

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

September 16, 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's 2022 Capital Budget Application

On May 18, 2021, Newfoundland Power ("NP") submitted its 2022 Capital Budget Application ("NP 2022 CBA" or the "Application") to the Public Utilities Board (the "Board"). The Application asks the Board to authorize NP to spend nearly \$110 million in 2022, and outlines NP's intention to spend an additional \$503 million by 2026.¹

Consumer Advocate's Request

In correspondence to the Board dated May 27, 2021, the Consumer Advocate initially asked the Board to order a public oral hearing of the Application. The Consumer Advocate has since then repeated that request, which request this letter reiterates.²

Bases for the Consumer Advocate's Request

The information provided in the Application and the RFIs falls short of what is needed to properly assess the merits of NP's proposed spending.

NP filed voluminous material, but much, if not most, of it is qualitative, and the language used is in many instances so repetitive as to be of a boilerplate nature.³ The material does not quantify the risks or benefits to consumers of various projects; which is a particular shortcoming in relation to a generation project (i.e. replacement of the Sandy Brook Penstock) intended to operate for the next 80 years. Decades-long projects merit the more detailed scrutiny that only public oral hearings can provide. This an important consideration since the Churchill Falls contract expires 20 years from now and, even before then, potential capacity additions by NL Hydro to the island system could strand such NP generation projects.

Given the complex technical aspects of some projects and the imbalance of information, expert engineering, legal and communications personnel acting on behalf of NP have hours to prepare carefully written responses to RFIs, which responses can obfuscate or even conceal weaknesses in NP's Application. When an individual who is responsible for proposing a project that is being scrutinized takes the witness stand, his or her professional judgment is subject to public review in a process with little upside and considerable potential for downside. The prospect of testifying provides a strong incentive for a regulated utility's internal management decisions to be cost effective and in the customer's best interest. Oral cross-examination affords little opportunity for a decision-maker witness to prevaricate, confuse or deflect a question that is uncomfortable or problematic. If there is uncertainty as to the exact meaning of an oral question or response, as is frequently the case in complex matters, it can promptly be addressed, and the germane point clarified and explained in follow-up questioning.

A public oral hearing would here allow the Consumer Advocate face-to-face real time access to NP personnel for cross-examination concerning their purported expertise and how it was or was not utilized in preparing the Application.

Comments earlier made by the Consumer Advocate are germane.

The PUB says that having no public hearing is the norm. The Consumer Advocate does not understand why that is so. Canadian appellate courts have said: "We rely on the adversarial process to get at the truth. That process assumes that the truth best emerges after a full and vigorous competition amongst the various opposing parties". That vigorous competition process routinely involves evidence being "tested in the crucible of cross-examination" in a public forum. Public oral hearings, particularly adversarial ones, further freedom of expression, foster public interest, and instigate public engagement and debate. Subjecting a utility's proposed budget to the crucible of cross examination in a public forum would: better identify the strengths and weaknesses of the proponent's and intervenors' cases; and be more likely to achieve the optimum outcome for ratepayers.

The public oral hearing requested by the Consumer Advocate would further freedom of expression, foster public interest, and instigate public engagement and debate. Subjecting a public utility's proposed budget to "the crucible of cross examination" in a public forum would better identify the strengths and weaknesses of the proponent's and the intervenors' cases, and would more likely achieve the optimum outcome for ratepayers.

This is particularly so during a time of challenging economic conditions in the Province, a concern the Board itself has alluded to in the recent past.⁴

The need to carefully scrutinize any utility capital budget application that proposes or envisages such large expenditures as those within Application does is herein compounded by:

- 1) uncertainty about the Muskrat Falls Project, and the - as yet - unfinalized rate mitigation process;

- 2) ongoing negative impacts of the Covid-19 pandemic, which impacts continue to: (a) dampen the economy; (b) disrupt normal business operations; (c) reduce the availability of certain goods (especially those reliant on computer chips); and (d) decrease labour productivity, and as a result thereby increase project costs and/or undermine the reliability of project cost estimates in the Application;⁵
- 3) the September 2020 public announcement by NP's parent company, Fortis Inc., of its plan to increase both the rate base of its regulated subsidiaries and Fortis Inc. dividends by an average of 6% per year over the ensuing five years;⁶ and
- 4) NP's failure to respond to what is presently the uncontradicted expert opinion evidence of John Todd (Report of Elenchus Research Associates Inc. "Comments on Newfoundland Power's 2022 Capital Budget Application") that the Application fails to meet the prudency standard the Board has expressly endorsed.


These aspects of the Application, as well as public policy concerns attendant upon there having been no public oral hearing of a NP capital budget application for more than 16 years (i.e. no actual public accountability) - referenced by the Consumer Advocate in his earlier requests - form the bases for the Consumer Advocate's request and identify the areas of concern to be addressed in an in-person, real time public forum.

