

**NEWFOUNDLAND AND LABRADOR  
BOARD OF COMMISSIONERS OF PUBLIC UTILITIES**

**ORDER NO. P. U. 25(2010)**

1 **IN THE MATTER OF** the *Electrical Power*  
2 *Control Act, 1994*, SNL 1994, Chapter E-5.1 (the  
3 “*EPCA*”) and the *Public Utilities Act*, RSNL 1990,  
4 Chapter P-47 (the “*Act*”), and regulations thereunder;

5  
6 **AND**  
7

8 **IN THE MATTER OF** an application by  
9 Newfoundland and Labrador Hydro (“Hydro”)  
10 for approval of the rates to be charged to  
11 Industrial customers.

12  
13  
14 **Decision of the Board Arising from a Preliminary Hearing**

15  
16 **Application**  
17

18 On June 30, 2009 Hydro filed an application (the “Application”) with the Board  
19 of Commissioners of Public Utilities (the “Board”) requesting,

20  
21 *“...an order approving:*

- 22 *i) that the rates for Teck Cominco Limited be the same as are in effect for all other*  
23 *Island Industrial Customers; and*  
24 *ii) that the existing Island Industrial Customer interim rates, except the rates for*  
25 *Teck Cominco Limited (formerly Aur Resources), be made final.”*  
26

27 The Application was filed in compliance with Order No. P.U. 6(2009) which  
28 directed Hydro to apply to the Board to finalize rates for Hydro’s Industrial Customers.  
29 Industrial customers’ rates were last established on a final basis in 2007 as a result of  
30 Hydro’s general rate application. Normally, following a general rate application, the rates  
31 would be adjusted annually in accordance with the Rate Stabilization Plan (the “RSP”)  
32 which adjusts for differences in test year and actual values for hydrology, fuel costs and  
33 load.  
34

35 On December 20, 2007 Hydro filed an application with the Board seeking to  
36 suspend the normal operation of the RSP and requesting that the 2007 rates for the  
37 Industrial Customers be continued for 2008 on an interim basis. Hydro stated in its  
38 application that the normal operation of the RSP could cause significant rate volatility for  
39 the Industrial Customers. Hydro explained that the potential rate volatility, due initially  
40 to a projected increase in the RSP rate and subsequently to a significant load change,

1 required further analysis and the determination of the year end hydraulic balance, prior to  
2 finalizing the Industrial Customers' rates. The Industrial Customers, Newfoundland  
3 Power and the Consumer Advocate were provided notice of the application. In Order No.  
4 P.U. 34(2007) the Board approved the Industrial Customers' rates on an interim basis.  
5 Hydro's Industrial Customers at the time were Corner Brook Pulp and Paper Limited,  
6 North Atlantic Refining Limited, Aur Resources Limited, Vale Inco Newfoundland and  
7 Labrador Limited, and Abitibi Consolidated Company of Canada Limited. Subsequently  
8 Aur Resources was acquired by Teck Cominco Limited and Abitibi Consolidated  
9 Company Limited ceased operations in the province.

10  
11 On August 13, 2008 the Board wrote to Hydro asking that it file an application by  
12 September 6, 2008 to finalize interim rates for the Industrial Customers. On September  
13 5, 2008 Hydro replied, stating that "*...Hydro is not yet able to file this Application,*  
14 *however we anticipate that we will be a position to do so over the next short while.*" On  
15 September 11, 2008 the Board again wrote Hydro noting the matter had been outstanding  
16 for sufficient time to make an application and advising that the application should be filed  
17 by September 22, 2008. On September 17, 2008 Hydro wrote the Board stating:

18  
19 *"...we regret that we will be unable to file an application by September 22, 2008 to*  
20 *finalize interim rates for the Island Industrial customers. Please be advised that this*  
21 *filing is under active consideration at Hydro and we remain hopeful that it can be filed in*  
22 *the near future."*

23  
24 On October 17, 2008 the Board wrote seeking a status report on the application.  
25 On October 30, 2008 Hydro wrote the Board stating:

26  
27 *"...we regret that at present we are still unable to file an application to finalize interim*  
28 *rates for the Island Industrial customers. We remain hopeful that it can be filed in the*  
29 *near future and will provide you with information in that regard as soon as it becomes*  
30 *available."*

31  
32 On December 11, 2008 Hydro filed an application with the Board again  
33 requesting interim approval of the continuation of the same rates for the Industrial  
34 Customers, except that it asked that the Teck Cominco Limited rates be increased to  
35 equal the other Industrial Customers' rates and that reference to the Historical Plan  
36 Balance be removed from rates. Hydro explained that it was proposing the continuation  
37 of interim rates to allow for analysis of further significant changes in Hydro's Industrial  
38 Customer load in 2008 along with a precipitous reduction in fuel prices. The Industrial  
39 Customers, Newfoundland Power and the Consumer Advocate were provided notice of  
40 the application. The Industrial Customers asked that the interim rates be approved to  
41 March 31, 2009 and that existing Teck Cominco Limited rates be continued. The  
42 Consumer Advocate and Newfoundland Power did not comment. In Order No. P.U.  
43 37(2008) the Board determined that the rates, rules and regulations for the Industrial  
44 Customers, including the rates for Teck Cominco Limited, should be continued on an  
45 interim basis until March 31, 2009, with no changes. The Board also ordered Hydro to  
46 make an application by January 30, 2009 to finalize the interim rates, rules and  
47 regulations for the Industrial Customers.

