

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

**AN ORDER OF THE BOARD**

**NO. P.U. 2(2014)**

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"), as amended, and regulations*  
5 *thereunder; and*  
6  
7

8 **IN THE MATTER OF** an application by Newfoundland  
9 and Labrador Hydro for approval of an amendment to  
10 the terms and conditions under which Newfoundland and  
11 Labrador Hydro supplies electricity to North Atlantic  
12 Refining Limited pursuant to Section 71 of the *Act*.  
13  
14

15 **The Application**

16  
17 Newfoundland and Labrador Hydro ("Hydro") filed an application (the "Application") on  
18 November 29, 2013 seeking approval of an amendment to the terms and conditions under which  
19 Hydro supplies electricity to North Atlantic Refining Limited ("North Atlantic"). Hydro requests  
20 that the Board approve an amendment to the service agreement with North Atlantic to add the  
21 following provision:  
22

23 *"9.04 (1) Subject to Clause 9.04(2) hereof, Hydro shall be liable for and in respect of*  
24 *only that direct loss or damage to the physical property of the Customer caused by*  
25 *any negligent act or omission of Hydro its servants or agents. Customer agrees*  
26 *that for the purpose of this Clause 9.04, "direct loss or damage to the physical*  
27 *property of the Customer" shall not be construed to include damages for*  
28 *inconvenience, mental anguish, loss of profits, loss of earnings or any other indirect*  
29 *or consequential damages or losses.*  
30

31 *(2) Hydro's liability under subclause 9.04(1) applies only when the direct loss or*  
32 *damage to the Customer arising from a single occurrence exceeds the sum of*  
33 *\$100,000.00. In no event shall the liability of Hydro exceed the sum of*  
34 *\$1,000,000.00 for any single occurrence.*  
35

36 *(3) Customer further agrees that any damages to which it may be entitled pursuant*  
37 *to clause 9.04(1) shall be reduced to reflect the extent to which such losses or*  
38 *damages could reasonably have been reduced if the Customer had taken*  
39 *reasonable protective measures."*

1 Notice of the Application was provided to: North Atlantic, Newfoundland Power Inc.  
2 (“Newfoundland Power”), the Consumer Advocate, Corner Brook Pulp and Paper Limited, Teck  
3 Resources Limited, Vale Newfoundland and Labrador Limited and Praxair Canada Inc.  
4

5 On December 5, 2013 the Board established the schedule for consideration of the Application.  
6 Newfoundland Power, Corner Brook Pulp and Paper Limited, Teck Resources Limited, Vale  
7 Newfoundland and Labrador Limited and Praxair Canada Inc. did not file information requests  
8 or submissions. Information requests were filed by North Atlantic on December 11, 2013. Hydro  
9 answered the information requests on December 18, 2013. The Consumer Advocate filed  
10 comments on January 3, 2014. North Atlantic filed written submissions on January 16, 2014 and  
11 Hydro filed its reply on January 21, 2014.  
12

### 13 **Background**

14

15 In Order No. P.U. 7(2002-2003) the Board approved, *inter alia*, service agreements for each of  
16 Hydro’s Island Industrial customers, setting out the rules and regulations for the provision of  
17 service. These service agreements were subsequently amended in Order Nos. P.U. 11(2002-  
18 2003), P.U. 12(2002-2003), P.U. 6(2003), P.U. 18(2007), P.U. 17(2009), P.U. 6(2011), P.U.  
19 15(2011) and P.U. 4(2012). In Order Nos. P.U. 1(2007), P.U. 6(2012) and P.U. 9(2013) the  
20 Board approved the service agreements for Aur Resources (now Teck Resources Limited), Vale  
21 Newfoundland and Labrador Limited and Praxair Canada Inc. respectively.  
22

23 With the exception of the North Atlantic service agreement, the Island Industrial customers’  
24 service agreements all contain a provision limiting Hydro’s liability for negligence to direct  
25 damages of between \$100,000 and \$1,000,000. In Hydro’s 2001 general rate application North  
26 Atlantic opposed Hydro’s proposal to include this provision in its service agreement. In Order  
27 No. P.U. 7(2002-2003) the Board determined that the service agreement would be approved  
28 without a limitation of liability provision. The Board stated at page 145:  
29

