

IN THE MATTER OF the *Public Utilities Act*,
(the “Act”); and

IN THE MATTER OF an application by
Newfoundland Power Inc., (“Newfoundland
Power”) for an Order pursuant to Section 48 of the
Act, and all other enabling powers for approval of
the sale by Newfoundland Power to Bell Aliant
Regional Communications Inc. (“Bell Aliant”) of
certain utility poles, anchors and related equipment
(“Support Structures”).

**WRITTEN SUBMISSION
OF
NEWFOUNDLAND POWER INC.**

MAY 26, 2011

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1 **1.0 INTRODUCTION**

2 **1.1 Background**

3 This Application is concerned with the terms associated with the continued shared use of utility
4 poles and related infrastructure in Newfoundland Power’s service territory (collectively “Support
5 Structures”).

6
7 In economic terms, the provision of services by multiple users of Support Structures from a
8 common infrastructure (“Joint Use”) is less costly than each user providing service from separate
9 infrastructure. Joint Use of Support Structures creates efficiencies through avoided costs of
10 duplicate infrastructure. Each user of the Support Structures and their customers receive the
11 economic benefits of these efficiencies.

12 **Reference:** Prefiled Evidence, page 3, lines 15-19.

13
14 The economic benefits of Joint Use are substantial. The construction cost associated with
15 installation of a single Joint Use Support Structure is approximately ½ of the construction cost of
16 separate Support Structures for each of an electric utility user and a telecommunications user.
17 This is broadly indicative of the scale of efficiencies associated with Joint Use.

18 **Reference:** Prefiled Evidence, page 4, lines 3-6; Exhibit 1.

19
20 Since the 1990s, the terms of Joint Use in Newfoundland Power’s service territory have been
21 predominantly established by way of negotiated agreement as opposed to regulatory orders.

22 **Reference:** Prefiled Evidence, page 1, lines 12-14; Response to Request for Information
23 PUB-NP-80.

24

1 **1.2 Legislative Framework**

2 To capture the substantial economic benefits associated with Joint Use, it is well established in
3 regulatory principle that public utilities and telecommunications service providers should be
4 granted non-discriminatory access to essential facilities that are controlled by each of these
5 parties.

6 **Reference:** Prefiled Evidence, page 4, lines 9-11; Responses to Requests for Information
7 PUB-NP-2, PUB-NP-48.

8

9 Section 53 of the *Public Utilities Act* governs the Joint Use of Support Structures by public
10 utilities and telecommunications service providers in Newfoundland and Labrador. Section 53
11 provides, in effect, that Newfoundland Power permit Joint Use of its Support Structures for
12 reasonable compensation where “public convenience and necessity require that use and it will
13 *not result in a substantial detriment* to the service rendered or to be rendered by” Newfoundland
14 Power. In the absence of agreement on appropriate conditions and compensation for Joint Use,
15 any of the parties may apply to the Board to prescribe the conditions and compensation for Joint
16 Use. (emphasis added)

17 **Reference:** Section 53 of the *Public Utilities Act*.

18

19 Section 37 (1) of the *Public Utilities Act* and Section 3 of the *Electrical Power Control Act, 1994*
20 (“EPCA”) constitute the essential legislative framework for the Board’s regulation of public
21 utilities, including Newfoundland Power. This legislative framework reflects the principal
22 considerations of *service* and *cost* that underlie most public utility regulatory regimes in Canada.

1 Section 37(1) of the *Public Utilities Act* states that a public utility shall provide service and
2 facilities that are reasonably safe and adequate and just and reasonable.

3
4 Section 3(b) of the EPCA states that all sources and facilities for the production, transmission,
5 and distribution of power in the province should be managed and operated in a manner that
6 would result in:

- 7 i. the most efficient production, transmission, and distribution of power,
- 8 ii. consumers in the province having equitable access to an adequate supply of
9 power, and
- 10 iii. power being delivered to customers in the province at the lowest possible cost
11 consistent with reliable service.

12 **Reference:** *Public Utilities Act; Electrical Power Control Act, 1994.*

13
14 Section 4 of the EPCA requires the Board, in carrying out its duties and exercising its powers under
15 the EPCA or the Act, to implement the power policy declared in Section 3 of the EPCA, and in
16 doing so to apply tests which are consistent with generally accepted sound public utility practice.

17 **Reference:** *Electrical Power Control Act, 1994.*

18
19 Section 48 of the *Public Utilities Act* states that a public utility shall not sell, assign or transfer
20 the whole of its undertaking or a part of it to a person or corporation until the approval of the
21 Board has been obtained. The Application seeks approval of the Board, pursuant to Section 48,
22 to sell Joint Use Support Structures to Bell Aliant as part of the establishment of a new Joint Use
23 regime in Newfoundland Power's service territory.

24 **Reference:** Section 48 of the *Public Utilities Act*.

1 **1.3 Application Context**

2 Prior to 2001, Newfoundland Power and Bell Aliant, then Aliant Telecom Inc., each shared the
3 use of Support Structures owned by the other in Newfoundland Power's service territory. Costs
4 of Joint Use Support Structures have been shared on the basis of 60% Newfoundland Power and
5 40% Bell Aliant since the late 1980s.