Summary

The burden of proof is on NP to provide sufficient data, information and analyses to justify its proposed expenditures and assist the Board in deciding the trade-off between cost to ratepayers, system reliability and risk. NP has acknowledged that the onus is on a utility to justify proposed expenditures⁷

While there is no specified quantitative threshold as to when the Board will convene a public hearing,⁸ given all of the above the threshold is here met. The Consumer Advocate again asks the Board to order a public oral hearing, as doing so would enable the Consumer Advocate to utilize cross-examination to effectively challenge NP's assertion that the Application and its responses to RFIs meet the onus on it.

Yours truly,



Dennis Browne, Q.C.
Consumer Advocate

Encl.
/bb

cc **Newfoundland & Labrador Hydro**
 Shirley Walsh (ShirleyWalsh@nlh.nl.ca)
 NLH Regulatory (NLHRegulatory@nlh.nl.ca)

Newfoundland Power Inc.
 Dominic J. Foley (dfoley@newfoundlandpower.com)
 Lindsay Hollett (lholllett@newfoundlandpower.com)
 Liam O'Brien (lobrien@curtisdawe.com)
 NP Regulatory (regulatory@newfoundlandpower.com)

Board of Commissioners of Public Utilities
 Jacqui Glynn (jglynn@pub.nl.ca)
 PUB Official Email (ito@pub.nl.ca)

-
- ¹ NP 2022 CBA, 2022 Capital Plan, p. 23, section 4.3 *Planned Expenditures by Asset Class*, Table 9 provides the *Five-Year Capital Plan: 2022-2026* annually by asset class.
- ² Endnote 8 describes the communications between the Consumer Advocate and the PUB concerning the former's request(s) for a public oral hearing.
- ³ In Schedule B of NP 2022 CBA, NP on 28 occasions makes the statement: "This project is justified on the obligation to provide reliable service to customers at least cost and cannot be deferred." However, NP did not incorporate customer input in the development of NP 2022 CBA (CA-NP-057). In CA-NP-108, NP also stated: "Newfoundland Power does not survey its customers on the value that customers put on increased reliability." A public oral hearing would enable the Consumer Advocate to challenge NP personnel concerning how NP can consider a trade-off between rates and reliability when NP "does not survey its customers on the value that customers put on increased reliability."
- ⁴ NP 2021 CBA, RFI PUB-NP-001 read: "Please highlight any actions that Newfoundland Power has taken in response to the current economic conditions within Newfoundland and Labrador to control and/or reduce capital expenditures while maintaining reliable service."
- ⁵ A public oral hearing would enable the Consumer Advocate to conduct a detailed inquiry, in light of the COVID-10 pandemic, into the reliability of various project cost estimates in the NP 2022 CBA. This is particularly important in light of RFI CA-NP-100 and the response thereto, which read: "Question: Has Newfoundland Power done any analysis of the effect(s) of the COVID-19 pandemic on the cost estimate for each project proposed in the 2022 Capital Budget Application? If so, please provide a copy of all such analyses for each project. Answer: No, Newfoundland Power has not done an analysis of the effect(s) of the COVID-19 pandemic on the cost estimate for each project proposed in its 2022 Capital Budget Application." This is of great concern when one considers that in its 2020 Capital Expenditure Report dated February 26, 2021 NP reported: "Actual expenditure on the *Replacements Due to In-Service Failures* project was \$415,000 or 13% above the budget estimate. The budget estimate was based on historical costs over the previous 5 years. The variance is principally due to increased labour costs associated with adhering to public health measures related to COVID-19...", and also reported: "Actual expenditure for the *Personal Computer Infrastructure* project was \$155,000 above budget. The budget estimate of \$493,000 was based on the anticipated replacement of 60 desktop computers and 85 mobile computers in 2020...Due to the pandemic, there was a global supply shortage of mobile computers and related equipment in 2020, resulting in an overall price increase. Additionally, discounts

normally associated with bulk purchase orders were not offered. In February 26, 2021 NP 2020 Capital Expenditure Report: Notes, see Appendix A, page 1 of 7, Substations, and Appendix A, page 5 of 7, Information Systems, located at:

<http://www.pub.nf.ca/indexreports/expenditure/From%20NP%20%202020%20Capital%20Expenditure%20Report%20-%202021-02-26.PDF>

- ⁶ See various NP 2022 CBA CA-NP RFIs and responses thereto, including: CA-NP-005 (including Schedule “A” to CA-NP-005), and response thereto; CA-NP-007 and response thereto; CA-NP-098 and response thereto; CA-NP-121 and response thereto; CA-NP-174 (including Attachment “A” to CA-NP-174) and response thereto.
- ⁷ See NP 2021 CBA, response to RFI CA-NP-128
- ⁸ See the attached correspondence between the Consumer Advocate (“CA”) and the PUB: letter dated May 27, 2021 from CA to PUB; letter dated June 2, 2021 from PUB to CA; letter dated June 17, 2021 from CA to PUB; letter dated June 25 from PUB to CA; letter dated June 30, 2021 from CA to PUB; and letter dated July 7, 2021 from PUB to CA, copies of which are enclosed herewith.