1 On January 16, 2009 Hydro applied to the Board for an Order to extend the  
2 deadline for filing an application until June 30, 2009 and to continue the existing rates,  
3 rules and regulations for Hydro's Industrial Customers on an interim basis. The  
4 Industrial Customers, Newfoundland Power and the Consumer Advocate were provided  
5 notice of the application and did not contest it. In Order No. P.U. 6(2009) the Board  
6 approved the continuation of the rates, rules and regulations for Hydro's Industrial  
7 Customers on an interim basis and directed Hydro to make an application to finalize the  
8 interim rates, rules and regulations by June 30, 2009.

9  
10 The Application, filed by Hydro on June 30, 2009, proposes that the interim rates  
11 for the Industrial Customers except Teck Cominco Limited be made final. Hydro stated  
12 "...that application of the existing RSP rules to calculate rates for Industrial Customers  
13 would result in significant and unreasonable rate volatility...". The Application does not  
14 seek changes to the RSP or to Hydro's other rates. Hydro circulated copies of the  
15 Application to the Industrial Customers, Newfoundland Power and the Consumer  
16 Advocate. Notice of the Application and the hearing date of May 17, 2010 was published  
17 in newspapers throughout the province beginning on March 27, 2010. Interventions were  
18 filed by:

- 19  
20 i) Hydro's Industrial Customers (Corner Brook Pulp and Paper Limited,  
21 North Atlantic Refining Limited, Teck Cominco Limited, and Vale Inco  
22 Newfoundland and Labrador Limited);  
23 ii) Abitibi Consolidated Company of Canada (as a former Industrial  
24 Customer of Hydro);  
25 iii) Newfoundland Power Inc.; and  
26 iv) Thomas Johnson, Consumer Advocate.

27  
28 No other interventions or comments were received. Information requests were  
29 issued and answered. Expert evidence was filed on September 30, 2009 by:

- 30  
31 i) Robert D. Greneman, P.E., Associate Director, Shaw Consultants  
32 International, Inc., Cambridge, MA, on behalf of Hydro;  
33 ii) Patrick Bowman, InterGroup Consultants, Ltd., Winnipeg, MB, on behalf  
34 of the Industrial Customers;  
35 iii) Larry Brockman, President, Brockman Consulting, Atlanta, Georgia, on  
36 behalf of Newfoundland Power; and  
37 iv) C. Douglas Bowman, Energy Consultant, Warrenton, VA, on behalf of the  
38 Consumer Advocate.

39  
40 The Board's financial consultants, Grant Thornton LLP, filed a report on March  
41 5, 2010 which set out the history of the RSP for the period January 1, 1986 to December  
42 31, 2009.

43  
44 On May 11, 2010 the Board notified the parties that, having reviewed the record,  
45 it had been determined that the Application and supporting evidence was inadequate and

1 may not address all the issues associated with the Application. The Board advised that  
 2 the public hearing would not proceed as scheduled and that a counsel meeting would be  
 3 held to ensure that the issues would be effectively addressed in a fair and timely manner.  
 4 On May 17, 2010 the Industrial Customers filed a letter expressing concerns in relation to  
 5 the postponement of the Application.  
 6

7 On May 25, 2010 the Board wrote the parties to advise that a preliminary hearing  
 8 would be held on June 14, 2010 and that written submissions were to be filed on June 9,  
 9 2010.  
 10

11 Following the counsel meeting Hydro submitted a letter on June 2, 2010, setting  
 12 out an agreed upon list of issues to be dealt with in the preliminary hearing. The issues  
 13 identified for the Board's consideration were as follows:  
 14

15 *“Does the Board have the jurisdiction to issue an order which changes how the Rate*  
 16 *Stabilization Plan (RSP) operated before the date of the order and, if so, does this*  
 17 *jurisdiction extend to any aspect of the operation of the RSP, including the rate charged*  
 18 *to customers, the determination of the balance(s) in the RSP, and how these balances are*  
 19 *allocated to customers or customer classes? In particular:*  
 20

