

December 11, 2014

Board of Commissioners of Public Utilities
Prince Charles Building
120 Torbay Road
St. John's, Newfoundland & Labrador
A1A 5B2

ATTENTION: Ms. Cheryl Blundon
Director of Corporate Services & Board Secretary

Re: Newfoundland and Labrador Hydro - 2013 General Rate Application - Hydro's 2014 Interim Cost Recovery Application, dated November 28, 2014

Dear Ms. Blundon:

This is further to Hydro's submission of December 9, 2014 and to the submission of Newfoundland Power of December 10, 2014. Hydro believes it is important to address one point in particular made by Newfoundland Power because it is, in Hydro's view, a misstatement of the law with regard to the Board's jurisdiction as to interim orders and deferral accounts. The Newfoundland Power submission contains the following passage:

Hydro appears to propose that the Board test the 2014 costs in 2015 prior to approving recovery.¹² Following approval of the Application, it is unclear to Newfoundland Power what jurisdiction, if any, the Board would retain to reduce recovery of the amount deferred. Section 75 of the Public Utilities Act specifically provides for interim orders governing rates. No equivalent provision exists permitting subsequent adjustment of interim orders with respect to deferral accounts. Accordingly, there exists a risk that an interim order in the Application could, in effect, be a final order.

With respect, the concern raised by Newfoundland Power is groundless and is inviting the Board to commit a jurisdictional error by imposing upon itself a restriction as to its authority to set rates through an interim order with respect to a deferral account.

Hydro's rates for 2014 for Island Interconnected customers are interim. Hydro's Application of November 28, 2014 seeks an interim order with respect to a deferral account which will allow the Board, in due course, to consider Hydro's 2014 cost and to make any adjustments that it may deem appropriate. The proposed amount set in the deferral account will be encumbered revenue; as such it will be subject to the later consideration of its treatment by the Board.

Regulatory Precedent

There is recent precedent from this Board confirming its jurisdiction to set aside an amount in a deferral account for later recovery and for the Board to consider, in a following year, its treatment and disposition. In Order No. P.U. 41(2013) the Board approved a deferral account with respect to repairs to the fuel oil system at Hydro's Holyrood Thermal Generating Station. By a subsequent Board Order, Order No. P.U. 4 (2014), the Board decided that Hydro would not be able to amortize and collect that amount as an extraordinary repair and directed Hydro to expense that amount.

Analysis and Treatment of the Issue by the Court of Appeal

An examination of the jurisdictional basis for deferral accounts shows that it comes from the Board's broad, rate making jurisdiction. With regard to setting rates generally, the Board's power comes from section 70 of the *Public Utilities Act*:

70. (1) A public utility shall not charge, demand, collect or receive compensation for a service performed by it whether for the public or under contract until the public utility has first submitted for the approval of the board a schedule of rates, tolls and charges and has obtained the approval of the board and the schedule of rates, tolls and charges so approved shall be filed with the board and shall be the only lawful rates, tolls and charges of the public utility, until altered, reduced or modified as provided in this Act.

The province's Court of Appeal has considered the Board's authority to set rates and in so doing to issue an order for a deferral account. This is addressed in *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, 2012 NLCA 38 (a copy of this case was included with Hydro's December 9, 2014 filing in this matter) at paragraph 63. Further, at paragraphs 54 and 55, Chief Justice Green speaking for a unanimous Court:

[54] The Board's jurisdiction and powers are governed by the *PUB Act* and the *Electrical Power Control Act, 1994*, SNL 1994 c. E-5.1 ("*EPC Act*"). The *PUB Act* confers on the Board the power for "the general supervision of all public utilities". Specifically the Board has sole authority to approve the rates charged by public utilities – ss. 70(1) and 71 – and the power to approve interim rates unilaterally – s. 75. The breadth of the Board's authority over rates is illustrated by s. 76 which confers the right to rescind or alter rates, s. 82 which confers the right to investigate a rate, where the Board believes that it is unreasonable or unjustly discriminatory, and ss. 84-87 which authorize the Board, following a formal complaint, to investigate and to cancel rates and void contracts where rates are found to be unjust, unreasonable, insufficient or unjustly discriminatory.