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

May 27, 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: Application for a Public Hearing
Newfoundland Power 2022 Capital Budget \$109,651,000.00**

We are in receipt of Newfoundland Power's proposed 2022 \$109,651,000 Capital Budget Application. The Board in previous correspondence has stated that it was acceptable for this Capital Budget Application to proceed based on the 2007 Capital Budget Application Guidelines (the 2007 Guidelines). We object.

The Board's own expert, Midgard, identified best Canadian regulatory practices. Midgard informed the Board that the 2007 Guidelines do not follow best Canadian regulatory practices.

Domestic and General Consumers expect that any regulatory process which directly affects them to be a process that is objectively and procedurally fair, as measured against best Canadian regulatory practices.

The Board cannot impose on Consumers a 2007 substandard process, one that falls short of national standards. There is a legal right to procedural fairness. For the Board to proceed using the 2007 Guidelines would - in the circumstances - be a breach of procedural fairness. Consumers properly expect an open and transparent procedure, one that complies with best Canadian regulatory practices.

Given the foregoing, Consumers object to the Board proceeding by the way of the 2007 Guidelines.

Furthermore, Newfoundland Power's proposed 2022 Capital Budget totals \$109,651,000, which is an extraordinary amount. The Budget ignores the Province's and Consumers' financial reality. The Report of the Economic Recovery Team (PERT) described the Province's troubled financial situation and stated that the Province's fiscal situation must be brought under control. PERT's report calls for a new model of accountability in the delivery of services. PERT's findings are inconsistent with Newfoundland Power's 2022 \$109,651,000 Capital Budget demands.

Significantly, the Muskrat Falls Inquiry (MFI) Commissioner recommended that for public projects with budgets of \$50 million or more Government establish well-defined oversight, and that it do so after considering oversight processes used in other jurisdictions. Newfoundland Power's proposed 2022 Capital Budget of \$109,651,000 far exceeds \$50 million. Consumers are entitled to a process that meets best Canadian regulatory practices found in other jurisdictions, a process that would provide transparency and accountability by means of full public hearings.

By way of the jurisdictional scan included in the Midgard report, it is plain and obvious that other Canadian utility regulators would schedule a hearing if they were presented a capital budget of the scale currently being presented by Newfoundland Power.

Given the foregoing, Consumers request a full public hearing in relation to Newfoundland Power's 2022 Capital Budget Application.

Yours truly,


Dennis Browne, Q.C.

/ss

cc **Newfoundland & Labrador Hydro**
 Shirley Walsh (ShirleyWalsh@nlh.nl.ca)
 NLH Regulatory (NLHRegulatory@nlh.nl.ca)

Newfoundland Power Inc.
 Kelly Hopkins (khopkins@newfoundlandpower.com)
 Gerard Haycs (ghaves@newfoundlandpower.com)
 NP Regulatory (regulatory@newfoundlandpower.com)

Board of Commissioners of Public Utilities
 PUB Official Email (ito@pub.nl.ca)
 Jacqui Glynn (jglynn@pub.nl.ca)
 Colleen Jones (cjones@pub.nl.ca)



NEWFOUNDLAND AND LABRADOR
BOARD OF COMMISSIONERS OF PUBLIC UTILITIES
120 Torbay Road, P.O. Box 21040, St. John's, Newfoundland and Labrador, Canada, A1A 5B2

E-mail: dbrowne@bfma-law.com

2021-06-02

Dennis Browne, Q.C.
Browne Fitzgerald Morgan & Avis
Terrace on the Square, Level 2
P.O. Box 23135
St. John's, NL A1B 4J9

Dear Mr. Browne:

**Re: Newfoundland Power Inc. – 2022 Capital Budget Application
Response to Consumer Advocate's Correspondence dated May 27, 2021**

The Board is in receipt of your correspondence dated May 27, 2021 stating that you object to the Board proceeding with the review of Newfoundland Power's 2022 Capital Budget Application based on the 2007 Capital Budget Guidelines and also requesting a full public hearing into the application.

A review of the 2007 Capital Budget Application Guidelines is currently ongoing. In correspondence dated March 2, 2021, the Board stated:

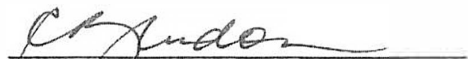
As previously indicated on several occasions, until the conclusion of this review the existing Guidelines remain in place and the 2022 Capital Budget Applications will be subject to the existing Guidelines and the additional requirements put in place last year.

The Board also continues to believe, as stated in previous correspondence, that the existing Guidelines allow for an open and transparent process and that proceeding with the review of Newfoundland Power's 2022 Capital Budget Application using the established Guidelines would not be a breach of procedural fairness.

With respect to your request for a public hearing the Board notes that the proposed schedule for the matter provides that a party may request a hearing following the filing of responses to requests for information and intervenor evidence. You may file a request for a hearing, setting out the basis for the request, at that time.

If you have any questions, please do not hesitate to contact the Board's Legal Counsel, Ms. Jacqui Glynn, by email, jglynn@pub.nl.ca or telephone (709) 726-6781.

