems the utilities made no effort to determine what it might take to overcome hurdles to investing in EV stations faced by others. We note that there is no evidence that NL utilities engaged stakeholders to ensure that utility participation in the charger market would not impede the development of a competitive market.

- 5) The NL utilities make a number of comments on Board jurisdiction relating to public charging stations and rates charged for their use.
- In CA-NP-014 (b) Newfoundland Power was asked if the \$15/hour charge for using charging stations would recover the full cost of supply. Newfoundland Power responded *"No, this rate will not cover the entire cost of supply including generation, transmission and distribution costs."* The response goes on to say that the rate was chosen *"based on a comparison of rates charged elsewhere in Atlantic Canada."*
 - In IIC-NLH-004 (c) Hydro indicates that charging rates are behind the meter and not subject to regulation. In support of its position Hydro quotes the Board in P.U. 27(2020) *"The Board does not believe that in the circumstances EV charging services are public utility services which should be subject to the requirements set out in the Act."*
 - In Newfoundland Power's March 5, 2021 submission titled *2021 Electrification, Conservation and Demand Management Application – NP Submission* it is stated (page 22) *"In Newfoundland Power's view, EV charging services are not a service under provincial legislation. This is consistent with the Board's determination in Order No. P.U. 27 (2020). As a result, the province's cost-of-service regulation does not apply to EV charging services."* Earlier in the submission, Newfoundland Power states (page 14) *"However, utility investment in EV charging services requires measures to ensure the interests of customers are adequately protected. In Newfoundland Power's view, this can be achieved through Board oversight of: (i) the costs and benefit of customer electrification programs, including all proposed capital expenditures; (ii) revenues from EV charging services; and (iii) the recovery of costs through the proposed Electrification Cost Deferral Account."*
 - In P.U.27(2020) the Board states: *"According to Hydro its responsibility, and the Board's regulatory mandate, ends at this metering point. It describes EV charging and other*

⁶ See eligibility for funding at <https://www.nrcan.gc.ca/energy-efficiency/transportation-alternative-fuels/zero-emission-vehicle-infrastructure-program/zero-emission-vehicle-infrastructure-program/22121>

consumer uses of electricity as services “after the meter”. Hydro submits that the Board does not regulate after the meter services offered by entities like the Port of St. John’s, which provides electricity to berthed ships, and campgrounds that offer access to electrical connections to recreational vehicle owners. The Board notes that, if the providers of such services or EV charging services were considered to be public utilities providing a regulated service, they would be subject to the supervision of the Board as well as the specific regulatory requirements set out in the legislation, including the filing of capital budgets.”

These statements raise a number of concerns. First, the argument is circular. Newfoundland Power is saying that the Board has jurisdiction because Newfoundland Power is recommending that the Board provide oversight of program costs and revenues, but not the rates, tolls and charges for EV charging services. In effect, Newfoundland Power is saying that the Board has jurisdiction because it says it does. This hardly qualifies as a legal argument supporting Board jurisdiction.

Second, the NL utilities are arguing that the Board does not have the authority to approve rates for charging stations owned by the utilities. If the Board does not have the authority, why are rates documented in the NP and Hydro applications? If the Board were to approve the applications, would it not effectively be endorsing the rate by providing regulatory oversight?

Third, the utilities are proposing charger rates that are below cost, so are providing a direct subsidy to EV owners at the expense of ratepayers, not the utilities’ shareholders. The subsidized charger rates present a barrier to private sector entry to the charging market because the private sector would be unable to charge rates that are below cost without soon going out of business. Again, we note that there is no evidence on the record that the NL utilities engaged stakeholders to ensure that utility participation in the charger market would not impede entry and harm competition.

In sum, Hydro has stated that EV charging is an “*after-the-meter*” service that is not subject to regulation by the Board. The Board itself concluded that EV charging is not a public utility service subject to the requirements of the Act. The Consumer Advocate agrees. Charging infrastructure is after-the-meter and should not be allowed in rate base or recovered from customers in any way, regardless of ownership. The District of Columbia and Ohio cases discussed in Comment 2 above support this conclusion. More so, public EV charging stations are not public utilities under the Act any more than are the Port of St. John’s and campgrounds offering electrical hook-ups. In short, construction and ownership of EV charging stations are not public utility matters, and, as such, should not be before the Board.

- 6) The utilities have neither identified nor quantified the risks of utility owned and operated charging infrastructure. In CA-NP-019 (c) Newfoundland Power states “*A risk assessment was not undertaken with respect to customer electrification programs.*” It appears that because it is not their money that is at risk, the utilities are not concerned that the charging stations

might become stranded or otherwise become a losing proposition leading to a loss of capital. Such concerns are easily remedied when it is someone else's money at risk, in this case, the ratepayers. A private sector developer has no such guarantees, and would undertake a risk assessment before pursuing the project.

