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October 18, 2013

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Via Electronic Mail and Courier

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

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

Dear Ms. Blundon:

Re: An Application by Newfoundland and Labrador Hydro pursuant to Subsection 41(3) of the Act for approval of a capital expenditure to supplement the Allowance for Unforeseen Items for the construction and purchase of certain improvements and additions to its property

The Island Industrial Customers Group submit this letter in response to the Board's email correspondence of October 15, 2013 inviting comment on the October 10, 2013 report filed by Hydro, in respect of the above Application.

The Island Industrial Customers Group, in the particular circumstances of the Black Tickle rehabilitation project, do not object to Hydro's Application to approve capital expenditure, in the revised amount of \$353,955, to supplement the Allowance for Unforeseen Items, notwithstanding the lack of a supplemental application for pre-approval of the Black Tickle expenditures. The Island Industrial Customers Group acknowledge that the initiating of the Black Tickle project was in response to an urgent circumstance, and are prepared to accept Hydro's explanation that subsequent expenditures through 2012-2013 were a necessary continuation of the rehabilitation and were limited to restoring the Black Tickle plant to its pre-fire condition. While it may be reasonable to query why Hydro could not have filed a supplemental application at some earlier point in the course of implementing these expenditures, the Island Industrial Customers are prepared to accept that the scope of the Black Tickle project, and of the Black Tickle project expenditures, do not represent an egregious circumstance where application for pre-approval by the Board would have been expected.

In stating this, however, the Island Industrial Customers Group reiterate the position, taken in their December 21, 2012 submission to the Board on the issue of 2011 Unforeseen Capital Expenditures (Charlottetown Additional Generating Capacity and Baie Verte – Ice Storm Damage), as it applies generally to approval of capital expenditures by the Board:

"The Island Industrial Customers believe that there is a strong presumption that arises from a contextual reading of the whole of the *Public Utilities Act* that the statutory norm for establishing "prudent" original cost (i.e. to meet the section 64

“prudent cost” test), for improvements or additions to the public utility’s property where the cost of construction or purchase is in excess of \$50,000.00 (paragraph 41(3)(a) of the *Public Utilities Act*), is that the prior approval of the Board will be obtained before proceeding with that improvement or addition to its property.

Some meaning must be given to subsection 41(3) of the *Public Utilities Act*. This necessarily implies that there ought to be potential consequences to a public utility not complying with subsection 41(3). In the view of the Island Industrial Customers those potential consequences are not necessarily limited to the imposition of a penalty under section 111 of the *Public Utilities Act*; the imposition of such penalty (if it were justified) would be a blunt and ineffective instrument to meet the regulatory purposes of the *Public Utilities Act* and the *Electrical Power Control Act, 1994* (“EPCA”)¹, at least in the circumstances such as those of the 2011 Unforeseen Capital Expenditures. In the view of the Island Industrial Customers, another potential consequence of lack of compliance with subsection 41(3) of the *Public Utilities Act* (and one more consonant with the regulatory purposes of that Act and of the EPCA) is that the Board may find that an unapproved cost was not “prudent”, within the meaning of paragraph 64(2)(b) of the *Public Utilities Act*.

The Island Industrial Customers accept that it is not every circumstance of a public utility proceeding with improvements or additions to its property without the prior approval of the Board contemplated by paragraph 41(3)(b) of the *Public Utilities Act* which will necessarily be found to be not “prudent”. There is express reference in subsection 41(4) of the *Public Utilities Act* to the possibility of expenditures in excess of those approved by the Board under subsection 41(1). A contextual interpretation of the *Public Utilities Act* must reasonably imply and accommodate both the possibility of unforeseen capital expenditures which are so urgently required that obtaining the prior approval of the Board before incurring that expenditure is not possible or not practical and the opportunity for *ex post facto* regulatory scrutiny of such expenditures.

The Island Industrial Customers would add though that such capital expenditures without prior approval should be the exception and outside of the norm of the public utility’s capital expenditures, and that the onus should be on the public utility to demonstrate that such capital expenditures are a justifiable exception to the norm of the public utility’s capital expenditures. The norm must be taken to be prior approval under subsection 41(1) (by the annual capital budget application) or under subsection 41(3) (by a supplemental capital expenditure application). If section 41(1) and section 41(3) processes were not recognized by the public utility, and enforced by the Board, as the norm for approval of capital expenditures, these provisions of the *Public Utilities Act* would be rendered nugatory.”

¹ Ss. 3(b) of the EPCA must always be considered: “all sources and facilities for the production, transmission, and distribution of power in the province should be managed and operated in a manner ...that would result in power being delivered to consumers in the province at the lowest possible cost consistent with reliable service”.

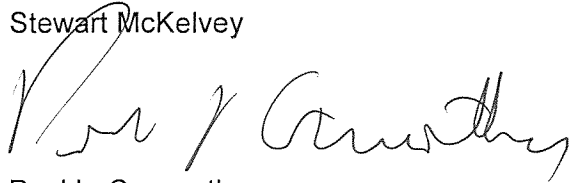
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We trust these submissions will be found to be in order.

Yours truly,

Stewart McKelvey

A handwritten signature in black ink, appearing to read "Paul L. Coxworthy". The signature is written in a cursive style with a large initial "P" and "C".

Paul L. Coxworthy

PLC/kmcd

- c. Mr. Geoffrey P. Young, Senior Legal Counsel, Newfoundland and Labrador Hydro
- Mr. Thomas J. Johnson, Consumer Advocate
- Mr. Gerard Hayes, Newfoundland Power
- Ms. Leanne O'Leary, Cox & Palmer
- Mr. Dean A. Porter, Poole Althouse