Sincerely,



Cheryl Blundon
Board Secretary

CB/ej

ecc **Newfoundland Power Inc.**
Kelly Hopkins, E-mail: khopkins@newfoundlandpower.com
Liam O'Brien, E-mail: lobrien@curtisdawe.com
Dominic Foley, E-mail: dfoley@newfoundlandpower.com
NP Regulatory, E-mail: regulatory@newfoundlandpower.com
Newfoundland and Labrador Hydro
Shirley Walsh, E-mail: shirleywalsh@nlh.nl.ca
NLH Regulatory, E-mail: NLHRegulatory@nlh.nl.ca
Consumer Advocate
Stephen Fitzgerald, E-mail: sfitzgerald@bfma-law.com
Sarah Fitzgerald, E-mail: sarahfitzgerald@bfma-law.com
Bernice Bailey, E-mail: bbailey@bfma-law.com

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

June 17, 2021

Via Email: jglynn@pub.nl.ca

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

Attention: Jacqui Glynn

Dear Ms. Glynn:

Re: Newfoundland Power 2022 Capital Budget Application

The undersigned is counsel for Consumer Advocate Dennis Browne in relation to Newfoundland Power's 2022 Capital Budget Application.

This letter is written without prejudice to the right of the Consumer Advocate to argue, in this and other proceedings, that the PUB's Capital Budget Application Guidelines [issued June 2005, revised October 2007] (the "Guidelines") are invalid because the Guidelines were never approved by the Lieutenant-Governor in Council in accordance with section 20 of the Public Utilities Act.

In its 2 June 2021 letter to the Consumer Advocate, the PUB stated:

With respect to your request for a public hearing the Board notes that the proposed schedule for the matter provides that a party may request a hearing following the filing of responses to requests for information and intervenor evidence. You may file a request for a hearing, setting out the basis for the request, at that time.

If you have any questions, please do not hesitate to contact the Board's Legal Counsel, Ms. Jacqui Glynn, by email, jglynn@pub.nl.ca or telephone (709) 726-6781.

The Consumer Advocate has questions, which are posed below.

The Guidelines say the following about hearings:

.../2

1. Expenditures under \$200,000

Expenditures under \$200,000 will be supported with evidence showing that the expenditure is prudent and necessary to provide reasonably safe, adequate, just and reasonable service. These expenditures will be considered based on the written record filed, including the utility's application, any relevant RFIs and replies, other evidence and written submissions.

2. Expenditures between \$200,000 and \$500,000

Expenditures of this amount will be supported with evidence showing that the expenditure is prudent, or necessary to provide reasonably safe, adequate, just and reasonable service. The utility will be expected to provide the following information where appropriate and when available:

- Age of equipment or system
- Major work/upgrades completed since installation/implementation
- Anticipated useful life
- Summary of maintenance records
- Summary of outage statistics
- Relevant industry experience
- What maintenance/support arrangements available (internal and external)
- Vendor recommendations
- Availability of replacement parts
- Safety performance (if relevant)
- Environmental performance (if relevant)
- Operating regime (continuous, cyclic, standby, etc.)
- Net Present Value NPV calculation
- Levelized cost of energy
- Cost benefit analysis
- Other legislative or regulatory compliance requirements
- Historical average and/or unit cost information
- Forecast customer growth estimate
- Energy efficiency benefits
- Losses incurred during construction
- Anticipated consequences of maintaining the status quo
- Any other alternatives considered
- Description of proposed solution
- Budget estimate
- Project schedule
- Detailed report/analysis of condition (if available).

Expenditures between \$200,000 and \$500,000 would be normally considered based on the written record filed, including the application, any relevant RFIs and replies, other evidence and written submissions. These expenditures may be challenged during a hearing if the Board, on its own motion or upon receiving a request from an Intervenor, determines that an oral hearing is necessary to properly assess whether the expenditure should be approved.

3. Expenditures in excess of \$500,000

Expenditures of this amount are considered significant expenditures which must be supported with more comprehensive and detailed documentation than other expenditures. It is expected that all the items in the checklist will be addressed with either the information provided or an explanation of why it is not appropriate in the circumstances. Where appropriate, a utility is expected to provide a report/analysis by a qualified engineer or other appropriate expert in support of the expenditure.

Expenditures in excess of \$500,000 are open to review at a hearing if it is determined by the Board, upon request or on its own motion, that the expenditure should be reviewed in an oral hearing.

4. Capital Leases

Annual lease amount less than \$20,000

Capital leases proposed to start in the year and involving an annual expenditure less than \$20,000 would be reviewed and generally approved based on the written record.

Annual lease amount equal to or in excess of \$20,000

Capital leases proposed to start in the year and involving an annual expenditure equal to or greater than \$20,000 would be open to review at a hearing, if it is determined by the Board, upon request or on its own motion, that the lease should be reviewed in an oral hearing.

Please answer the following questions:

1. For capital expenditures between \$200,000 and \$500,000:

What specific criterion or criteria does or do the PUB utilize, upon receiving a request from an Intervenor for a hearing, to determine that an oral hearing is necessary to properly assess whether the expenditure should be approved?