6 **Reference:** Prefiled Evidence, page 1, line 16 to page 2, line 12.

7

8 In 2001, Newfoundland Power acquired all of the Joint Use Support Structures in its service
9 territory that had been owned by Bell Aliant, and entered into a Joint Use Facilities Partnership
10 Agreement with Bell Aliant (the "JUFPA") that established comprehensive terms for the
11 continued Joint Use of Support Structures. The terms of Newfoundland Power's 2001
12 acquisition of the Joint Use Support Structures owned by Bell Aliant provided that, upon
13 termination or nonrenewal of the JUFPA, Bell Aliant would repurchase 40% of the Joint Use
14 Support Structures. The Board specifically recognized the existence of this repurchase
15 obligation in Order No. P.U. 6 (2001-2002) and ultimately approved Newfoundland Power's
16 acquisition of the Joint Use Support Structures in Order No. P.U. 17 (2001-2002).

17 **Reference:** Order No. P.U.6 (2001-2002), page 2; Order No. P.U. 17 (2001-2002)
18 whereby the Board felt approval of the JUFPA was unnecessary and that an
19 application under Section 48 would be required to effect Bell Aliant's repurchase.
20

21 Since 2001, Newfoundland Power has owned and maintained all of the Joint Use Support
22 Structures in its service territory. The benefits associated with Newfoundland Power ownership
23 of all Joint Use Support Structures under the JUFPA from 2001 through 2010 were
24 approximately \$10.1 million, when compared to the multi-party ownership arrangement existing
25 in 2000. These benefits materially exceeded the benefits forecast in 2001. Since 2001, there has

1 been no *substantial detriment* to the service rendered by Newfoundland Power associated with
2 the JUFPA.

3 **Reference:** Prefiled Evidence, page 7, lines 6-10; Exhibit 4; Response to Request for
4 Information PUB-NP-37.

5
6 On June 30, 2010, Bell Aliant gave notice to Newfoundland Power of its intention not to renew
7 the JUFPA upon its expiration on December 31, 2010. Newfoundland Power and Bell Aliant
8 have since negotiated a new Joint Use regime based upon a 60% / 40% sharing of ownership and
9 costs of Joint Use Support Structures, as contemplated by the JUFPA.

10 **Reference:** Prefiled Evidence, page 7, line 14 to page 8, line 6.

11

12 **1.4 Application**

13 This Application seeks the Board's approval pursuant to Section 48 of the *Public Utilities Act* of
14 the sale of 40% of Newfoundland Power's Joint Use Support Structures to Bell Aliant. The
15 Board's approval of the Application will enable the establishment of a new Joint Use regime
16 which is consistent with the relevant legislative framework and the JUFPA.

17

18 **2.0 PROCESS**

19 **2.1 Application and Public Notice**

20 The Application and Newfoundland Power's Evidence were filed with the Board on February 4, 2011.

21

22 Public notice of the Application was given on April 2, 2011.

23

24 **2.2 Further Information**

25 Newfoundland Power responded to a total of 96 Requests for Information ("RFIs").

1 On February 18, 2011, the Board issued 12 RFIs to Newfoundland Power. Newfoundland Power
2 responded to those 12 RFIs on March 4, 2011.

3
4 On April 22, 2011, the Board issued a further 68 RFIs to Newfoundland Power. On April 26,
5 2011, the Consumer Advocate issued 7 RFIs. Newfoundland Power responded to those 75 RFIs
6 on May 6, 2011.

7
8 On May 10, 2011, the Board issued one further RFI to Newfoundland Power, and the Consumer
9 Advocate issued a further 8 RFIs. Newfoundland Power responded to those 9 RFIs on May 13, 2011.

10
11 On April 21, 2011, the Board entered as Consent No. 1 and Consent No. 2, respectively,
12 materials related to the July 26, 2001 and May 8, 2001 Newfoundland Power applications for
13 approval to acquire the Joint Use Support Structures of Bell Aliant (then, Aliant Telecom.)

14

15 **2.3 Other Matters**

16 No other evidence was filed in proceedings on the Application.

17

18 No technical conference or formal hearing was requested or ordered in respect of the
19 Application.

20

21 By letter dated May 17, 2011, the Board identified certain legal issues that the parties may wish
22 to address in their submissions on the Application.

1 **3.0 SUMMARY OF EVIDENCE**

2 **3.1 The New Joint Use Regime**

3 Newfoundland Power and Bell Aliant have agreed comprehensive terms for the continued Joint
4 Use of Support Structures in Newfoundland Power’s service territory.

5 **Reference:** Prefiled Evidence page 2, lines 14-18.

6

7 All aspects of the change in the Joint Use regime were evaluated by Newfoundland Power,
8 including the risk of negative impacts, from either a cost or service perspective, to current
9 Newfoundland Power customers.

10 **Reference:** Responses to Requests for Information PUB-NP-33, PUB-NP-34.