- 21 • *Does legislation or common law give the Board any specific relevant authority or*  
 22 *alternatively, restrict the Board's authority?*  
 23
- 24 • *What would generally accepted sound public utility practice as set out in s.4 of the*  
 25 *EPCA require?*  
 26
- 27 • *Are there any concerns in relation to vested rights, i.e. does the language of the RSP*  
 28 *create a right/obligation in each of the customers or customer classes? If so at what*  
 29 *point does this right/obligation accrue? Does this mean that credits/debits allocated*  
 30 *to each customer in accordance with the plan are the responsibility of or to the*  
 31 *benefit of customers in the class at the time of the accumulation or does the Board*  
 32 *have the jurisdiction to order alternative disbursements of the balances?*  
 33
- 34 • *Does the issuance of Order Nos. P.U. 34(2007), P.U. 27(2008), P.U. 6(2009), the*  
 35 *filing of Hydro's application on June 30, 2009, or any other order of the Board*  
 36 *impact the jurisdiction of the Board?”*  
 37

38 The preliminary hearing proceeded as scheduled on June 14, 2010 with written  
 39 and oral submissions from:  
 40

- 41 i) Hydro, represented by Mr. Geoffrey Young, Counsel;
- 42 ii) Industrial Customers, except Abitibi Consolidated Company of Canada,  
 43 represented by Joseph Hutchings, Q.C., Counsel and Paul Coxworthy,  
 44 Counsel;
- 45 iii) Abitibi Consolidated Company of Canada, represented by Gregory Moores,  
 46 Counsel;
- 47 iv) Newfoundland Power, represented by Ian Kelly, Q.C., Counsel and Gerard  
 48 Hayes, Counsel; and
- 49 v) The Consumer Advocate, Thomas Johnson.

## 1 RSP History

2  
3 When the RSP was established in 1986 Hydro was not regulated by the Board. At  
4 that time, Hydro made referrals to the Board and the Board submitted a report to  
5 Government with recommendations for consideration in setting Hydro's rates. In 1985  
6 Hydro filed a referral with the Board proposing the implementation of a rate stabilization  
7 plan and the elimination of the Water Equalization provision and the Fuel Adjustment  
8 Charge. On November 8, 1985 the Board filed its report with Government  
9 recommending that a rate stabilization plan be implemented as a means of protecting  
10 customers from large increases caused by the Fuel Adjustment Charge. Government  
11 accepted the Board's recommendations and, on January 1, 1986, the RSP replaced the  
12 Water Equalization provision and the Fuel Adjustment Charge. The RSP provided for  
13 the recovery of the difference between the forecast and actual test year fuel costs for the  
14 Holyrood Thermal Generating Station as well as differences in hydraulic production and  
15 load.

16  
17 As detailed by Grant Thornton in its March 5, 2010 report, Hydro set out the  
18 planned operation of the RSP in a letter filed with the Board on March 26, 1986. In this  
19 correspondence Hydro proposed that it establish two separate RSPs, one for Hydro's  
20 retail customer, Newfoundland Power, and one for Hydro's Industrial Customers. This  
21 would allow Hydro to reflect the revenue that would have been collected from each  
22 customer group had the actual load, hydro production and fuel prices been known at the  
23 time the cost of service was prepared. Hydro believed that this would result in  
24 Newfoundland Power and the Industrial Customers being treated fairly and independently  
25 of each other. The adjustment of the balances in the RSP for each group would be  
26 derived monthly by comparing the revised cost of service for the specific group with the  
27 1986 final cost of service filed with the Board for the same customer group net of  
28 revenue received due to any changes in firm energy sales.

29  
30 Over the years the RSP was an important regulatory tool for minimizing rate  
31 variability. It was frequently an issue in Hydro rate referrals and general rate applications  
32 and adjustments were often made to the way the RSP operated. In 2001 during Hydro's  
33 first general rate application as a fully regulated utility several aspects of the RSP were  
34 addressed, including customer splits, load variation and the creation of a historical plan.

- 35  
36
- 37 • Customer splits - The Industrial Customers argued that the Board should  
38 recalculate and restate the RSP for prior years since Hydro had calculated the  
39 demand elements each month instead of using the Board approved demand  
40 elements. The Board found in Order No. P.U. 7 (2002-2003) that there was  
41 no basis upon which to reallocate past RSP balances between Newfoundland  
42 Power and the Industrial Customers, stating that Hydro had consistently  
applied the rules as they were intended and communicated.

- 1           • Load variation - The Industrial Customers argued that there was no basis for  
2 the Industrial Customers rate class to bear all the costs associated with the  
3 closure of Albright and Wilson Americas in 1998 and Royal Oak Mines in  
4 1997 (Osler supplemental evidence, pg. 4). At the time the revenue  
5 component of the load variation provision in the RSP was assigned to the  
6 class causing the change, making the Industrial Customers responsible for all  
7 the lost revenue, estimated to be about \$500,000 per annum. The Board did  
8 not accept the Industrial Customers' argument and the revenue component of  
9 the load variation was reflected in the Industrial Customers RSP.
- 10
- 11           • Historical Plan - The Board concluded that the large balances in the RSP  
12 owing from customers should be addressed and ordered the creation of the  
13 Historical Plan so that these balances would be recovered in the RSP rate. A  
14 rate was calculated for each of Newfoundland Power and the Industrial  
15 Customers to recover the Historical Plan balance over five years, beginning in  
16 2003.