2. For capital expenditures in excess of \$500,000:

What specific criterion or criteria does or do the PUB utilize to determine, upon receiving a request from an intervenor for a hearing, that the expenditure should be reviewed in an oral hearing?

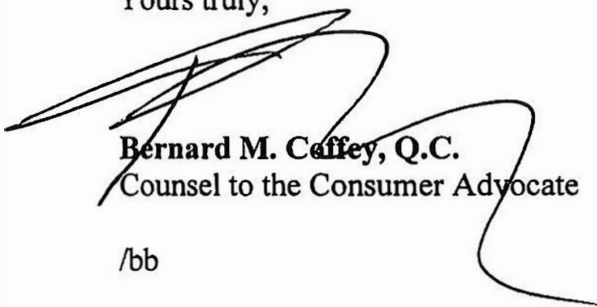
3. For an annual capital lease equal to or in excess of \$20,000:

What specific criterion or criteria does or do the PUB utilize to determine that the lease should, upon request by an intervenor, be reviewed in an oral hearing?

4. Are the Guidelines posted on the PUB website? If not, why not?

I look forward to hearing from you.

Yours truly,



Bernard M. Coffey, Q.C.
Counsel to the Consumer Advocate

/bb

cc Newfoundland & Labrador Hydro
Shirley Walsh (ShirleyWalsh@nlh.nl.ca)
NLH Regulatory (NLHRegulatory@nlh.nl.ca)

Newfoundland Power Inc.
Kelly Hopkins (khopkins@newfoundlandpower.com)
Dominic Foley (dfoley@newfoundlandpower.com)
NP Regulatory (regulatory@newfoundlandpower.com)

Board of Commissioners of Public Utilities
PUB Official Email (itc@pub.nl.ca)
Jacqui Glynn (jglynn@pub.nl.ca)
Colleen Jones (ciones@pub.nl.ca)



NEWFOUNDLAND AND LABRADOR
BOARD OF COMMISSIONERS OF PUBLIC UTILITIES
120 Torbay Road, P.O. Box 21040, St. John's, Newfoundland and Labrador, Canada, A1A 5B2

E-mail: dbrowne@bfma-law.com

2021-06-25

Dennis Browne, Q.C.
Consumer Advocate
Browne Fitzgerald Morgan & Avis
Terrace on the Square, Level 2
P.O. Box 23135
St. John's, NL A1B 4J9

Dear Mr. Browne:

Re: Newfoundland Power Inc. – 2022 Capital Budget Application – Response to Consumer Advocate's Correspondence dated June 17, 2021

The Board is in receipt of two letters from the Office of the Consumer Advocate dated June 17, 2021 in relation to Newfoundland Power's 2022 Capital Budget Application. The Board notes that the schedule for this matter will be addressed in separate correspondence.

It is the Consumer Advocate's position that Newfoundland Power's 2022 Capital Budget of \$109,651,000 is an extraordinary amount of spending which requires a full public hearing. The correspondence questions the criteria used by the Board in its determination as to whether an oral hearing is necessary in a capital budget application and states:

Based on Midgard's scan of other jurisdictions, it is doubtful whether any other Utility Board in the Canada would refuse to grant an immediate public hearing on this application.

The Board notes that a full public proceeding is always held for utility annual capital budget applications, including public notice of the application, an opportunity to intervene or file a letter of comment, comprehensive information exchange, including a presentation of the application, requests for information, an opportunity to file intervenor evidence, a technical conference, if requested, as well as written submissions.

While the hearing of a capital budget application is normally a written proceeding, the Board may hold an oral hearing where it determines that it is required to properly assess whether the proposed project expenditures should be approved. The Board does not make this determination based solely on the magnitude of the proposed annual capital budget. The Board will consider all the information filed, including the application, the issues and projects to be addressed, responses to requests for information, intervenor evidence, and the justification provided in the request for an

oral hearing. Since holding an oral hearing can be very costly and these costs are passed on to customers, this determination must consider whether an oral hearing would be in customers' best interests.

The Board would also like to clarify that the information provided by Midgard does not support your suggestion that other utility regulators would grant an immediate oral hearing on this application. Based on the information provided in Midgard's report, it appears that comprehensive oral hearings for capital budget applications are not routine in Canada and many jurisdictions only require Board approval for large projects. It is not the magnitude of the overall capital budget which is normally considered but rather the magnitude of an individual project expenditure. For example in New Brunswick approval is not required for a capital project expenditure less than \$50 million. In addition approval of annual capital budget expenditures is generally not required in the Western provinces and Ontario. Where approval is required, oral hearings are often not held. Prince Edward Island generally does not hold hearings for capital budget applications and the last hearing in New Brunswick was in 2019. While the Nova Scotia Utility and Review Board does hold oral hearings for annual capital expenditure plans, the hearings are short, normally less than a day.