30 *“In light of the importance of this issue upon both North Atlantic and NLH, and its other*  
31 *customers, it is imperative that sufficient evidence be offered to allow the Board to fully*  
32 *consider the two viewpoints. The Board sees merit in the argument that it is inappropriate*  
33 *for the other customers of NLH to bear the full cost of an industry specific sensitivity to*  
34 *power interruption, yet no evidence was called to show the impact upon the other NLH*  
35 *customers. It may also be argued that this risk is a cost of doing business, which should be*  
36 *absorbed by North Atlantic, yet no evidence was called to establish the costs and the*  
37 *impact upon North Atlantic of incurring these costs. No evidence was presented either as*  
38 *to potential sources of back up power or other ways in which damage from power*  
39 *interruption may be mitigated, nor was there any evidence on practices at other refineries.*  
40 *In addition, while there was some suggestion during the hearing that insurance is not*  
41 *available to cover this type of loss, the parties did not file any evidence on this point.*  
42

43 *The Board finds that the evidence presented was inadequate to allow the Board to impose*  
44 *the liability provision as proposed by either of the parties. The Board is not satisfied that*  
45 *the liability provision is reasonable and necessary and will not accept clause 9.04 as part*  
46 *of the rules and regulations of the provision of service to North Atlantic. The Board*  
47 *acknowledges that the decision to exclude this provision from the contract will result in the*  
48 *continuance of the current situation in that liability of NLH will have to be established and*

1           *limited according to common law. However, the Board notes that it has not decided upon*  
2           *the merits of the liability provision and that, under the Act, the parties may bring this issue*  
3           *back before the Board."*  
4

5 Hydro now makes application for approval to amend the service agreement with North Atlantic  
6 to include a provision, identical to the provision in the service agreements with the other Island  
7 Industrial customers, to limit Hydro's liability for negligence to direct damages of between  
8 \$100,000 and \$1,000,000.  
9

## 10 **Evidence and Submissions**

11

12 In the Application Hydro states that the proposed provision is required because it is industry  
13 standard, insurance coverage is not available, it is inappropriate for Hydro to bear the risk and  
14 North Atlantic should be required to mitigate. Hydro references the service agreements in place  
15 with the other Island Industrial customers, each of which contains the same clause. Hydro notes  
16 that section 73 of the *Act* requires that *"tolls, rates and charges under substantially similar*  
17 *circumstances and conditions with respect to service of the same description be charged equally"*.  
18 According to Hydro the concept of a utility rate extends to the terms and conditions that apply to  
19 that rate and, as a result, there is no reason to continue with different liability provisions for  
20 North Atlantic than the other Island Industrial customers. Hydro also submits that, if the risk of  
21 service interruption would result in such a catastrophic loss to the refinery, North Atlantic should  
22 be expected to mitigate against these potential losses and have backup generation in place.  
23 According to Hydro, *"Service interruptions and the repercussions that follow are reasonably*  
24 *foreseeable losses and should be absorbed by NARL as a cost of doing business that NARL*  
25 *should mitigate against."* (Application, page 7)  
26

27 Hydro explains that, subsequent to Order No. P.U. 7(2002-2003), it was able to secure insurance  
28 coverage for legal liability to North Atlantic for property damage or bodily injury caused by a  
29 failure to supply electricity. Hydro advises that it maintained this coverage until recently when,  
30 following a power outage in February 2013, Hydro's insurance provider advised that, effective  
31 July 1, 2013, there would be no coverage for claims brought by North Atlantic for service  
32 interruptions. Hydro's insurance policy now has a specific exclusion removing all coverage for  
33 claims brought by North Atlantic. The Application includes a copy of correspondence from  
34 Hydro's insurance broker, dated November 19, 2013, which states:

35  
36           *"Insurers offer the coverage to utilities, (and most utilities would have the coverage), but it*  
37           *is underwritten based on the belief that the utility's liability is limited under regulatory*  
38           *tariffs or by contract.*  
39

40           *When the NARL claim arose and the NARL contract was reviewed by Hydro's insurers,*  
41           *they determined the exposure was such that they were no longer willing to offer the*  
42           *coverage going forward due to the absence of a limitation of liability."* (Application,  
43           Schedule A)  
44

45 Hydro states in the Application that the lack of coverage by insurance or contract poses a  
46 significant financial risk to Hydro.