17

18           The RSP was again an important issue during Hydro's next general rate  
19 application in 2003. The parties negotiated a settlement and made a joint proposal in  
20 relation to the RSP which was accepted by the Board. The most notable change was that  
21 both revenue and fuel costs associated with load variation would be assigned to the  
22 customer class responsible for the variation. Previously just the revenue component was  
23 assigned to the customer class responsible.

24

25           During Hydro's 2006 general rate application the parties again agreed on a joint  
26 proposal in relation to the RSP which was accepted by the Board. Notably this proposal  
27 continued the 2003 agreement in relation to the load variation, so that both revenue and  
28 fuel costs continued to be assigned to the class causing the changes. In addition, the  
29 Industrial Customers' Historical Plan balance was reduced substantially in accordance  
30 with an Order in Council issued pursuant to the *EPCA* and the *Act*, directing the Board to  
31 approve an application from Hydro for the modification of the calculation of the  
32 Historical Plan RSP recovery rate for the Industrial Customers to reflect a contribution to  
33 the plan. Newfoundland Power's RSP balances were not affected.

34

35           In 2007 the Industrial Customers' recovery of its Historical Plan balance expired  
36 with an overpayment by the Industrial Customers of \$1,382,494 credited to the Industrial  
37 Customers' RSP current plan. In 2008 the Newfoundland Power Historical Plan balance  
38 also expired with a credit balance of \$2,238,025 transferred to the Newfoundland  
39 Power's RSP current plan.

40

41           **Decision**

42

43           The preliminary hearing was held to receive submissions from the parties on the  
44 question of whether the Board has the jurisdiction to change the manner in which the  
45 RSP operated, including the rates charged, the determination of the balance(s) in the RSP  
46 and how these balances are allocated to customer classes. This question of jurisdiction is

1 raised in the context of the interim orders issued by the Board for Industrial Customer  
2 rates since December 2007.

3  
4 All parties agree that the Board has the jurisdiction to set final rates for the  
5 Industrial Customers as of January 1, 2008. Hydro, Newfoundland Power and the  
6 Consumer Advocate submit that, in establishing these final rates, the Board also has the  
7 jurisdiction to deal with the manner of how those rates, and in particular the RSP rates,  
8 are calculated as of the date of any interim order, including the disposition of any  
9 balances in the RSP arising. The Industrial Customers submit that s. 75 of the *Act* only  
10 allows the Board to set interim rates and that the rules and regulations affecting those  
11 rates cannot be made interim. The Industrial Customers argue that the Board's  
12 jurisdiction with respect to the disposition of any balances in the RSP is confined to the  
13 existing RSP rules and regulations.

14  
15 Following from the submissions the fundamental question before the Board in this  
16 preliminary hearing is how an established deferral account, such as the RSP, should be  
17 treated by the Board in the context of interim orders affecting the balances in the account.

#### 18 Deferral Accounts

19  
20  
21 The RSP is a deferral account which allows for the accumulation of balances  
22 which are subsequently collected from or refunded to customers. The Board regulates  
23 utilities in the province on a prospective basis but does, in appropriate circumstances,  
24 allow the use of deferral accounts such as the RSP. It is well accepted that the use of  
25 deferral accounts is consistent with prospective regulation and further that regulators such  
26 as the Board have the jurisdiction to establish deferral accounts.

27  
28 In its written submissions Hydro states at paragraph 18:

29  
30 *“Courts have determined that the treatment of amounts held in deferral accounts are*  
31 *subject to change, that the parties are aware of that potential, and therefore that orders*  
32 *that make those subsequent changes do not offend notions of predictability and fairness*  
33 *which is the basis for the presumption against retroactive ratemaking.”*

34  
35 Newfoundland Power states at paragraph 40 of its written submissions:

36  
37 *“The use and operation of deferral accounts are administrative matters for the Board to*  
38 *ensure that rates are reasonable, not unjustly discriminatory, and provide the utility with*  
39 *its just and reason return.”*

40  
41 and at paragraph 61:

42  
43 *“In addition, the Board has the jurisdiction to determine the appropriate disposition of*  
44 *the balance in the RSP, in particular, the load variation transfers since January 1,*  
45 *2008.”*

1 The Consumer Advocate, relying on the decision in ATCO Gas, Re (City of  
2 Calgary and Alberta Energy and Utilities Board and ATCO Gas and Pipelines Ltd) 2010  
3 Carswell Alta 764 (Alta C.A.), notes that the Alberta Court of Appeal found that the  
4 Board had the jurisdiction to correct balances in a deferral account in respect of costs  
5 incurred years earlier even though the costs were not within the original purpose and  
6 definition of the deferral account.