In terms of your suggestion that the Guidelines are invalid the Board does not agree. The Guidelines are not issued pursuant to section 20 of the *Public Utilities Act* but rather flow from the Board's authority to manage its proceedings. The regulations provide that, where the Board determines that it will not proceed by way of a public hearing, the Board may, among other things, dispose of the matter on the basis of the written documentation. Further the regulations set out that:

3.(2) In any application or other proceeding, the board may dispense with, vary or supplement any provision of these regulations on those terms as the board considers necessary.

3.(4) Before the disposition of an application or proceedings, the board may issue those directions as it considers necessary for the proper consideration and disposition of an issue.

As the Board has previously indicated in correspondence to the Office of the Consumer Advocate dated October 30, 2020, the Guidelines are procedural in nature and do not alter or change the requirements of the *Act* or the regulations. The Guidelines expressly state that they are designed to provide direction as to the general administrative process and to provide direction on process and timing, including the specific information to be filed. The Board notes that guidelines, directives and policies are widely used by administrative tribunals and are recognized to be useful tools for administrative tribunals to aid in decision-making.

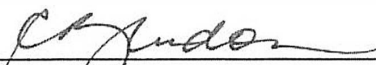
As you are aware the Guidelines are currently the subject of a comprehensive review. As a part of this review the Board engaged Midgard to prepare a report and Midgard held individual meetings with stakeholders before completing its report. This report and potential changes to the Guidelines were the subject of several meetings of the parties and Board staff to clarify the issues and identify commonality. As the parties were not able to reach a consensus with respect to new Guidelines the Board will decide on the changes to be made following receipt of the submissions of the parties. The Board is now awaiting submissions from the Consumer Advocate and the Industrial Customer Group. As indicated in correspondence dated February 18, 2021, the new Guidelines will be in place for next year's Capital Budget Applications. In the meantime, as the Board has previously advised on numerous occasions, the existing Guidelines, as modified in 2020, will be followed.

These Guidelines provide for an oral hearing should it be found to be necessary and appropriate in the circumstances. The Board notes that it is Midgard's opinion that the choice between an oral and written hearing should remain in the Board's discretion and further that Midgard did not recommend the addition of specific criteria as to how the Board should exercise this discretion. The Board expects that all parties will work within the existing regulatory framework until the implementation of the new Guidelines.

I acknowledge your email of June 22, 2021 withdrawing your question 4 on the basis that you found the link to the Guidelines, which is on the front page of on the Board's website. In terms of your request as to when Newfoundland Power initially informed the Board that it planned to file its capital budget application on May 18, 2021, I can confirm that Board counsel was advised on May 17 that the application would be filed on May 18 or 19. It is noted that Newfoundland Power had advised Board counsel in a phone call a few days earlier that the application may be filed in early June.

If you have any questions, please do not hesitate to contact the Board's Legal Counsel, Ms. Jacqui Glynn, by e-mail, jglynn@pub.nl.ca or telephone (709) 726-6781.

Sincerely,


 Cheryl Blundon
 Board Secretary

CB/cj

ecc **Newfoundland Power Inc.**
 Dominic Foley, E-mail: dfoley@newfoundlandpower.com
 Liam O'Brien, E-mail: lobrien@curtisdawe.com
 NP Regulatory, E-mail: regulatory@newfoundlandpower.com
Newfoundland and Labrador Hydro
 Shirley Walsh, E-mail: shirleywalsh@nlh.nl.ca
 NLH Regulatory, E-mail: NLHRegulatory@nlh.nl.ca

Consumer Advocate
 Bernard M. Coffey, Q.C., E-mail: berncoffey@gmail.com
 Stephen Fitzgerald, E-mail: sfitzgerald@bfma-law.com
 Sarah Fitzgerald, E-mail: sarahfitzgerald@bfma-law.com
 Bernice Bailey, E-mail: bbailey@bfma-law.com

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

June 30, 2021

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

Attention: Ms. Cheryl Blundon
Director Corporate Services & Board Secretary

Dear Ms. Blundon:

Re: Newfoundland Power Inc. 2021 Capital Budget Application

In its response to the Consumer Advocate dated June 25, 2021, the PUB said:

“While the hearing of a capital budget application is normally a written proceeding, the Board may hold an oral hearing where it determines that it is required to properly assess whether the proposed project expenditures should be approved. The Board does not make this determination based solely on the magnitude of the proposed annual capital budget...Since holding an oral hearing can be very costly and these costs are passed on to customers, this determination must consider whether an oral hearing would be in customers’ best interests.”

The PUB’s past practice in processing capital budget applications has been: to initially utilize ss. 4 to 15; to then invoke s. 3(2) to dispense with ss. 16 to 20; and to finally dispose of the application under s. 22(a). [All section references herein are to sections of the regulations.]

The sole factor the PUB identified in its June 25 response as a consideration in whether to order a public hearing is that the additional cost would be borne by customers. The PUB has not publicly quantified its understanding as to the amount of additional cost.

Whether a dollar amount is “very costly” must be considered in context.

The last time the PUB held a public hearing for a capital budget application was in 2004. Over the 16 years in which no public hearing occurred, the PUB approved nearly \$1.3 billion of capital spending by Newfoundland Power. Disallowing 5% of those past expenditures would have saved ratepayers \$64 million.