[55] In considering the extent of the Board's powers under the *PUB Act* reference must be made to s. 118 which states:

118.(1) This Act shall be interpreted and construed liberally in order to accomplish its purposes, and where a specific power or authority is given the board by this Act, the enumeration of it shall not be held to exclude or impair a power or authority otherwise in this Act conferred on the board.

(2) The board created has, in addition to the powers specified in this Act, all additional, implied and incidental powers which may be appropriate or necessary to carry out all the powers specified in this Act.

The legislative authority to issue an interim order is found in section 75 of the *Public Utilities Act*. Other than the words in section 75 which speak to the interim nature of the order, the words are strikingly similar to section 71 which empowers the Board to set rates, including the power to make an order a deferral account:

75. (1) The board may make an interim order unilaterally and without public hearing or notice, approving with or without modification, a schedule of rates, tolls and charges submitted by a public utility, upon the terms and conditions that it may decide.

The words "schedule of rates tolls and charges" are found in both sections 70 and 75. The Court of Appeal has found that these words permit the ordering of a deferral account with respect to a section 70 order; there are no provisions in the Act that specifically authorize deferral accounts, the power is implied from this section. Reading sections 70 and 75 side by side, there is nothing from the wording of these sections that suggest that the Board could not likewise order a deferral account through an interim order.

In fact, by the very nature of a deferral account holding encumbered revenues, the Board retains the power of disposition of amounts held in a deferral account even in the absence of an interim order made with respect to that account. Where the Board issues an interim order as to a deferral account, there can be absolutely no doubt as to its authority to later consider the amount in the account and the disposition of that amount. The province's Court of Appeal has provided very useful guidance on this matter. In *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, 2012 NLCA 38, at paragraphs 61 through 65, Chief Justice Green speaking for a unanimous Court (and making reference to the Supreme Court of Canada case, *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764 (*Bell Canada* 2009)), said:

[60] It is nevertheless clear from the authorities that the above noted principle of prospective ratemaking cannot bar the use of two widely used regulatory tools authorized by applicable legislation though the same may be thought to have an element of retrospectivity. These two are interim rates and deferral accounts. See *Bell Canada v. Canada (Canadian Radio-television & Telecommunications Commission)*, [1989] 1 S.C.R. 1722 (*Bell Canada 1989*); *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764 (*Bell Canada 2009*).

[61] The power of the Board to authorize interim rates is granted in s. 75 of the *PUB Act*. That section allows the board to set rates expeditiously without full evidence and submissions, such rates being subject to review and possible modification in the final order of the Board, as is expressly provided for in subsections 75(2) and (3). Depending on the nature of the final order of the board it may have a retroactive or retrospective effect. In *Bell Canada 1989*, Gonthier J. stated:

The statutory scheme established by the *Railway Act* and the *National Transportation Act* is such that one of the differences between interim and final orders must be that interim decisions may be reviewed and modified in a retrospective manner by a final decision. It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order. I hasten to add that the words "further directions" do not have any magical, retrospective content. Under the *Railway Act* and the *National Transportation Act*, final orders are subject to "further [prospective] directions" as well. It is the interim nature of the order which makes it subject to further retrospective directions.