- 7) There is no evidence on the record that utility construction, ownership and operation of charging station infrastructure has been discussed with customers. As a result, there is no evidence that customers value the benefits, if any, of utility ownership of EV charging stations and are willing to accept the risk associated with the stations. Further, the Applications do not identify or quantify risks, or the critical risk factors, of the proposed charger station project. There has been no public debate. A public hearing on this issue will certainly provide an opportunity for public intervention in this matter.
- 8) CA-NP-020 (g) asked if there would be savings associated with having a single entity responsible for charging station infrastructure development. It is not clear to the Consumer Advocate why both Newfoundland Power and Hydro are developing charging stations rather than only one or the other to reduce duplication of costs. Newfoundland Power responded, "*Coordination in the installation of charging infrastructure will optimize public access to EV chargers and avoid the development of redundant infrastructure by the utilities.*" This does not answer the question. There is no evidence offered on how coordination will optimize public access. Further, there is no evidence to suggest that having both utilities participate in this program will provide benefits to consumers.

A troubling aspect of Newfoundland Power's response is that it seems to imply that there will be no other participants in the EV charging market. Does NP expect no entry of competitors? Or, does it expect that new entrants would agree to some sort of market sharing arrangement with NP and Hydro? In a competitive market whether infrastructure is redundant or not is determined by competition not by market sharing agreements or "*coordination*" among suppliers.

- 9) Newfoundland Power states that its proposal to own charging stations is consistent with its CDM programs (PUB-NP-067): "*while Newfoundland Power does not construct, own or operate infrastructure as part of its CDM programs, its customer energy conservation website is a capital asset. This capital asset is included in the Company's rate base.*" This is a very weak example of asset ownership under the CDM program. Owning a website is far different than owning the hard assets associated with an EV charging station.

4. RESPONSES TO THE BOARD

With respect to the three specific areas that the Board requested be addressed:

- i) Whether the Board has the jurisdiction to order that the costs of the EV charging stations will be borne by ratepayers;

No, there is no legislative jurisdiction for the Board to order that the cost of the EV charging stations be paid by ratepayers. To make such an Order would be ultra vires as the Board has no legal authority to accede to this request. This is beyond the powers of the Board.

- ii) Whether the 2021 capital expenditures proposed by Hydro and Newfoundland Power for public EV charging stations should be approved by the Board;

No, these capital expenditures should not be approved by the Board. The long-term implications of utilities dominating the EV charging market in a coordinated way have not been sufficiently investigated or addressed. Admittedly, if the utilities decide not to proceed outside the regulatory process, this may result in the loss of one-time federal government capital grants if such programs are not extended or replaced with new ones. On the other hand, there may be negative long-term consequences of allowing these two monopolies to proceed in a coordinated fashion to enter a market that is not for a public utility service, to set prices in that market, and to gain early entry advantage over potential competitors. The demand for EV charging services can be met by others. If other entities, be they for-profit or non-profit, construct and own public access EV charging stations then the benefits of electrification associated with EV adoption would still be realized, and without ratepayers taking the business risk.

- iii) Whether there should be recovery of the associated costs from ratepayers.

No, if these capital expenditures are approved by the Board then the associated costs should not be recovered from ratepayers. The services from these capital assets are not public utility services. Non-utility private businesses and other organizations can provide these services and are doing so at an increasing rate in other jurisdictions. If utilities want to invest in this infrastructure they should do so only on the same basis as non-utilities. Capital costs (and operating deficits for that matter) should not be recovered from ratepayers.

Utility construction, ownership and operation of charging station infrastructure is an unregulated business and is not subject to Board jurisdiction or cost recovery from ratepayers.

By seeking Board approval to pass-through to ratepayers the costs of utility owned and operated charging stations, the NL utilities are in fact interfering with a market where competition is fully expected to develop. As stated by Hydro (CA-NLH-009) *“this level of investment would correlate to approximately 200 more DCFCs being installed on the Island Interconnected System. Even after expansion of the public charging network by Hydro and Newfoundland Power Inc., there remains ample opportunity for private sector investments in EV charging.”* A poor business case should not be used as an excuse for monopoly intervention in a market that is expected to soon become fully competitive. The only way that competition in the charger market is likely to be derailed is if the Board grants the utilities an unfair advantage in the charger market by approving pass-through of charger station costs to ratepayers.

To acquiesce to the utilities' proposal, the Board would in effect be assisting the utilities in the establishment of a monopoly, giving an unfair market advantage. How can a statutory administrative tribunal such as the Public Utilities Board have any role in facilitating such a result?

All of which is respectfully submitted.

Yours truly,



Dennis Browne, Q.C.
Consumer Advocate

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cc

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