7  
8 While the Board has jurisdiction in relation to deferral accounts the Board has  
9 stated that it views the use of these accounts to be an extraordinary measure [Order No.  
10 P.U. 15 (2009)]. The Board believes that its jurisdiction with respect to deferral accounts  
11 is limited by the principles of predictability and fairness, as discussed by the Alberta  
12 Court of Appeal in ATCO, and does not necessarily extend to changing how balances are  
13 calculated and allocated in the past. At paragraph 57, Justice Hunt states:

14  
15 *“Both Bell Canada 1989 and Bell Aliant (which concerned deferral accounts rather than*  
16 *interim rates) illustrate the same preoccupation: were the affected parties aware that the*  
17 *rates were subject to change? If so, the concerns about predictability and unfairness that*  
18 *underlies the prohibitions against retroactive and retrospective ratemaking become less*  
19 *significant.”*

20  
21 and at paragraph 59:

22  
23 *“The history of DGA’s demonstrates that affected parties knew they would be used from*  
24 *time to time to alter gas rates based on later, actual gas prices.”*

25  
26 The ATCO decision differs from the situation before the Board in the current  
27 Application. While the Board acknowledges that the RSP has been used creatively over  
28 the years to address a variety of issues it is also clear that changes to the established RSP  
29 rules have always been made on a prospective basis. Hydro acknowledges this at  
30 paragraph 20 of its submission where it says:

31  
32 *“Barring an intervening order of the Board, which can be either a final order changing*  
33 *the way the collection or disbursement of amounts occur through rate setting of for future*  
34 *energy consumption, or an interim order signalling a potential change in the rate for*  
35 *consumption that occurs after the interim order is issued, the customer can expect to rely*  
36 *upon the rate structure to provide an outcome which will be calculated in manner which*  
37 *has already been set.”*

38  
39 The Industrial Customers speak to the use of deferral accounts in different  
40 circumstances and refer to the ATCO decision in their oral submissions:

41  
42 *“There’s a useful discussion which I won’t read all of there, but down at paragraph 165*  
43 *it said, ‘it is one thing to create a deferred account at the outset of an interim rate to*  
44 *specify what amounts it is to record during that period and at the end, to reconcile and*  
45 *clear out that account by a final rate in the way ordained at the outset’ and that, in our*  
46 *view, is what the RSP is supposed to do.*



1           *'It is quite another thing to return later to a fixed final rate and change it after the fact by*  
2           *ordering premium payments by or refunds to customers and then try to justify that by*  
3           *creating for the purpose a new deferred account into which sums will be put retroactively*  
4           *and immediately removed by premium or refund.'* And it is, with respect, that second  
5           *case that Newfoundland Power and the Consumer Advocate are trying to make here.*  
6           *They are trying to take the final rate for Newfoundland Power and effectively make it*  
7           *interim by the use of a deferral account by reallocating balances within the RSP, and that*  
8           *is, in fact, the essence of a retroactive rate change."*  
9           (Transcript, June 14, 2010, pgs. 43/20-25 and 44/1-20)

10  
11           In the Board's view changing how the RSP operated in prior years would be  
12           analogous to the situation that Mr. Justice Green suggested might constitute retroactive  
13           regulation in Reference: re s. 101 of the *Public Utilities Act* (Nfld) (1998), 164 Nfld &  
14           PEIR 60 (Nfld C.A.), at paragraph 91:

15  
16           *"The issue, therefore, is not whether the Board may revise the definition of excess*  
17           *revenue and then apply the revised definition to the results of previous years. That might*  
18           *well engage the principle of non-retroactivity."*

19  
20           In the circumstances the Board would have expected Hydro to file an application  
21           to make changes to the RSP. However, neither the interim rates application filed on  
22           December 20, 2007 and subsequent applications nor the Application filed on June 30,  
23           2009 sought changes to the RSP. In the cover letter to the Application Hydro explains:

24  
25           *"Discussion with Newfoundland Power, the Industrial Customers, and the Consumer*  
26           *Advocate were held during 2007 and 2008 on changes to the RSP rules. While there was*  
27           *no consensus during those discussions, it was Hydro's intention that the proposed change*  
28           *to the RSP with regard to the load variation be filed with the Board no later than at the*  
29           *time of Hydro's next General Rate Application. Although the attached Application does*  
30           *not contain any proposed changes, the Board may wish to consider suspension of the*  
31           *existing load variation allocation rules and holding in abeyance current and future load*  
32           *variation amounts until such time as Hydro can develop a proposal to address the*  
33           *current anomalies in the RSP. Hydro anticipates that an application with regard to the*  
34           *RSP load variation can be made prior to the end of 2009."*

35  
36           No such application was filed by Hydro. In the absence of an application, the  
37           Board did not take it upon itself to consider suspending the operation of the load variation  
38           allocation rules as suggested by Hydro in its correspondence.