Newfoundland Power wants to spend \$110 million in 2022, and plans to annually spend an average of \$125 million during the following four years. A 5% reduction in those planned expenditures of \$613 million would save ratepayers nearly \$31 million.

The PUB says that having no public hearing is the norm. The Consumer Advocate does not understand why that is so. Canadian appellate courts have said: “We rely on the adversarial process to get at the truth. That process assumes that the truth best emerges after a full and vigorous competition amongst the various opposing parties.” That vigorous competition process routinely involves evidence being “tested in the crucible of cross-examination” in a public forum.

The public oral hearing requested by the Consumer Advocate would further freedom of expression, foster public interest, and instigate public engagement and debate. Subjecting a public utility’s proposed budget to “the crucible of cross examination” in a public forum would better identify the strengths and weaknesses of the proponent’s and the intervenors’ cases, and would more likely achieve the optimum outcome for ratepayers.

In its June 25 response, the PUB said:

“...the Guidelines are procedural in nature and do not alter or change the requirements of the Act or the regulations...In the meantime, as the Board has previously advised on numerous occasions, the existing Guidelines, as modified in 2020, will be followed. These Guidelines provide for an oral hearing should it be found to be necessary and appropriate in the circumstances.”

Please provide a copy of the Guidelines as revised by the 2020 modifications.

As the PUB has not invoked s. 3(1), the regulations apply to Newfoundland Power’s 2022 Capital Budget Application.

Sections 3(2) and 22(a) of the regulations read:

3.(2) In any application...the board may dispense with, vary or supplement any provisions of these regulations on those terms as the board considers necessary.

22. When the board does not proceed by way of a public hearing, the board may, (a) dispose of the matter on the basis of the written documentation before it.

The PUB's practice in processing capital budget applications has been: (i) to utilize ss. 4 to 15; (ii) to then *de facto* invoke s. 3(2) to dispense with ss. 16 to 20; and (iii) to ultimately dispose of the application under s. 22(a).

In its June 25 response, the PUB said:

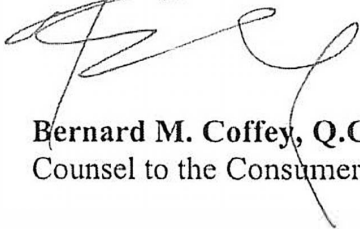
“The Board will consider all the information filed, including the application, the issues and projects to be addressed, responses to requests for information, intervenor evidence, and the justification provided in the request for an oral hearing.”

The application schedule sets July 13 as the date for parties to request a public [oral] hearing. As the dates for a technical conference (July 21) and for replies to RFIs (August 5) are well after July 13, the Consumer Advocate is denied procedural fairness because he cannot use information obtained from replies to RFIs or from a technical conference to inform and substantiate his request for a public hearing.

The application schedule also indicates the PUB's decision on holding a public hearing will occur on August 11, which is more than a week before responses to RFIs on intervenor evidence are filed. Therefore, in making its hearing decision the PUB will not consider all the information filed because on August 11 it will not yet have the responses to RFIs on intervenor evidence. The Guidelines schedule (page 3) suggests the PUB's past practice has been similarly unsatisfactory. The Guidelines schedule thereby denies ratepayers procedural fairness.

In light of the foregoing, the Consumer Advocate asks that the PUB forthwith indicate: (i) the total dollar value of capital expenditures that would have to be challenged by the Consumer Advocate in order for the PUB to order a public hearing; and (ii) how much it believes the daily cost of a public hearing would be.

Yours/truly,



Bernard M. Coffey, Q.C.
Counsel to the Consumer Advocate

cc

Newfoundland & Labrador Hydro

Shirley Walsh (ShirleyWalsh@nlh.nl.ca)

NLH Regulatory (NLHRegulatory@nlh.nl.ca)

Newfoundland Power Inc.

Kelly Hopkins (khopkins@newfoundlandpower.com)

Dominic Foley (dfoley@newfoundlandpower.com)

NP Regulatory (regulatory@newfoundlandpower.com)

PUB of Commissioners of Public Utilities

PUB Official Email (ito@pub.nl.ca)

Jacqui Glynn (jglynn@pub.nl.ca)

Colleen Jones (cjones@pub.nl.ca)



NEWFOUNDLAND AND LABRADOR
BOARD OF COMMISSIONERS OF PUBLIC UTILITIES
120 Torbay Road, P.O. Box 21040, St. John's, Newfoundland and Labrador, Canada, A1A 5B2

E-mail: dbrowne@bfma-law.com

2021-07-07

Dennis Browne, Q.C.
Consumer Advocate
Browne Fitzgerald Morgan & Avis
Terrace on the Square, Level 2
P.O. Box 23135
St. John's, NL A1B 4J9

Dear Mr. Browne:

Re: Newfoundland Power Inc. – 2022 Capital Budget Application – Response to Consumer Advocate’s Correspondence dated June 30, 2021 and Revised Schedule of Dates

This is in relation to correspondence from the Office of the Consumer Advocate dated June 30, 2021 with respect to the public hearing process for Newfoundland Power’s 2022 Capital Budget Application.