11

12 A Joint Use Support Structures Purchase Agreement (the “Purchase Agreement”) for the sale to
13 Bell Aliant of 40% of Newfoundland Power’s Joint Use Support Structures was executed on
14 December 22, 2010.

15 **Reference:** Prefiled Evidence, page 8, lines 1-4; Exhibit 5.

16

17 The sale contemplated by the Purchase Agreement is subject to the Board’s approval pursuant to
18 Section 48 of the *Public Utilities Act*. If the sale is approved by the Board by June 30, 2011, the
19 new Joint Use regime will be effective as of January 1, 2011. The Purchase Agreement is
20 subject to termination by either party if Board approval is not received by June 30, 2011.

21 **Reference:** Prefiled Evidence, page 8, lines 11-15.

1 The sale price of \$45,698,000 is calculated based on the net book value of 40% of Newfoundland
2 Power's Joint Use Support Structures as of December 31, 2010, as defined in the JUFPA.

3 **Reference:** Prefiled Evidence, page 9, lines 4-6; Exhibit 6.

4
5 Upon payment of the sale price, together with agreed adjustments, Bell Aliant will have assumed
6 the *financial* responsibilities associated with 40% of the Joint Use Support Structures with effect
7 from January 1, 2011.

8 **Reference:** Prefiled Evidence, page 8, line 17 to page 9, line 2.

9
10 In order to facilitate the continued Joint Use of Support Structures under the new regime,
11 Newfoundland Power and Bell Aliant have initiated a pole count survey. The pole count survey
12 will confirm the necessary information to permit transfer of specific Joint Use Support Structures
13 to Bell Aliant, to achieve an equitable apportioning according to defined characteristics.

14 **Reference:** Prefiled Evidence, page 9, lines 11-17; Responses to Requests for Information
15 PUB-NP-7, PUB-NP-8, PUB-NP-10, PUB-NP-28.

16
17 The pole count survey will not alter any of the fundamental cost sharing and operational
18 arrangements agreed between Newfoundland Power and Bell Aliant.

19 **Reference:** Response to Request for Information PUB-NP-7.

20
21 Following the transfer of specific Joint Use Support Structures to Bell Aliant by December 31,
22 2011, Bell Aliant will have assumed the *operational* responsibilities associated with 40% of the
23 Joint Use Support Structures.

24 **Reference:** Prefiled Evidence, page 10, lines 1-3.

1 As part of the Purchase Agreement, Newfoundland Power and Bell Aliant revised the terms for
2 their Joint Use of Support Structures to be effective January 1, 2011 (the “2011 JUA”).

3 **Reference:** Prefiled Evidence, page 8, lines 4-6; Exhibit 5.

4
5 The negotiated terms of the 2011 JUA substantially reflect longstanding operational practice
6 regarding Joint Use of Support Structures in Newfoundland Power’s service territory. The 2011
7 JUA achieves 60% / 40% cost sharing through proportionate ownership of Joint Use Support
8 Structures by Newfoundland Power and Bell Aliant. The initial term of the 2011 JUA is five
9 years. No attachment rental fees will be paid by either party under the 2011 JUA.

10 **Reference:** Prefiled Evidence, page 10, line 9 to page 11, line 2; Response to Request for
11 Information PUB-NP-12.

12
13 Both the JUFPA and the 2011 JUA are based upon a 60% / 40% sharing of Joint Use costs.
14 Accordingly, Newfoundland Power’s costs for Joint Use Support Structures under the 2011 JUA
15 are broadly comparable to those costs which could be expected had the JUFPA been renewed to
16 reflect current financial parameters.

17 **Reference:** Prefiled Evidence, page 11, lines 7-10; Exhibit 8; Response to Request for
18 Information PUB-NP-44.

19
20 The 2011 JUA maintains all existing rights of third parties to attach to Joint Use Support
21 Structures as required by Section 53 of the *Public Utilities Act*.

22 **Reference:** Prefiled Evidence, page 11, lines 4-5; Responses to Requests for Information
23 PUB-NP-2, PUB-NP-3.

24
25 Regardless of the change in ownership of Support Structures, Newfoundland Power will, after
26 completion of the sale, continue to own and be responsible for the operation and maintenance of

1 *all electrical distribution facilities* within its service territory. In addition, Newfoundland Power
2 will have the same right to use all Joint Use Support Structures in its service territory as it had
3 under the JUFPA.

4 **Reference:** Responses to Requests for Information PUB-NP-11, PUB-NP-68.

5

6 **3.2 Least Cost Service**

7 Joint Use of Support Structures in Newfoundland Power's service territory has resulted in
8 substantial economic benefits to the Company's customers, primarily through the avoided cost of
9 duplicate Support Structures.

10 **Reference:** Prefiled Evidence, page 3, lines 15-20.

11

12 Newfoundland Power's 2001 purchase of Bell Aliant's Joint Use Support Structures (together
13 with the JUFPA) and Bell Aliant's 2011 repurchase of 40% of the Joint Use Support Structures
14 (together with the 2011 JUA) are collectively, and individually, consistent with the least-cost
15 standard.

16 **Reference:** Prefiled Evidence, page 6, line 20 to page 7, line 10; Prefiled Evidence, page 11,
17 lines 7-17; Response to Request for Information PUB-NP-45.

