

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

AN ORDER OF THE BOARD

NO. P.U. 23(2011)

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 for
10 approval of a capital expenditure of
11 \$600,000 for the upgrade of the access road
12 to the Bay d’Espoir Hydroelectric Generating
13 Station.

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16 **Background**

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18 Newfoundland and Labrador Hydro (“Hydro”) is a corporation continued and existing under the
19 *Hydro Corporation Act*, is a public utility within the meaning of the *Act*, and is subject to the
20 provisions of the *EPCA*.

21
22 Subsection 41(3) of the *Act* states that a public utility shall not proceed with the construction,
23 purchase or lease of improvements or additions to its property where:

- 24
25 a) the cost of construction or purchase is in excess of \$50,000; or
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27 b) the cost of the lease is in excess of \$5,000 in a year of the lease,

28
29 without prior approval of the Board.

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31 Section 78 of the *Act* says that the Board may fix and determine the rate base of a utility.
32 Specifically subsection (2) says:

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34 *“78 (2) In fixing a rate base the board may, in addition to the value of the property and*
35 *assets as determined under section 64, include*
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1 (f) *the part, that the board may determine, of the money paid for the use of plant or*
 2 *equipment leased, hired or shared by the public utility, either as supplementary*
 3 *to or instead of its own plant or equipment;”*
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5 In Order No. P. U. 38(2010) issued December 23, 2010 the Board approved, *inter alia*, Hydro’s
 6 2011 Capital Budget of \$55,046,000 and the Board fixed and determined Hydro’s rate base for
 7 the year ending December 31, 2009 at \$1,473,477,000. Supplemental 2011 Capital Expenditures
 8 were approved by the Board in:
 9

- 10 i) Order No. P.U. 5 (2011) in the amount of up to \$60,000 per year plus
 11 HST for the lease of residential accommodations in Labrador City or
 12 Wabash; and
 13
 14 ii) Order No. P.U. 20 (2011) in the amount of \$133,700 to replace the support
 15 structures of the Unit 1 stack breeching at the Holyrood Thermal
 16 Generating Station.
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18 In 2009 Hydro applied as part of its 2010 capital budget application for approval of a capital
 19 expenditure in the amount of \$1,550,000 for a planned upgrade of the access road to the Bay
 20 d’Espoir Hydroelectric Generating Station. In Order No. P. U. 1(2010) the Board agreed that the
 21 road was in need of repair but concluded that Hydro would not be permitted to reflect the
 22 expenditure in rate base until it demonstrated that to do so would be consistent with generally
 23 accepted sound public utility practice.
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25 Application

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 27 On August 12, 2011 Hydro applied to the Board for an Order approving a capital expenditure of
 28 \$600,000 to upgrade the access road to the Bay d’Espoir Hydroelectric Generating Station (the
 29 “Application”). Hydro states in the Application that the access road is owned and maintained by
 30 the Government of Newfoundland and Labrador, and that Hydro had arranged for the Province
 31 to undertake the road upgrade, subject to a \$600,000 contribution from Hydro.
 32

33 Hydro describes the road as a 3.5 kilometer access road to the Bay d’Espoir plant that was
 34 constructed in 1965 and paved in 1977. It is primarily used by Hydro employees for travelling to
 35 and from work. Hydro further states that the current state of the road poses safety issues and
 36 causes excessive wear and tear on vehicles as the road has numerous holes, depressions, bumps
 37 and frost heaves.
 38

39 In support of the Application Hydro filed a report “*Upgrade Access Road at the Bay d’Espoir*
 40 *Hydroelectric Generating Station, August 2011*”. At page 8 of this report Hydro advises that the
 41 road is the main access road to the Province’s largest Island Interconnected hydroelectric
 42 generating plant, which also serves as the center for maintenance for all Hydro generating plants,
 43 and is used every day by approximately 90 Hydro employees as well as the general public.
 44 Further, the asphalt surfacing is thirty years old and has exceeded its useful life of twenty years.
 45 Hydro states that the road is not in compliance with the provincial roadway Rural Lane
 46 Undivided 50 km (RLU50) standard because this standard reflects a speed of 50km/h while the
 47 average driving speed now is 30 km/h. Hydro advises at page 6 that this road is “*not in a*