#### 39 40           Interim Orders

41  
42           Hydro argues that the interim rates orders for the Industrial Customers provide the  
43           Board with the jurisdiction to change the way the RSP operated in 2008 and 2009, both in  
44           terms of how the rates are set and the allocation of balances for prior years. Hydro states  
45           in oral submission:

1           *“It’s Hydro’s submission that the fact that the Board made an interim order as to the*  
2           *RSP rates puts beyond any serious doubt that the Board has jurisdiction to determine the*  
3           *appropriateness of the rates that applied since the interim order was made or whether*  
4           *some other rates ought to have applied. Further, it is Hydro’s submission that the Board*  
5           *is empowered to make a rate change to go into effect perspectivevely that deals with the*  
6           *activity in the RSP with the Industrial Customer plan balance as if the Board had made*  
7           *the order on January 1<sup>st</sup>, 2008.”*

8           (Transcript, June 14, 2010, pgs. 9/22-25 and 10/1-9)

9

10           The Industrial Customers do not accept Hydro’s position and instead argue that,  
11 in the context of the interim rates orders, the Board is obliged to assess reasonable rates  
12 for the Industrial Customers and make a determination as to how the Industrial  
13 Customers’ RSP balance should be distributed to the Industrial Customers. The  
14 Industrial Customers state:

15

16           *“What is not final is the specific rate, the RSP portion of the rate that will be charged in*  
17           *respect of the Industrial Customers from January 1, 2008, and that you have complete*  
18           *discretion to deal with as long as the benefits remains within the rules and remains*  
19           *within the Industrial Customer group, and you can spread out that surplus in a just and*  
20           *reasonable manner so as to avoid volatility in the Industrial rates.”*

21           (Transcript, June 14, 2010, pg. 98/5-14)

22

23           Newfoundland Power and the Consumer Advocate do not agree with the  
24 Industrial Customers, and instead support Hydro’s position. Newfoundland Power  
25 argues:

26

27           *“So Mr. Chairman, that’s the fourth point, and when you boil all that down, the Board,*  
28           *therefore, has full and ample power and jurisdiction to determine on a final basis the*  
29           *operation of the RSP from and after January 1, 2008; number two, determine on a final*  
30           *basis the rates that the Industrial Customers should pay effective from January 1, 2008,*  
31           *and then determine the appropriate disposition of any accumulated balance in the RSP*  
32           *for all of the years from 2007 right through to currently, and the Board can use some of*  
33           *that money, if the Board deems appropriate, to look at what the impact has been on*  
34           *Industrial rates over that period of time. They can look at that in terms of what the use it*  
35           *for Newfoundland Power’s customers on a go-forward basis.”*

36           (Transcript, June 14, 2010, pg. 66/9-25)

37

38           The Consumer Advocate suggests that with interim rates *“the rate structure is up*  
39 *for revision.”* (Transcript, June 12, 2010, pgs. 103-104) In support of this position the  
40 Consumer Advocate references the comments of the Supreme Court of Canada, *Bell*  
41 *Canada v. Canada* (Canadian Radio-Television and Telecommunications Commission)  
42 [1989] S.C.R. 1722 where the Court says at paragraph 58:

43

44           *“The underlying theory behind the rule that a positive approval scheme only gives*  
45           *jurisdiction to make prospective orders is that the rates are presumed to be just and*  
46           *reasonable until they are modified because they have been approved by the regulatory*  
47           *authority on the basis that they were indeed just and reasonable. However, the power to*  
48           *make interim orders necessarily implies the power to modify in its entirety the rate*  
49           *structure previously established by final order.”*

1 The Board accepts and agrees with these comments from the Supreme Court of  
 2 Canada but does not accept the Consumer Advocate's interpretation of these comments.  
 3 The Board does not believe that an interim rate order for one group of customers  
 4 empowers the Board to change the utilities' entire rate structure. This interpretation  
 5 would not be in keeping with the principles of predictability and fairness cited by the  
 6 Alberta Court of Appeal in the 2010 ATCO decision or with the specific language of the  
 7 Supreme Court of Canada in *Bell Canada v. Canada (Canadian Radio-Television and  
 8 Telecommunications Commission)* [1989] S.C.R. 1722 where the Court states at para. 39:

9  
 10 *"Thus, the question before this Court is whether the appellant has jurisdiction to make  
 11 orders for the purpose of remedying the inappropriateness of rates which were approved  
 12 by it in a previous interim decision." (emphasis added)*

13  
 14 Section 75 of the *Act* allows the Board to approve rates unilaterally on an interim  
 15 basis without notice to affected customers. Subsections 75(1) and (3) state:

16  
 17 *"75(1) The board may make an interim order unilaterally and without public hearing or  
 18 notice, approving with or without modification, a schedule of rates, tolls and charges  
 19 submitted by a public utility, upon the terms and conditions that it may decide.*

20  
 21 *(3) The board may order that the excess revenue that was earned as a result of an interim  
 22 order made under subsection (1) and not confirmed by the board be*

23  
 24 *(a) refunded to the customers of the public utility; or  
 25 (b) placed in a reserve fund for the purpose that may be approved by the board."*

