

**P.U. 4 (2003)**

**PROCEDURAL ORDER**

**FIRST PROCEDURAL ORDER P.U. 27 (2002-2003)  
AMENDED BY P.U. 34 (2002-2003)  
FURTHER AMENDED BY P.U. 1 (2003)**

**IN THE MATTER OF** the *Public Utilities Act*  
R.S.N. 1990, Chapter P-47 (the "*Act*");

**AND IN THE MATTER OF** a General Rate  
Application (the "Application") by Newfoundland  
Power Inc. filed pursuant to Order No. P. U. 22  
(2002-2003)

**BEFORE:**

**Robert Noseworthy**  
**Chair and Chief Executive Officer**

**Darlene Whalen, P.Eng.**  
**Vice-Chair**

**John William Finn, Q.C.**  
**Commissioner**

## **AMENDED PROCEDURAL ORDER**

### **DECISION**

#### **Background**

Newfoundland Power Inc. (“NP”), pursuant to Order No. P.U. 22 (2002-2003) filed an application with the Board of Commissioners of Public Utilities (“the Board”) on October 11, 2002 for an Order or Orders of the Board approving, among other things, the proposed rates for the various customers of NP, to be effective May 1, 2003. Notice of the Application and Pre-hearing Conference was published in newspapers throughout Newfoundland and Labrador beginning on October 19, 2002 and the pre-hearing conference was held on October 30, 2002. The Application was re-filed to reflect updated financial information on February 10, 2003.

After the pre-hearing conference the Board issued a procedural order, Order No. P.U. 27 (2002-2003), setting out, among other things, the Rules of Procedure and the Order of Witnesses for the hearing of the Application. This Order was amended by two subsequent orders of the Board, Order No. P.U. 34 (2002-2003), and Order No. P.U. 1 (2003).

#### **Issues**

On February 21, 2003 at the hearing of an application on another issue relative to the proceeding, Board Counsel presented for the consideration of the Board a revised Rules of Procedure as well as an Order of Witnesses for the hearing. In addition, Board Counsel entered as an information item a calendar of dates covering the duration of the hearing.

While the parties agreed with the Order of Witnesses as proposed, there were two areas of disagreement between the parties concerning Rules of Procedure, as follows:

- 1) Panel of witnesses; and
- 2) Documents which are not a part of the hearing record.

## **Findings**

### **Order of Witnesses**

The parties did not take issue with the Order of Witnesses as proposed by Board Counsel. The Board finds that the proposed Order of Witnesses is acceptable and reasonable in the circumstances.

### **Panel of Witnesses**

A Panel of witnesses is common in tribunal hearings and has been used successfully by this Board for a number of years. Often the evidence presented in a hearing before the Board is technical and multi-disciplinary requiring the expertise of many people. The use of a panel of witnesses in appropriate circumstances allows the presentation of evidence on technical and complex issues to be completed in a comprehensive and timely fashion.

### **Supplementary or Clarifying Evidence**

One area of disagreement between the parties is generally the extent to which a witness on a panel may supplement or clarify evidence given by another witness. The Consumer Advocate suggests that it is not appropriate for a witness on a panel to offer testimony unless a question has been posed directly to the witness. NP and NLH suggest that it is appropriate for a witness to provide supplementary or clarifying evidence in response to a question answered by another witness on the panel.

The Board will not impose undue procedural barriers to the introduction of relevant and helpful evidence. In the past, witness panels and parties have generally been respectful to the process and where supplementary or clarifying testimony is given, it has been helpful to the Board and has resulted in a more efficient process. The Board expects that the parties will continue to respect the orderly presentation of evidence. While in general a question put to a particular witness should be answered by that witness, the Board will allow another witness to offer supplementary or clarifying evidence where the testimony may be helpful.

### Proposed Witness Panel on Forecasting

NP has proposed that Mr. Barry Perry, VP Finance and Chief Financial Officer, and Mr. Ron Crane, Director of Forecasts, present evidence on certain issues as a panel. NP submits the Board must first determine if the proposed panel is appropriate in the circumstances and subsequently must establish the process that is to be followed in presenting and cross-examining the witnesses.

### Is the Proposed Panel Appropriate?

While the Consumer Advocate did question whether it was necessary for Mr. Perry and Mr. Crane to sit as a panel, he did not ask the Board to direct that the evidence be presented by the witnesses individually. As to the issue of whether a witness panel is appropriate in the circumstances, the Board is satisfied that prima facie, the party calling the witness panel is in the best position to make that assessment. The Board, therefore, will allow the evidence to be presented by way of a panel if NP chooses to do so.