1 *suitable condition to quickly transport sick and/or injured people or to quickly mobilize*
2 *emergency response equipment and materials.”* Hydro advises at page 10 of this report that it
3 has successfully negotiated with the Department of Works, Services and Transportation which
4 will manage and undertake the road work with a contribution from Hydro in the amount of
5 \$600,000. Hydro likens the expenditure to a leasehold improvement and cites the Ontario
6 Energy Board’s Uniform System of Accounts and the American Federal Energy Regulatory
7 Commission’s system of accounts as precedent for including the proposed costs in rate base.

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9 On August 22, 2011 Newfoundland Power advised that it would not be commenting on the
10 Application.

11
12 On August 29, 2011 Hydro’s Industrial Customers filed comments in relation to the Application.
13 The Industrial Customers maintain that there is no justification for including the proposed
14 expenditures in Hydro’s rate base and submit that the Board should continue to maintain a clear
15 distinction between expenditures for improvements or additions to Hydro’s property and other
16 expenditures. The Industrial Customers argue that section 41 of the *Act* identifies that Hydro’s
17 capital budget and contributions from its customers are required to be in reference to the cost of
18 improvements or additions to the property of Hydro.

19
20 On August 30, 2011 the Consumer Advocate filed comments agreeing with the position of the
21 Industrial Customers and noting that, from a legal perspective, Hydro does not own and does not
22 have any rights or privileges to this road that members of the general public do not also possess.

23
24 The Board sent requests for information to Hydro on September 9, 2011 which were answered
25 by Hydro on September 14, 2011.

26
27 The Board’s financial consultants, Grant Thornton, filed a report on September 30, 2011
28 concluding that the \$600,000 expenditure would not result in the acquisition of an asset by
29 Hydro in accordance with International Financial Reporting Standards and would not be included
30 in Hydro’s rate base. Specifically Grant Thornton states that the accounting standard identifies
31 “control” and future economic benefits as essential features in the definition of the asset.

32
33 On October 7, 2011 the Consumer Advocate agreed with the analysis and conclusions in the
34 Grant Thornton report.

35
36 On October 7, 2011 Hydro filed comments in relation to Grant Thornton’s report. Hydro
37 submits that subsection 78(2)(f) of the *Act* is intended to provide the Board with the power and
38 discretion to allow a public utility to include in its rate base costs incurred pertaining to assets
39 that it does not own outright but which it shares with some other entity and that this is a matter
40 where the Board ought to exercise the discretion afforded it by the *Act* to include the access road
41 upgrade in rate base. Hydro argues that the use of the word “*shared*” in addition to “*leased or*
42 *hired*” suggests that a broad and purposive approach should be used in considering a utility’s
43 rate base items.

1 On October 11, 2011 Hydro filed an amended Application seeking, additionally, an Order of the
2 Board approving the inclusion of the cost of the access road upgrade in rate base pursuant to
3 subsection 78(2)(f) of the *Act*.

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5 On October 14, 2011 the Industrial Customers filed further comments. The Industrial Customers
6 concur with Grant Thornton's analysis and specifically state:

7
8 *"In conclusion, the Industrial Customers would submit that a reasonable interpretation of section*
9 *78 of the Public Utilities Act, and the one which is most consistent with the accounting standard*
10 *of "control" identified by Grant Thornton in their September 28, 2011 report, is that the*
11 *legislature, whether under section 64 or section 78 of the Public Utilities Act, did not intend that*
12 *there would be included in rate base capital expenditures on assets that Hydro has no legal*
13 *interest in, or which it has no 'control' over.*

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15 *The precedent that would be established by deciding otherwise would be, in the respectful*
16 *submission of the Industrial Customers, a difficult one to predict and control."*

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18 On October 14, 2011 the Consumer Advocate filed further comments. The Consumer Advocate
19 submits that Hydro has not shown the applicability of subsection 78(2)(f) to the fact situation
20 before the Board. The Consumer Advocate states:

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22 *"It is not enough in s. 78(2)(f) for the utility to show that it paid money 'for the use' of plant or*
23 *equipment. It also has to show that the plant or equipment in question was 'leased, hired or*
24 *shared by the public utility, either as supplementary to or instead of its own plant or equipment.'*
25 *This road is not 'leased' and it was not 'hired'. It is also not 'shared' by the public utility, as*
26 *stated. The Consumer Advocate would agree with the Industrial Customers that one can*
27 *contemplate the possibility of Hydro contributing to the cost of an asset so as to be able to share*
28 *in the ownership or control of that asset with another party, as when Hydro and Newfoundland*
29 *Power might each contribute to the cost of, or pay for the use of, an asset. But this is not the case*
30 *before the Board."*

31 32 **Decision**

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34 The deteriorated condition of the access road is not an issue. It is clear that this road needs to be
35 upgraded. Neither the Industrial Customers nor the Consumer Advocate argue that the access
36 road should not be upgraded. In Order No. P.U. 1(2010), issued on January 22, 2010, the Board
37 accepted that the access road is in need of repair and stated:

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39 *"However, the Board shares the Industrial Customers' concern regarding Hydro's proposal to*
40 *undertake capital improvements to a major asset it does not own. Therefore, Hydro will not be*
41 *permitted to reflect this expenditure in rate base until it has satisfied the Board that the inclusion*
42 *of these costs in rate base is consistent with generally accepted sound public utility practice."*

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44 In this Application Hydro submits that including the proposed expenditures for the upgrade of
45 the access road in rate base is supported by section 78 of the *Act* as well as by regulatory
46 precedent in Ontario and the United States. The Board agrees with the Consumer Advocate that
47 the word "*shared*" in section 78 refers to shared ownership or control. Similarly the Board
48 agrees with the Industrial Customers that the Ontario and American precedents provided do not

1 support the inclusion of this expenditure in rate base. As stated by the Industrial Customers
2 these accounting systems refer to accounts for land rights, interests and privileges held by the
3 utility in land owned by others. There is no evidence that Hydro holds any land rights or right to
4 use any different from the public's right to use or has any other form of control over the access
5 road. In PUB-NLH-3 Hydro states that there is no formal agreement with Government regarding
6 the use of the road and it was not part of the land originally acquired through lease for the
7 project. In PUB-NLH-2 Hydro states that the agreement for the road work with Government was
8 done in an exchange of letters, emails and verbal discussions.
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10 Section 41 of the *Act* requires a utility to seek the Board's approval in relation to improvements
11 and additions to "its" property. Establishing a utility's rate base determines the used and useful
12 property of the utility so that a fair return on property utilized in the enterprise can be allowed.
13 Hydro has not shown that the proposed expenditures in relation to the upgrade of the access road
14 will result in an asset upon which Hydro should be entitled to earn. The Government, as owner
15 of the access road, could at any time decide to close the road or deny access to Hydro. While
16 Hydro holds a special relationship with Government given that Government is its shareholder,
17 legal and accounting rules and requirements must be observed as Hydro is a separate entity. The
18 Board agrees with Grant Thornton that Hydro must show some control over the access road
19 before it can be considered to be Hydro's asset and included in rate base. The Board finds that
20 section 41 of the *Act* contemplates property which is owned by the utility and subsection 78(2)(f)
21 allows amounts to be included in rate base which relate to property which may not be held in a
22 traditional ownership or leasehold structure but there must be a legal right or interest or some
23 other evidence of control over the property by the utility.
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26 **IT IS THEREFORE ORDERED THAT:**
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- 28 1. The Application is denied.
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30 2. Hydro shall pay all expenses of the Board arising from this Application.

DATED at St. John's, Newfoundland and Labrador this 1st day of November, 2011.



Andy Wells
Chair & Chief Executive Officer



Darlene Whalen, P.Eng.
Vice-Chair



Dwanda Newman
Commissioner



James Oxford
Commissioner



Cheryl Blundon
Board Secretary