26  
 27 Hydro, Newfoundland Power and the Consumer Advocate suggest that this  
 28 section permits the Board to place any excess revenue paid by the Industrial Customer  
 29 group as a result of the interim rates into an account for the possible benefit of other  
 30 customer group. This interpretation would not appear to be consistent with the scheme of  
 31 the legislation generally or with generally accepted sound public utility practice which  
 32 requires that rates be just and reasonable and not unjustly discriminatory. The Board has  
 33 reference to the comments of Mr. Justice Green in Reference: re s. 101 of the Public  
 34 Utilities Act (Nfld) (1998), 164 Nfld & PEIR 60 (Nfld C.A.) where he said at paragraph  
 35 18:

36  
 37 *"It follows from these provisions that a literal and technocratic interpretation and  
 38 application of the provisions of the Act is to be avoided, in favour of an interpretation  
 39 which will advance the underlying purpose of the legislation as well as the power policy  
 40 of the province and be consistent with generally accepted sound public utility practice."*

41  
 42 Reading s. 75 in the overall context of the legislation and regulatory structure the  
 43 Board believes that a purposeful interpretation would require that the refund or the  
 44 reserve fund must, to the extent possible, be for the benefit of the customer group which  
 45 was found to have paid the excess revenue. There may be times when it is not practical  
 46 to refund to the customers that paid the excess, for example where the amount is nominal  
 47 or the customers cannot be found. The Board believes that, in the absence of  
 48 extraordinary circumstances, a finding that interim rates for a group of customers were in

1 excess of reasonable rates would require that the same customer group be effectively  
2 charged the reasonable rates through a refund or the use of a reserve account.

3  
4 The Board agrees with the Industrial Customers' position that a determination  
5 under s. 75 requires an assessment of reasonable rates for the customers subject to the  
6 order from the date of the interim order. The section does not, in the Board's view,  
7 contemplate a wholesale review of the rate structure of all the customers of the utility  
8 where only one group of customers has interim rates. This is the only reading of this  
9 section which is consistent with fair and reasonable rates and the principles of  
10 predictability and fairness, especially given that an interim rates order can be made  
11 unilaterally by the Board without notice. The Board does not agree with Hydro when it  
12 states that:

13  
14 *"Taken together, the interim orders, the factual context, and the legislative grant of*  
15 *power and discretion constitute clear signals that amounts attributable to the period*  
16 *following the issuance of the first interim order were at the discretion of the Board to*  
17 *disburse or refund in accordance with sound rate making practices. The parties knew, or*  
18 *reasonably should have known, that the Board had through its interim orders reserved its*  
19 *regulatory power to make a disposition of amounts in the RSP accounts in a different*  
20 *manner and with a different outcome than would have been the case had no interim order*  
21 *been made affecting the Industrial Customer RSP."*

22 (Hydro, Written Submission, paragraph 23)  
23

24 In its applications for interim rates for the Industrial Customers Hydro did not  
25 request changes to the RSP rules and did not ask that any excess revenue be refunded to  
26 the benefit of other customer groups. Hydro did not advise that there could be significant  
27 changes such that the balance in both the Industrial Customers' and Newfoundland  
28 Power's RSP may be affected. Hydro applied for interim rates for the Industrial  
29 Customers but did not apply for interim rates for Newfoundland Power. Order Nos. P.U.  
30 11(2008) and P.U. 22(2009) approved on a final basis the rates charged to Newfoundland  
31 Power by Hydro and the RSP rules as of July 1, 2008 and July 1, 2009 respectively.  
32 Newfoundland Power's customer rates were finalized in Order Nos. P.U. 15(2008) and  
33 P.U. 26(2009), setting Newfoundland Power's rate stabilization adjustment which reflects  
34 *"any change in the rates to be charged to Newfoundland Power by Hydro for the coming*  
35 *year as a result of the operation of the RSP"*. Correspondence from Newfoundland  
36 Power in relation to the 2009 interim rate application is also telling as to the  
37 understanding of the parties at the time. In a letter to the Board dated December 16, 2008  
38 Newfoundland Power says in relation to the application for interim rates for the Industrial  
39 Customers:

40  
41 *"As the above-noted matter affects only Hydro's Industrial Customers, and has no impact*  
42 *on the customers of Newfoundland Power, we will not be commenting on the*  
43 *Application."*  
44

45 Indeed, as referenced by the Industrial Customers during the Application, the  
46 Board made a similar statement in Order No. P.U. 37(2008) which stated:

1           “WHEREAS the Board has considered Hydro’s Application as well as the submissions of  
2           the Island Industrial Customers, the only customers affected by the Application, and in  
3           the absence of a reply from Hydro as to these submissions has determined that the rates,  
4           rules and regulations for the Island Industrial Customers should be continued until final  
5           rates are established after a full examination of all of the issues with a full opportunity  
6           for interested persons to participate in the examination process; and”  
7