### What is the Appropriate Process for the Proposed Panel?

NP suggests that Mr. Perry and Mr. Crane testify as a witness panel on certain issues, and Mr. Perry testify alone as to other issues. Effectively NP proposes to limit the cross-examination of Mr. Perry when he is testifying alone to exclude the issues which would be addressed by the witness panel. The question arises as to whether Mr. Perry can present evidence both on a witness panel and alone and whether the Board should direct the parties as to their cross-examination of these witnesses.

In considering this issue the Board acknowledges both the right of the presenting party to control the presentation of its evidence as well as the right of the opposing party to manage the cross-examination of witnesses. In this context the Board must adopt procedures which respect the rights of the parties while allowing the efficient and comprehensive presentation of evidence.

In balancing the interests of NP and the other parties in this case, the Board is not satisfied that it is necessary to restrict the time for a panel witness with a view to excusing that particular witness and expecting the questioning party to lead their cross-examination to accommodate what is essentially a decision taken by the presenting party to schedule the witnesses as a panel. The Board has concerns that NP's proposal may introduce procedural difficulties into the hearing and limit cross-examination. The Board would expect the presenting party to consider the nature, time and extent of cross-examination in determining whether or not witnesses are presented individually or as a panel. The Board notes that where witnesses have testified individually in the past, there has not been an issue with a witness deferring a question to another witness who is better equipped to answer it.

The Board will not grant NP's request to permit NP to have Mr. Crane join Mr. Perry to form a witness panel for a limited portion of Mr. Perry's testimony. Should NP wish to present a witness panel then the parties will have the opportunity to cross-examine the witnesses as they determine appropriate.

#### **Documents not a part of the record**

As discussed already the issues and evidence presented in most of the matters before the Board are technical and comprehensive. The Board recognizes that witnesses must be familiar with the record in the proceeding which may consist of thousands of pages of documents detailing events over several years. The Board finds that it would be unfair to the witnesses and likely unhelpful to the process to allow cross-examination on documents with which a witness has not had a reasonable opportunity to become familiar. Therefore the Rules of Procedure will reflect that reasonable notice must be given to a witness where he or she is to be questioned on a document which is not part of the record of the proceeding.

The Board finds that reasonable notice requires that the party introducing the document must provide a copy of the document to the parties and the Board by 4:00 P.M. on the last business day before the witness is cross-examined on the document. The exceptions to this notice requirement are in the case of prior Orders of the Board and transcripts of the person's own testimony given before the Board in the last two years or in the 1998 NP general rate hearings. In these cases the witness will be given sufficient time during cross-examination to review and become familiar with the document presented.

### **ORDER**

#### **THEREFORE THE BOARD ORDERS THAT:**

1. The Order of Witnesses in the proceeding is as set out in the attached Appendix "A" - Item 3.
2. The Rules of Procedure set out in Order P.U. 27 (2002-2003) Appendix "A"- Item 4 are rescinded and are replaced with the Rules of Procedure as set out in the attached Appendix "A" - Item 4.

**DATED** at St. John's, Newfoundland and Labrador, this 26<sup>th</sup> day of February, 2003.

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Robert Noseworthy,  
Chair & Chief Executive Officer.

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Darlene Whalen, P.Eng.,  
Vice-Chairperson.

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John William Finn, Q.C.  
Commissioner.

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G. Cheryl Blundon,  
Director of Corporate Services and  
Board Secretary.

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**Order of Witnesses**

The following order of witnesses is established:

**NP - Presentation of Application**

NP - President & Chief Executive Officer - Philip Hughes  
NP - Vice-President - Barry Perry  
NP - Forecasting - Ron Crane

**Other witnesses**

NP - Vice-President - Earl Ludlow

**Cost of Service Witnesses**

NP - Cost of Service Witness - Lorne Henderson  
NP - Cost of Service Witness - Larry Brockman  
CA - Cost of Service Witness - Doug Bowman

**Cost of Capital Witnesses**

NP - Cost of Capital Expert Witness - Roger Morin  
NP - Cost of Capital Expert Witness - Kathleen McShane  
CA - Cost of Capital Expert Witness - Basil Kalymon

**Other expert witnesses**

NP - Depreciation Expert - John F. Wiedmayer  
NP - Regulatory Expert - John T. Browne

**Other witnesses**

BOARD - Financial Consultant - William Brushett



## APPENDIX "A" - Item 4, Page 1 of 7

### Rules of Procedure

#### 1. Record

- (1) Unless otherwise ordered by the Board, all documents filed with respect to this proceeding shall be placed on the public record.
- (2) Unless otherwise ordered by the Board, the official record of this proceeding will be the original paper copy filed with the Board's Secretary

#### 2. Form of Documents

- (1) Every written document filed shall be prepared as follows:
  - (a) Typed, written or printed on 8½" X 11" letter size paper, 3-hole punched for standard binders.
  - (b) Each page shall be numbered.
  - (c) Where reasonable, each line shall be numbered.