(p. 1752)

...The underlying theory behind the rule that a positive approval scheme only gives jurisdiction to make prospective orders is that the rates are presumed to be just and reasonable until they are modified because they have been approved by the regulatory authority on the basis that they were indeed just and reasonable. However, the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order. As a result, it cannot be said that the rate review process begins at the date of the final hearing; instead, the rate review begins when the appellant sets interim rates pending a final decision on the merits. As was stated in *obiter* in *Re Eurocan Pulp & Paper Co. and British Columbia Energy Commission* (1978), 87 D.L.R. (3d) 727 (B.C.C.A.), with respect to a similar though not identical legislative scheme, the power to make interim orders effectively implies the power to make orders effective from the date of the beginning of the proceedings. In turn, this power must comprise the power to make appropriate orders for the purpose of remedying any discrepancy between the rate of return yielded by the interim rates and the rate of return allowed in the final

decision for the period during which they are in effect so as to achieve just and reasonable rates throughout that period.

(p. 1761)

[62] The statutory scheme of the *PUB Act* is to the same effect, as noted in the *Stated Case* as follows:

[87] The scenario contemplated by Questions 3 & 4 is unlike the situation which arises where an interim order setting rates, tolls and charges is subsequently superseded by a final order, resulting in excess revenue being earned in the intervening period because the rates, tolls and charges charged in that period pursuant to the interim order were higher than those which were ultimately found to be justified in the final order. In that situation, if the final order is treated as being operative as and from the date of the interim order that was superseded, the final order will, indeed, have a retroactive effect. In the context of the Newfoundland legislation, that situation is specifically contemplated and authorized by s. 75(3) of the *Act*.

[63] The operation of deferral accounts is permissible under the existing regulatory scheme in this province regardless of whether it might be argued they incidentally have retrospective or retroactive effect. Deferral accounts are utilized in public utility regulation to deal with the effects of uncertain or volatile costs in a manner that ensures that rates are reasonable, not unjustly discriminatory and that the utility earns a just and reasonable return. They permit the recovery or rebate in a subsequent period of any deficiency or excess between forecast and actual costs. Regulatory regimes generally permit the operation of deferral accounts. See *Bell Canada 2009* at paras. 54-55; *Atco Gas* at paras. 33-44; *City of Edmonton v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392 at p. 406. It was properly acknowledged by all parties that the *PUB Act* authorizes the utilization of deferral accounts. See *Stated Case* at paras. 93-98.

[64] In *Bell Canada 2009* the use of deferral accounts to ensure that rates return to a utility the actual - not forecast - costs, was held to preclude a finding of retroactivity or retrospectivity:

[63] In my view, the credits ordered out of the deferral accounts in the case before us are neither retroactive nor retrospective. They do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures, since these credits or reductions were contemplated as a possible disposition of the deferral account balances from the beginning. These funds can properly be characterized as encumbered revenues, because the rates *always* remained subject to the deferral accounts mechanism established in the Price Caps Decision. The use of deferral accounts therefore precludes a finding of retroactivity or retrospectivity. Furthermore, using deferral accounts to account for the difference between forecast and actual costs and revenues has traditionally been held not to constitute retroactive rate-setting (*EPCOR*

Generation Inc. v. Energy and Utilities Board, 2003 ABCA 374, 346 A.R. 281, at para. 12, and *Reference Re Section 101 of the Public Utilities Act* (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. C.A.), at paras. 97-98 and 175).

(Emphasis added.)

[65] As stated, funds in a deferral account can properly be characterized as encumbered revenues as the rates are subject to the deferral account mechanisms established by the regulatory authority.

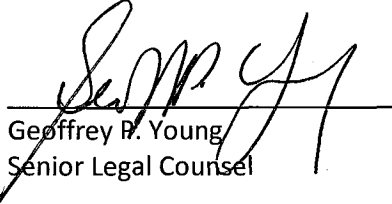
Conclusion

In summary, Hydro disagrees with Newfoundland Power's submission on this issue and submits that it is clear that the Board has and will retain full jurisdiction and broad authority to make a later order in this respect, including an order as to the final amount of the proposed deferral account and its specific treatment or disposition.

Please contact the undersigned should there be any questions arising from the foregoing.

Yours truly,

NEWFOUNDLAND AND LABRADOR HYDRO



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GPY/jc

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