18

19 The 2011 JUA is effectively an extension of the JUFPA, since the purchase of Joint Use Support
20 Structures by Newfoundland Power in 2001 was predicated on providing the right to Bell Aliant
21 to repurchase 40% of Joint Use Support Structures upon termination or non-renewal of the
22 JUFPA in 2011.

23 **Reference:** Response to Request for Information PUB-NP-45.

24

1 The Board has mandated the net present value methodology for economic analysis for regulatory
2 purposes by Newfoundland Power.

3 **Reference:** Order No. P.U. 6 (1991), pages 32 and 83.

4
5 Net present value analysis indicates the benefits achieved by the Company's Joint Use of
6 Support Structures under the JUFPA for the period 2001 through 2010 were approximately \$10.1
7 million. The benefits indicated for the Company's Joint Use of Support Structures under the
8 2011 JUA are approximately \$497,000 for the period 2011 through 2015. These benefits are
9 effectively in *addition* to any on-going benefits established under the JUFPA which would have
10 continued over the period 2011 through 2015 had the JUFPA been renewed. The economic
11 analysis remains positive if considered on the basis of a 10-year term.

12 **Reference:** Exhibit 4; Exhibit 8; Responses to Requests for Information PUB-NP-45,
13 PUB-NP-78, PUB-NP-81.

14
15 This economic analysis is conservative, and does not include potential additional benefits which
16 may result from the new Joint Use regime.

17 **Reference:** Responses to Requests for Information PUB-NP-35, CA-NP-9.

18
19 From a *service* perspective, the proposed sale of Joint Use Support Structures will not impact any
20 customers of Newfoundland Power. Newfoundland Power's existing operational practices for
21 Support Structure inspections and maintenance and for emergency response times have been
22 incorporated in the terms of the 2011 JUA.

23 **Reference:** Prefiled Evidence, page 10, lines 14-17; Exhibit 2; Responses to Requests for
24 Information PUB-NP-1, PUB-NP-34, PUB-NP-37, PUB-NP-38, PUB-NP-39,
25 PUB-NP-49, PUB-NP-55, PUB-NP-56, PUB-NP-57, PUB-NP-58, PUB-NP-60,
26 PUB-NP-61, PUB-NP-62, PUB-NP-63, PUB-NP-64, PUB-NP-68, CA-NP-1.

1 The evidence shows that the sale of 40% of the Joint Use Support Structures to Bell Aliant and
2 establishment of a new Joint Use regime maintains the substantial economic benefits associated
3 with Joint Use, including those achieved under the JUFPA. The sale of the poles and the 2011
4 JUA indicates a positive net present value when compared to the renewal of the JUFPA. These
5 are *additional* benefits. This is consistent with the least cost service requirement of Section 3(b)
6 of EPCA.

7

8 **3.3 Canadian Public Utility Practice**

9 The shared use of utility poles and related infrastructure by multiple parties is a longstanding
10 Canadian public utility practice. Typically, the multiple users of Support Structures include
11 electrical service providers, telecommunication service providers and cable television service
12 providers.

13 **Reference:** Prefiled Evidence, page 1, lines 3-6.

14

15 In January 2011, Newfoundland Power conducted a survey of the Joint Use practices of 13
16 electric utilities representing 9 Canadian provinces.

17 **Reference:** Prefiled Evidence, page 5, lines 1-2; Exhibit 2; Responses to Requests for
18 Information CA-NP-17, CA-NP-18.

19

20 Joint Use of Support Structures can be achieved either through (i) ownership by multiple users
21 (“Joint Ownership”) or (ii) ownership by a single user with tenants paying for attachments to
22 Support Structures (“Single Ownership”). Joint Ownership of Support Structures appears to be
23 the predominant model in Canada. The Joint Ownership arrangement that will result from the
24 proposed sale is consistent with Canadian public utility practice.

25

1 **Reference:** Prefiled Evidence, page 5, lines 2-6; Exhibit 2; Response to Request for
2 Information PUB-NP-20.

3
4 Regardless of ownership model, fair and equitable distribution of the economic benefits of Joint
5 Use of Support Structures by electric utilities and telecommunications companies occurs when
6 each user (i) shares equally in the common costs of the Support Structures and (ii) fully bears
7 those costs related to its specific requirements. This ensures that each of the users bears a
8 reasonable portion of the overall costs of Joint Use, and substantially minimizes any risk of
9 cross-subsidization between users.

10 **Reference:** Prefiled Evidence, page 4, lines 11-16.

11
12 Joint Use Support Structure cost sharing on the basis of approximately 60% for the electric
13 utility and 40% for the telecommunications company appears to be the predominant model in
14 Canada, regardless of ownership model. The similarity and longevity of these arrangements
15 across a number of provinces suggests that a 60% / 40% cost sharing approach is fair and
16 equitable.

17 **Reference:** Prefiled Evidence, page 5, lines 8-12; Exhibit 2; Response to Request for
18 Information CA-NP-4.