8           The interim rate applications put the Industrial Customers on notice that the Board  
9           would be reviewing the Industrial Customers rates for reasonableness and that it may set  
10          different rates and a different method of calculating the Industrial Customers’ RSP  
11          balances and rates. Hydro did not provide notice that anyone other than the Industrial  
12          Customers may be affected and did not put the Industrial Customers on notice that the  
13          accumulating balances in the RSP may be transferred to the benefit of other customer  
14          groups. The potential for a review of Hydro’s rate structures or that any excess revenue  
15          as a result of the interim rates could be put to the benefit of other customer groups was  
16          not made clear. This result would not be consistent with the historical operation of the  
17          RSP and would be unprecedented in the context of an interim rate order in this province  
18          and therefore could not reasonably have been anticipated by the Industrial Customers.  
19

20          The interim orders clearly provide the Board with the full jurisdiction to, in the  
21          words of the Supreme Court of Canada, “*modify in its entirety the rate structure*” for the  
22          Industrial Customer group, which includes all aspects of the Industrial Customers’ rate,  
23          including the RSP rate. The Board does not accept the position of the Industrial  
24          Customers that the Board has no power to change the rules and regulations affecting the  
25          RSP. The Industrial Customers argue that because there is one set of RSP rules which  
26          apply to both the Industrial Customers and Newfoundland Power and because there was  
27          no interim order in relation to Newfoundland Power then the rules could not have been  
28          made interim. The Board notes, as referenced by the Consumer Advocate, that the  
29          Industrial Customers’ rate sheet specifically states that the RSP adjustment reflects the  
30          operation of the RSP. The Board agrees with Hydro when it states “*The RSP rules are  
31          just a means of calculating a rate. That’s their only role.*” (Transcript, June 12, 2010, pg.  
32          18/7-8) The Board finds no distinction between the rates and the RSP rules used to  
33          calculate the rates.  
34

35          The Board finds that it has the jurisdiction to set reasonable rates for the Industrial  
36          Customers for the period beginning on January 1, 2008 but it does not have the  
37          jurisdiction to make a comprehensive assessment of the reasonableness of Hydro’s entire  
38          rate structure. Had there been an application for a change to the RSP along with an  
39          application for interim rates for Hydro’s other customers or a request that any excess go  
40          to the benefit of other customer groups the Board may have taken a different view of the  
41          Application. The Board agrees with the comments of the Industrial Customers:  
42

1           *“An application to address specific fact situations which gave rise to an inability on the*  
2 *part of Hydro to make reliable predictions ought not to be transformed into a wholesale*  
3 *review of rate stabilization in the entire system under the guise of finalizing an interim*  
4 *rate.”* (Industrial Customers, Written Submission, pg. 7)  
5

6           The Board is frankly disappointed with Hydro’s handling of this matter, both  
7 substantively and procedurally. Hydro was in the best position to know the impacts of  
8 the anticipated significant load changes. Major changes in load will not only impact the  
9 operation of the RSP but may also potentially impact significantly the cost of service and  
10 base rates that were set in the last general rate application. The Board would expect that,  
11 in light of such major changes from test year forecasts and the resulting impact on  
12 Industrial Customer rates, Hydro would have filed a general rate application. Such major  
13 changes could only have been addressed through a general rate application or,  
14 alternatively, perhaps an application which sought a review of its rate structure, changes  
15 to the RSP and interim rates for all potentially affected customers. Such an application  
16 should have set out specific proposals in relation to the excess so that all affected  
17 customers understood what was at stake. In addition, the Board would have expected  
18 Hydro to address these load changes promptly to avoid the complications which have  
19 now arisen as a result of the passing of two years. Hydro failed to take timely appropriate  
20 steps in the circumstances so that the matter could be effectively addressed, ensuring that  
21 all stakeholders understood the issues.  
22  
23

#### 24 Conclusion

25

26           The Board finds that in the circumstances its jurisdiction to make orders in  
27 relation to how the RSP operated in prior years is limited. Given the manner in which  
28 this matter was brought forward the Board does not have the jurisdiction to change how  
29 Newfoundland Power’s RSP operated in prior years, either in terms of the rates charged  
30 or the resulting balances. The Board does have the jurisdiction to issue an order which  
31 sets just and reasonable rates for the Industrial Customers for 2008 and 2009, including  
32 the Industrial Customers’ RSP rates and how the Industrial Customers RSP operated for  
33 those years. The Board also finds that it has jurisdiction to determine whether any  
34 overpayment as a result of the interim rates is to be refunded to the Industrial Customer  
35 group or placed in a reserve account to the benefit of the Industrial Customer group.  
36 Given these findings it is not necessary to make a determination at this time in relation to  
37 the 2007 year-end balance or the issues raised by Abitibi. These matters will be  
38 addressed in the context of the setting of final rates by the Board for the Industrial  
39 Customers as of January 1, 2008 and the Board’s determination in relation to any  
40 resulting balances.

Dated at St. John's, Newfoundland and Labrador this 26<sup>th</sup> day of August, 2010

---

Andy Wells  
Chair & Chief Executive Officer

---

Darlene Whalen, P.Eng.  
Vice-Chair

---

Dwanda Newman, LL.B.  
Commissioner

---

James Oxford  
Commissioner

---

Cheryl Blundon  
Board Secretary