#### 3. Filing of Documents

- (1) Unless otherwise ordered by the Board, one original signed copy of each document to be entered in the proceeding shall be filed with the Board as set out in the Distribution Listing in Item 5 of Appendix "A".
- (2) In addition to the original document a party shall submit to the Board twelve (12) copies.
- (3) Documents may be filed by:
  - (a) Hand delivery;
  - (b) Courier service;
  - (c) Facsimile;
  - (d) Registered Mail; or
  - (e) Other means directed by the Board
- (4) Filing is accomplished when the Board receives the document.

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- (5) All documents filed according to the scheduled dates shall be filed no later than 3:00 P.M. on the date stipulated. Documents filed after 3:00 P.M, or those which are filed on a Board holiday, shall be considered to have been filed on the next Board business day.

**4. Electronic Filing**

- (1) Unless otherwise ordered by the Board, each party shall file with the Board an electronic version of all documents filed in this proceeding in the following manner:
- (a) Each individual document shall be converted while in electronic form to “read only” \*.pdf format, still allowing for key word searches and cut and paste functionality.
  - (b) Within two days after the day of filing of the hard copy, one copy of the electronic \*.pdf file will be emailed to [ito@pub.nf.ca](mailto:ito@pub.nf.ca).
  - (c) All Documents that are generated in-house by the parties shall be filed electronically, with the exception of:
    - i. Covering letters or correspondence;
    - ii. Background reports, Board Orders or historical documentation that are unavailable or impractical to provide electronically, and
    - iii. Case law filed in support of Motions.
- (2) The electronic file will not be an official record for the purposes of this proceeding.

**5. Service of Documents**

- (1) A copy of each document filed with the Board shall be served on the other parties in this proceeding in accordance with the Distribution Listing detailed in Item 5 of Appendix “A” .
- (2) Parties will appoint one person to receive documents for this proceeding.
- (3) Service may be made as follows:
- (a) Hand delivery;
  - (b) Courier service;
  - (c) Registered Mail;
  - (d) Facsimile; or
  - (e) Other means ordered by the Board.

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- (4) Service will be effective:
- (a) On the day of delivery, where the document is sent by hand, courier or facsimile;
  - (b) On the date of receipt, where the document is delivered by registered mail, or
  - (c) On a date determined by the Board, where service is made by any other means.

**6. Revisions to Documents**

- (1) Any document may be revised where new information, or information to correct errors in documents, becomes available before the completion of the hearing.
- (2) Where all or any part of a document is revised, each revision shall indicate the page(s) revised, the line(s) revised, the number of the revision (i.e. 1<sup>st</sup> revision), and the date of the revision.
- (3) Where a revision is made to a document the Board may, upon its own motion or upon the request of another party, after receiving submissions of the parties, make any order in respect of the revisions.

**7. Charges for Copies**

- (1) The Board will provide a copy of any document authored by the Board or its consultants at no charge.
- (2) Copies of documents originating or authored by a party should be requested directly from the party.
- (3) One copy of the transcript for each day of the hearing will be provided to each party at no cost.
- (4) Copies of the Legislation, Acts, and Regulations can be obtained from the Queen’s Printer, viewed at the Board’s Main Office, or viewed on the Board’s Website at [www.pub.nf.ca](http://www.pub.nf.ca).
- (5) The Board may charge copy fees for the cost associated with the reproduction of any other document requested by an individual or party in accordance with the applicable legislation.

**8. Public Viewing**

- (1) Interested persons may view any or all documents filed in this proceeding on the Board’s website, ([www.pub.nf.ca](http://www.pub.nf.ca)) or at the Board’s main office by contacting the Board Secretary.

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**9. Information Requests**

- (1) Requests for Information and Responses shall form a part of the record in the proceeding and will be considered to be evidence in the proceeding.
- (2) Where ordered by the Board, a party providing a Response to an Information Request shall make a witness or witnesses available for cross-examination to speak to the information provided in the Response.

**10. Interlocutory Applications**

- (1) Applications on issues arising out of this proceeding (hereafter referred to as motions) must be filed in writing with the Board and served upon the parties two days before the hearing of the motion.
- (2) Where a party files a response brief it must be filed with the Board and served upon the parties one day before the hearing of the motion.
- (3) Unless otherwise ordered by the Board, motions shall proceed on a scheduled motions day.
- (4) A party wishing to have a motion heard on a date other than a scheduled motion day must, along with the motion, file with Board and serve upon the parties reasons why the motion should be heard on the proposed date.
- (5) The Board may, at its discretion, where the parties were advised and provided with an opportunity to make written submissions, consider a motion on the basis of written submissions.
- (6) The Board may consider the written consent of any party in reaching its decision on a motion.
- (7) The order of presentation of argument on a motion shall be as set out in the Order of Presentation described at page 7 of these Rules of Procedure.