Before addressing the specific questions raised in your correspondence the Board finds it necessary to clarify that it is not correct to state: *“The sole factor the PUB identified in its June 25 response as a consideration in whether to order a public hearing is that the additional cost would be borne by customers.”* As set out in the Board’s June 25, 2021 letter, Newfoundland Power’s 2022 Capital Budget Application is being heard in a public proceeding and a determination as to whether an oral hearing will be held will be made based on all of the circumstances, including the best interests of customers. The Board notes that the paragraph you cite from the Board’s letter omits a key sentence in the middle of the paragraph, as underlined below:

While the hearing of a capital budget application is normally a written proceeding, the Board may hold an oral hearing where it determines that it is required to properly assess whether the proposed project expenditures should be approved. The Board does not make this determination based solely on the magnitude of the proposed annual capital budget. The Board will consider all the information filed, including the application, the issues and projects to be addressed, responses to requests for information, intervenor evidence, and the justification provided in the request for an oral hearing. Since an oral hearing can be very costly and these costs are passed on to customers, this determination must consider whether an oral hearing would be in customers’ best interests. [emphasis added]

In addition the Board wishes to clarify that the schedule for this application does not require the Consumer Advocate to file a request for a public hearing by July 13. As stated by the Board in its June 25, 2021 correspondence:

The Board notes that the Consumer Advocate has already made a request for an oral hearing and, as the matter progresses, the Board may ask the Consumer Advocate to provide clarification as to the basis for this request.

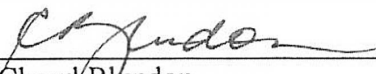
Should the Board require further input from the Consumer Advocate the Board will advise. In the absence of such a requirement, the Consumer Advocate is free to provide additional information in support of the request for an oral hearing in advance of the Board's determination.

In relation to the other matters raised in your correspondence:

- The timing of the Board's decision with respect to whether there will be an oral hearing will be moved to August 24, 2021. A revised schedule is attached.
- The Board advised on February 18, 2021 that the existing Capital Budget Application Guidelines would be followed with three modifications. A copy of this correspondence is attached.
- There is no set dollar value which would require an oral hearing since all of the circumstances are considered and the magnitude of the proposed capital budget is not the sole factor in this determination.
- The costs of an oral hearing depend on a number of factors, including the number of parties and witnesses, the complexity of the issues raised and the conduct of the parties. Hearing costs include all Board and Consumer Advocate costs and may also include other parties' costs where the Board makes an order for cost recovery at the end of the proceeding. As a result, the costs of an oral hearing are not known until after the hearing concludes.

If you have any questions, please do not hesitate to contact the Board's Legal Counsel, Ms. Jacqui Glynn, by e-mail, jglynn@pub.nl.ca or telephone (709) 726-6781.

Sincerely,


 Cheryl Blundon
 Board Secretary

CB/cj

ecc **Newfoundland Power Inc.**
 Dominic Foley, E-mail: dfoley@newfoundlandpower.com
 Liam O'Brien, E-mail: lobrien@curtisdawe.com
 NP Regulatory, E-mail: regulatory@newfoundlandpower.com
Newfoundland and Labrador Hydro
 Shirley Walsh, E-mail: shirleywalsh@nlh.nl.ca
 NLH Regulatory, E-mail: NLHRegulatory@nlh.nl.ca

Consumer Advocate
 Bernard M. Coffey, Q.C., E-mail: berncoffey@gmail.com
 Stephen Fitzgerald, E-mail: sfitzgerald@bfma-law.com
 Sarah Fitzgerald, E-mail: sarahfitzgerald@bfma-law.com
 Bernice Bailey, E-mail: bbailey@bfma-law.com

**Newfoundland Power Inc.
2022 Capital Budget Application Schedule**

May 2021

May 18 (Tuesday) Application Received

June 2021

June 5 (Saturday) Notice Published

June 22 (Tuesday) Intervenor Submissions Filed

June 29 (Tuesday) Request for Presentation of the Application

July 2021

Week of July 5 Presentation of Capital Budget to Intervenors by NP

July 13 (Tuesday) RFIs to be filed

Request for Technical Conference (including the list of projects or areas of concerns to be addressed) or oral hearing

Notice of Intervenor Evidence (including the name of the experts and the area of evidence on which they will provide evidence)

July 21 (Wednesday) Technical Conference (Reserved Date if Required)

July 28 (Wednesday) Intervenor Evidence to be filed

August 2021

August 5 (Thursday) Replies to RFIs on the Application

August 9 (Monday) RFIs on Intervenor Evidence to be filed

Letters of Comments¹

August 20 (Friday) Responses to RFIs on Intervenor Evidence

August 24 (Tuesday) Decision on whether Oral Hearing will be held

September 2021

September 9 (Thursday) Oral Hearing (Reserved Date if Required)

September 23 (Thursday) Written Submissions

September 30 (Thursday) Reply Submission from NP

¹ As set out in the published notice of Application