19
20 The typical Canadian public utility practice of sharing the costs of Joint Use Support Structures
21 on the basis of 60% / 40% is also supported by the engineered dimensions of a typical Joint Use
22 Support Structure.

23 **Reference:** Prefiled Evidence, page 5, lines 14-16; Exhibit 3.

1 Under the 2011 JUA, as under the JUFPA, Newfoundland Power and Bell Aliant avoid the cost
2 of duplicate infrastructure and share the costs of Joint Use of a common infrastructure consistent
3 with current Canadian public utility practice. This is fair to, and in the best interests of,
4 Newfoundland Power, Bell Aliant and the customers of each.

5 **Reference:** Prefiled Evidence, page 11, lines 10-12; Response to Request for Information
6 CA-NP-7.

7

8 **4.0 SPECIFIC ISSUES RAISED BY BOARD**

9 **4.1 Questions from the Board**

10 By letter dated May 17, 2011, the Board identified certain legal issues that the parties may wish
11 to address in their submissions on the Application. Each of these legal issues is addressed in this
12 section.

13

14 **4.2 Application of Section 48**

15 ***What is the appropriate test to be applied by the Board in an application by a utility under***
16 ***section 48 of the Public Utilities Act to sell used and useful assets?***

17

18 The Board has not indicated a test which has been, or should be, applied by the Board in
19 applications under Section 48 of the Act. In deciding *this* Application, the Board should apply
20 those provisions of the Act and the EPCA which are set out and described under *Section 1.2*
21 *Legislative Framework* above, within the context of the new Joint Use regime agreed by
22 Newfoundland Power and Bell Aliant. A summary of those provisions and their relevance to this
23 Application follows.

1 The new Joint Use regime ensures the continued Joint Use of Support Structures as required by
2 Section 53 of the Act. This, in turn, ensures that the substantial economic benefits associated
3 with Joint Use, particularly those resulting from the avoidance of duplicate facilities, continue to
4 be realized without any substantial detriment to the service provided by Newfoundland Power.

5 The evidence in support of the Application shows that the new Joint Use regime, including the
6 2011 JUA, ensures that all Joint Use Support Structures will, following the proposed sale to Bell
7 Aliant, continue to be *used by, and useful to*, Newfoundland Power in the delivery of service to
8 its customers, as they were before the sale.

9 **Reference:** Prefiled Evidence, page 10, lines 14-17; Prefiled Evidence, page 11, lines 4-5;
10 Responses to Requests for Information PUB-NP-1, PUB-NP-37.

11
12 The evidence indicates that the new Joint Use regime is consistent with Newfoundland Power's
13 continued provision of service and facilities which are reasonably safe and adequate and just and
14 reasonable as required by Section 37 of the Act. In addition, the evidence indicates that the new
15 Joint Use regime is consistent with the management and operation of distribution facilities in a
16 least cost, reliable manner as required by Section 3(b) of the EPCA. The cost benefits of the new
17 Joint Use regime to Newfoundland Power and its customers will be greater than those associated
18 with renewal of the JUFPA. Accordingly, the new Joint Use regime is least cost as compared to
19 renewal of the JUFPA. The new Joint Use regime will not affect the service enjoyed by
20 Newfoundland Power's customers, including the reliability of that service.

21 **Reference:** Prefiled Evidence, page 11, lines 7-12; Exhibit 4; Exhibit 8; Responses to
22 Requests for Information PUB-NP-38, PUB-NP-45.

23
24 Finally, the evidence indicates that the new Joint Use regime is consistent with current Canadian
25 generally accepted sound public utility practice. The 60% / 40% cost sharing ratio for Joint Use

1 of Support Structures is the most common division of costs in current Canadian practice. The
2 new Joint Use regime incorporates detailed operational practices for inspections, maintenance
3 and emergency response which are over and above what is typical in current Canadian Joint Use
4 arrangements.

5 **Reference:** Prefiled Evidence, page 5, line 1 to page 6, line 5; Prefiled Evidence, page 10,
6 lines 14-17; Exhibit 2; Responses to Requests for Information CA-NP-4, PUB-NP-20.
7

8 In deciding this Application under Section 48 of the Act, the Board should consider that the
9 evidence before it shows that the new Joint Use regime:

- 10 (i) ensures the continuation of the economic benefits associated with Joint Use of
11 Support Structures;
- 12 (ii) ensures Newfoundland Power's continued right to use all Joint Use Support
13 Structures;
- 14 (iii) ensures least cost provision of service in that it provides more economic benefits
15 to Newfoundland Power and its customers than those associated with renewal of
16 the JUFPA;
- 17 (iv) does not diminish the service enjoyed by Newfoundland Power's customers; and
18 (v) is consistent with current Canadian public utility practice.

19 **4.3 Possibility of Adverse Consumer Impact**

20 *If it is found that the evidence shows that there is a possibility that consumers will be worse off*
21 *after the sale should the application for approval of the sale be denied?*

22

23 Newfoundland Power submits that, for a number of reasons, a Board finding that there is a
24 *possibility* that customers will be worse off after the sale cannot form a basis for denial of the
25 Application.