**12. Witnesses**

- (1) **Direct Testimony**
  - (a) Pre-filed testimony of all non-expert witnesses and reports of expert witnesses should be adopted in direct examination, and, unless otherwise objected to, will be accepted as evidence.
  - (b) Direct examination should be limited to matters set out in the witnesses pre-filed testimony.

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- (c) The Board may allow a witness to provide supplementary or clarifying evidence where it is relevant and of assistance to the Board.
- (d) The Board may restrict direct testimony where it is irrelevant or redundant and not helpful to the Board in making its decision.

(2) **Examination of Witness called by Other Parties**

- (a) Other counsel will have an opportunity to examine a witness in accordance with the Order of Presentation described at page 7 of these Rules of Procedure.
- (b) After the examinations by other counsel are completed there will be an opportunity for re-direct examination as set out in the Order of Presentation described at page 7 of these Rules of Procedure.

(3) **Board Questions**

- (a) After re-direct the Board may pose questions to the witness.
- (b) Questions on matters arising from the questions of the Board will proceed in the order set out in the Order of Presentation described at page 7 of these Rules of Procedure.

(4) **Objections**

Where an objection is made during the presentation of evidence, counsel shall state their position on the objection in the order set out in the Order of Presentation described at page 7 of these Rules of Procedure.

(5) **Panels of Witnesses**

- (a) Where evidence will be presented by way of a panel of witnesses, prior notice must be given to the Board Secretary and the parties.
- (b) When examining a panel of witnesses Counsel shall put each question to a particular witness on the panel.
- (c) A witness on a panel may answer or supplement a question that was posed to and answered by another witness on the panel where the evidence is relevant and may be of assistance to the Board.

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**(6) Co-Counsel**

Where co-counsel intend to examine the same witness, or panel of witnesses, prior notice must be given to the Board Secretary and the parties. Co-counsel shall not examine the same witness on the same subject matter.

**(7) Documents not part of the record of the proceeding**

When a witness is presented with a document which is not part of the record of the proceeding:

- (a) Fourteen (14) copies shall be provided to the Board Secretary.
- (b) The witness shall be given a reasonable time to review any document that is the subject of cross-examination. In addition the witness cannot be cross-examined on a document that is not a part of the record in the proceeding unless:
  - i) A copy of the document is provided to the Board and all parties by 4 p.m. on the last business day before the cross-examination on the document;
  - ii) The document is a portion of a transcript of the witnesses own testimony given in the last two years or at the 1998 Newfoundland Power General Rate hearings; or
  - iii) The document is an Order of the Board.
- (c) Where the witness adopts the document it shall be marked as an exhibit to his testimony.
- (d) Where a document was not adopted as part of the witness' testimony the document may be:
  - i) if the parties consent, entered as a consent exhibit; or
  - ii) entered as an information item.

**13. Time**

- (1) All references to time shall be clear days, that is the first and the last day shall be excluded.

**14. Other**

- (1) Unless otherwise ordered by the Board, the rules of procedure set out in *Regulation 39/96* apply in this proceeding to the extent that they are consistent with these rules.

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Order of Presentation

Examination

<u>WITNESS CALLED BY</u>	<u>WITNESS CROSS-EXAMINED BY</u>	<u>MATTERS ARISING FROM BOARD QUESTIONS</u>
<u>NP</u>	<u>CA</u>	<u>CA</u>
	<u>NLH</u>	<u>NLH</u>
	<u>BHC</u>	<u>BHC</u>
	<u>Redirect NP</u>	<u>NP</u>
<u>CA</u>	<u>NP</u>	<u>NP</u>
	<u>NLH</u>	<u>NLH</u>
	<u>BHC</u>	<u>BHC</u>
	<u>Redirect CA</u>	<u>CA</u>
<u>NLH</u>	<u>NP</u>	<u>NP</u>
	<u>CA</u>	<u>CA</u>
	<u>BHC</u>	<u>BHC</u>
	<u>Redirect NLH</u>	<u>NLH</u>
<u>BHC</u>	<u>NP</u>	<u>NP</u>
	<u>CA</u>	<u>CA</u>
	<u>NLH</u>	<u>NLH</u>
	<u>Redirect BHC</u>	<u>BHC</u>

Objections

Counsel making the objection  
Responding Counsel  
Remaining Counsel  
Reply by the objecting Counsel  
Board Hearing Counsel

Motions

Counsel making motion  
Responding Counsel  
Remaining Counsel  
Reply by Counsel making motion  
Board Hearing Counsel