1 First, the use of a *possibility* as the basis for denial of the Application would be contrary to the
2 Act. Section 53 effectively requires Newfoundland Power to permit Joint Use (and the Board to
3 mandate it in circumstances where it cannot be agreed) in all cases where public convenience
4 and necessity require the use and it will not result in a *substantial detriment* to service. In
5 Newfoundland Power's view, the substantial economic benefits associated with Joint Use
6 indicate sufficient public convenience and necessity. Given this, it is not open to the Board to
7 effectively substitute a *possibility* consumers will be worse off for the *substantial detriment*
8 standard specifically contained in Section 53.

9
10 Secondly, as a matter of law, the Board is required to determine matters upon evidence. The
11 evidence on the record of this Application does not indicate a reasonable possibility that
12 customers will be worse off as a result of the proposed sale of the Joint Use Support Structures.
13 Accordingly, there is no reasonable evidentiary basis for a Board finding of a possibility
14 customers will be worse off.

15
16 Finally, the Board's essential role is that of supervisor, not manager, of Newfoundland Power's
17 regulated operations. As a general rule, the Court of Appeal has determined that the Board
18 should not substitute its judgement on managerial and business issues for the judgement of the
19 management of Newfoundland Power. Management is entitled to latitude to run the business.
20 This principle of latitude is especially applicable to cases in which the evidence clearly indicates
21 a *probability* of customer benefits associated with Board approval.

22 **Reference:** The Stated Case, paras. 118 to 120; Responses to Requests for Information
23 PUB-NP-1, PUB-NP-33, PUB-NP-34, PUB-NP-35, PUB-NP-37, PUB-NP-38,
24 PUB-NP-55, PUB-NP-60, PUB-NP-61, PUB-NP-62, PUB-NP-63, PUB-NP-64.

1 **4.4 The Limits of Provincial Regulation**

2 *Is it a relevant consideration that Newfoundland Power is selling used and useful assets to a*
3 *corporation that is not regulated by the Board or another provincial regulator?*

4
5 In the circumstances of this Application, it is not a material consideration that Bell Aliant is not
6 regulated by the Board or another provincial regulator.

7
8 In 2001, when the Board approved Newfoundland Power's acquisition of Joint Use Support
9 Structures then owned by Aliant Telecom, Aliant Telecom was not regulated by the Board or
10 another provincial regulator. At the time of that approval, there was a clear recognition by the
11 Board of the existence of a repurchase obligation of Aliant Telecom. The repurchase by Bell
12 Aliant of the Joint Use Support Structures in 2011, in effect, returns the status of ownership of
13 Joint Use Support Structures to where it was for over a decade prior to 2000. Multi-party
14 ownership of Joint Use Support Structures between telecommunications companies and electric
15 utilities is the predominant model in eastern Canada. Bell Aliant is the owner of approximately
16 2.3 million utility poles in eastern Canada. Sales of Joint Use Support Structures by an electric
17 utility to a telecommunications company is not unprecedented.

18 **Reference:** Order No. P.U. 6 (2001-2002), page 2; Responses to Requests for Information
19 PUB-NP-11, PUB-NP-20, PUB-NP-72.

20
21 The sale of Joint Use Support Structures to Bell Aliant will not diminish Newfoundland Power's
22 right to use the Support Structures owned by Bell Aliant in the delivery of electrical service to
23 customers in any way. This right has been agreed in the 2011 JUA which contains enforceable
24 contractual obligations. As is indicated in the evidence, this arrangement is conceptually similar
25 to a lease which is a contractual right to use (as opposed to own) property. The fact that a lessor

1 of Newfoundland Power was not regulated by the Board or another provincial regulator would
2 not be relevant in leasing of computers, vehicles, office facilities, or other assets necessary to
3 deliver service.

4 **Reference:** Response to Request for Information PUB-NP-11.

5
6 Agreed arrangements for Joint Use of Support Structures such as contained in the 2011 JUA are
7 consistent with both the Act and the *Telecommunications Act (Canada)* to which Bell Aliant is
8 subject. Once agreed, these arrangements have not historically been subject to *any* uncertainty
9 associated with regulatory intervention.

10 **Reference:** Responses to Requests for Information PUB-NP-2, PUB-NP-48.

12 **4.5 The Issue of Assignment**

13 ***Is it a relevant consideration that after purchasing the support structures Bell can sell or***
14 ***assign its interest in the used and useful assets without seeking the approval of the Board?***

15
16 After purchasing the Joint Use Support Structures, Bell Aliant's rights of assignment under the
17 2011 JUA are subject to Newfoundland Power's reasonable consent (except for the case of
18 assignment to an affiliate). Assignment of the 2011 JUA by Bell Aliant, even if consented to by
19 Newfoundland Power, would not affect Newfoundland Power's rights to use Support Structures.

20
21 After purchasing the Joint Use Support Structures, Bell Aliant's right to sell Support Structures
22 used by Newfoundland Power is subject to Newfoundland Power's right of first refusal to
23 purchase the Support Structures.

24 **Reference:** Response to Request for Information PUB-NP-13.

1 The practical effect of these provisions is to preserve Newfoundland Power's *right to use* all
2 Joint Use Support Structures owned by Bell Aliant, even if Bell Aliant in the future chooses not
3 to use or own the Support Structures. From a service perspective, the right to use Joint Use
4 Support Structures is necessary; ownership of the Support Structures is not.

5
6 Newfoundland Power observes that sale and assignment provisions similar to those in the 2011
7 JUA have existed in Joint Use agreements since at least the late 1980s. There is no indication in
8 evidence that such provisions have affected either service delivery by Newfoundland Power or
9 regulatory oversight of that service delivery in any way.

10

11 **4.6 The Administration Practices**

12 *Is it a relevant consideration that the terms of the Joint Use Agreement and the*
13 *Administration Practices which were presented to the Board in support of the application*
14 *may be changed without the approval of the Board?*

15

16 The Joint Use of Support Structures has historically been left for agreement between joint users
17 in the first instance. Both Section 53 of the Act and Section 43(5) of the *Telecommunications*
18 *Act* only contemplate regulatory intervention in cases where agreement cannot be reached. Since
19 the 1990s, the terms of Joint Use in Newfoundland Power's service territory have been
20 predominantly established by way of negotiated agreement as opposed to regulatory orders.

21 **Reference:** Prefiled Evidence, page 1, lines 12 to 14; Responses to Requests for Information
22 PUB-NP-15, PUB-NP-48.

23

1 Historically, routine amendments to facilitate the ongoing efficient administration of Joint Use as
2 agreed between the users have not been subject to regulatory oversight nor does such oversight
3 seem required by legislation or regulatory order.

4 **Reference:** Response to Request for Information PUB-NP-15.

5
6 The JUFPA contained Administrative Practices conceptually similar to those contained in the
7 2011 JUA, including similar provisions governing amendment. In Order No. P.U. 17 (2001-
8 2002), the Board was of the opinion that the JUFPA did *not* require Board approval.

9 **Reference:** Section 53 of the Act; Order No. P.U. 17 (2001-2002), page 5.

10

11 The terms of the new Joint Use regime have been agreed between Newfoundland Power and Bell
12 Aliant. These agreed arrangements are consistent with regulatory legislation and practice
13 governing Joint Use. Absent a legislative or regulatory requirement or practice, Newfoundland
14 Power sees no reason why Joint Use agreements and amendments should now be subject to prior
15 Board approval. Other agreements that are equally necessary to the efficient, reliable delivery of
16 service, such as collectively bargained labour agreements and amendments, are not subject to
17 prior regulatory approval.

18

19 **4.7 The Finalization of Arrangements**

20 ***Is it a relevant consideration that the specific support structures to be sold have not yet***
21 ***been determined and that the formal arrangements for the management of the Bell***
22 ***support structures have not yet been finalized for the entire initial term of the contract?***

23

24 The level of detail before the Board in this Application concerning specific Joint Use Support
25 Structures to be sold is substantially similar to the level of detail before the Board in 2001

1 concerning Joint Use and non-joint use Support Structures. Once approved by the Board in
2 Order No. P.U. 17 (2001-2002), the 2001 acquisition of Bell Aliant Joint Use Support Structures
3 by Newfoundland Power closed without incident or adverse impact upon customers,
4 notwithstanding the lack of precise detail before the Board concerning Joint Use and non-joint
5 use Support Structures.

6 **Reference:** Consent No. 2, May 8, 2001, Response to Request for Information PUB-6,
7 pages 2 and 3 of 4.

8
9 Detail concerning the attributes of the aggregate Joint Use Support Structure population is before
10 the Board. The principles and approach to be used in confirming the specific Joint Use Support
11 Structures to be purchased by Bell Aliant are agreed between Newfoundland Power and Bell
12 Aliant, and are also before the Board.

13 **Reference:** Responses to Requests for Information PUB-NP-7, PUB-NP-8, PUB-NP-9,
14 PUB-NP-28, PUB-NP-29, PUB-NP-30.

15
16 The pole count survey which is currently underway is a co-operative effort by virtually all users
17 of Joint Use Support Structures. The evidence before the Board concerning regulatory oversight
18 or intervention into Joint Use detail, such as cable attachment counts and tracking processes,
19 does not indicate that regulatory oversight or intervention is as efficient or transparent as agreed
20 processes between joint users of Support Structures.

21 **Reference:** Responses to Requests for Information PUB-NP-24, PUB-NP-80.

22
23 The 2011 JUA contains the Joint Use obligations of Newfoundland Power and Bell Aliant for the
24 entire term of the contract. Newfoundland Power has done sufficient due diligence and has the
25 necessary experience to determine Bell Aliant's ability to meet its obligations.

1 **Reference:** Exhibit 5, Schedule 4; Responses to Requests for Information PUB-NP-33,
2 PUB-NP-66, PUB-NP-73, PUB-NP-76.

3
4 The new Joint Use regime, including the 2011 JUA, provides for continued use of a Committee
5 structure to provide co-ordination in all Joint Use matters. This Committee structure is
6 consistent with past Joint Use regimes, including the JUFPA. This structure is responsive to the
7 detailed complexity of Joint Use administration.

8 **Reference:** Section 2, Administration Practices in Exhibit 5, Schedule 4; Consent No. 1,
9 July 26, 2001.

10
11 There are potential additional benefits to be achieved in Joint Use management through the term
12 of the 2011 JUA which are not reflected in the analysis filed with the Application. These
13 benefits will only serve to *increase* the overall benefits to Newfoundland Power and its
14 customers associated with the new Joint Use regime from that indicated in the evidence. The
15 benefits realized over the period 2001 through 2010 under the JUFPA were greater than those
16 indicated before the Board in 2001.

17 **Reference:** Prefiled Evidence, page 6, line 20 to page 7, line 10; Response to Request for
18 Information PUB-NP-35.

19
20 The potential consequences of delay in the application while all details are determined will
21 introduce a degree of financial and operational uncertainty for Newfoundland Power in respect
22 of Joint Use of Support Structures.

23 **Reference:** Responses to Requests for Information PUB-NP-5; PUB-NP-6 (1st Revision);
24 PUB-NP-23, PUB-NP-24, CA-NP-3.

25

1 The Joint Use obligations of both Bell Aliant and Newfoundland Power for the initial term are
2 clearly stated in the 2011 JUA. In addition, the principles governing the confirmation of the
3 specific Joint Use Support Structures to be purchased by Bell Aliant are settled. It is not
4 necessary, nor is it consistent with past regulatory practice, for the Board's consideration of
5 approval of a Joint Use matter to be delayed by detail of specific poles to be transferred or formal
6 settlement of every potential management detail over a 5-year prospective period.

7

8 **4.8 Contractual Responsibility**

9 *On what legal basis does Newfoundland Power suggest that Bell may hold Newfoundland*
10 *Power contractually responsible for its loss if the Board denies the application?*

11

12 The JUFPA clearly contains contractual obligations of both Bell Aliant and Newfoundland
13 Power.

14

15 In Order No. P.U. 6 (2001-2002), which considered Newfoundland Power's 2001 acquisition of
16 Bell Aliant's Support Structures, the Board specifically recognized that, upon termination or
17 non-renewal of the JUFPA after the initial 10-year term, Bell Aliant was obligated to purchase
18 40% of the Joint Use Support Structures at a net book value. The JUFPA was not renewed
19 following the initial 10-year term. This gave rise to the obligation of Bell Aliant to repurchase
20 (and the concomitant obligation for Newfoundland Power to sell) 40% of the Joint Use Support
21 Structures.

22 **Reference:** Order No. P.U. 6 (2001-2002), page 2; Prefiled Evidence, page 2, lines 7 to 15.

1 In Order No. P.U. 17 (2001-2002), the Board indicated, in effect, that its approval of the JUFPA
2 was not required and that an application under Section 48 of the Act was necessary before sale of
3 the Joint Use Support Structures as contemplated by the JUFPA was *finalized*.

4 **Reference:** Order No. P.U. 17 (2001-2002), page 5.

5
6 The Board, which has recognized the existence of the purchase obligation, has correctly
7 indicated that an application under Section 48 would be necessary to finalize that obligation.
8 However, this regulatory requirement does not, in and of itself, necessarily extinguish a party's
9 responsibility to fulfil its clear *contractual* obligations or answer for its failure to do so.

10 **Reference:** Response to Request for Information PUB-NP-23.

12 **5.0 REASONS FOR GRANTING ORDER REQUESTED**

13 The Board should grant the order requested in the Application because the evidence shows that
14 by granting the order requested the Board will enable the establishment of a new Joint Use
15 regime that is:

- 16 1. consistent with least cost management of Joint Use facilities and is consistent with
17 Section 53 of the *Public Utilities Act* and Section 3(b) of the *Electrical Power*
18 *Control Act, 1994*;
- 19 2. consistent with Newfoundland Power's right to continued use of all Joint Use Support
20 Structures, and comprehensively adopts Newfoundland Power's construction,
21 inspection and maintenance standards, thereby maintaining current levels of service
22 to Newfoundland Power's customers, consistent with Section 37(1) of the *Public*
23 *Utilities Act*;

- 1 3. consistent with current Canadian public utility practice, in that it is based on a 60% /
2 40% cost sharing ratio that is by far the most common Joint Use cost sharing ratio in
3 Canada;
- 4 4. consistent with the terms of Newfoundland Power’s 2001 purchase of the Joint Use
5 Support Structures approved by the Board in Order No. P.U. 17 (2001-2002), which
6 contemplated the purchase by Bell Aliant of 40% of the Joint Use Support Structures
7 and negotiation of a new Joint Use regime if the JUFPA was not renewed; and
- 8 5. consistent with fairness to Newfoundland Power, Bell Aliant and the customers of
9 each, in that Newfoundland Power and Bell Aliant each bear a reasonable proportion
10 of the cost and enjoy a reasonable proportion of the benefits of Joint Use.

11

12 **RESPECTFULLY SUBMITTED** at St. John’s, Newfoundland and Labrador, this 26th day of
13 May, 2011.

14

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