1 North Atlantic submits the Application should be dismissed or, in the alternative, if the Board is  
2 inclined to impose a limit of liability on either a permanent or interim basis pending a full  
3 hearing on the matter, it ought to be either a limitation to claims for direct damages with no  
4 monetary limit or a monetary limit of \$10,000,000. According to North Atlantic there is  
5 insufficient evidence on the issues of lack of insurability and industry standards to alter the  
6 Board's finding in Order No. P.U. 7(2002-2003). North Atlantic argues that there is no evidence  
7 whether other insurers would have insured the risk or whether insurance would be provided if  
8 there were a limitation of liability to direct damages or some greater amount than proposed by  
9 Hydro. North Atlantic also notes that the limitation of liability provisions in Ontario and Quebec  
10 do not include a monetary limit.

11  
12 North Atlantic states that it accepts that there is no guarantee of uninterrupted power and that it  
13 would have to prove negligence to make a successful claim against Hydro. North Atlantic  
14 explains the impact of a service interruption on its operations as follows:

15  
16 *"That energy supply is critical to the efficient operation of the refinery and its equipment.*  
17 *When the energy supply to the plant is disrupted or discontinued, it generally requires an*  
18 *emergency shutdown of all process units and causes loss of product through emergency*  
19 *flaring. Once production is down as a result of a power failure, it takes 5-7 days to bring*  
20 *the refinery back up to full production. Certainly, any time there is an emergency*  
21 *shutdown there is greater risk to process equipment and catalysts."* (North Atlantic  
22 Submission, Tab 2, Evidence, Glenn Mifflin, 2002, pages 2-3)

23  
24 North Atlantic's evidence is that it suffered direct damages of \$9,000,000 as a result of outages  
25 in 1995 and 1996, \$650,000 as a result of an outage in 1997, and \$8,600,000 as a result of an  
26 outage in 2013.

27  
28 North Atlantic submits that it has taken reasonable steps to reduce the risk attributable to power  
29 outages, and provided evidence that it has sufficient emergency back-up power to supply the  
30 control room and the boiler and steam systems. North Atlantic states it would cost several  
31 hundred million dollars to make changes to its processes, systems or plant to lengthen the three  
32 minute window for emergency shutdown. North Atlantic also states that it investigated building a  
33 co-generation unit in the 1990s and determined that it did not have the required capital to  
34 proceed and, further, that the payback was too long. North Atlantic references the survey results  
35 provided by Hydro and states that its back-up systems are consistent with the approach of the  
36 other refineries described in the survey and also with North Atlantic's own information on  
37 industry standards.

38  
39 The Consumer Advocate recommends the Board approve the Application as soon as practicable.  
40 He notes that not only are all the other Island Industrial customers subject to such contract  
41 language, but that it is industry standard to include such limitation of liability clauses in  
42 industrial customer power contracts. Of more immediate concern to the Consumer Advocate is  
43 Hydro's statement at paragraph 22 of the Application that "*due to lack of coverage, either*  
44 *through insurance or contract, Hydro's risk exposure has increased substantially should another*  
45 *incident occur for which Hydro is found liable. (emphasis added)*". The Consumer Advocate  
46 states that it is inappropriate for Hydro to bear that risk.

1 In its reply submission Hydro states that it no longer has insurance liability coverage for failure  
2 to supply claims by North Atlantic as a direct result of the fact that Hydro's service agreement  
3 with North Atlantic does not contain a limitation of liability provision. Hydro submits that, by  
4 agreeing to be liable for acts or omissions of ordinary negligence, it is proposing a lower  
5 standard of liability than is in place in both Ontario and Quebec where ordinary negligence is  
6 excluded. Hydro notes that it is seeking protection equal to what is offered in British Columbia  
7 where there is a limit on liability of \$1,000,000. Hydro argues that there is ample evidence to  
8 support its position that there ought to be a \$1,000,000 limit of liability provision in the North  
9 Atlantic service agreement. Hydro further argues that the rates and rules of providing service  
10 should be uniform unless differential treatment can be justified. It is Hydro's position that North  
11 Atlantic's suggested \$10,000,000 limit on liability is unreasonably high and that the examples  
12 provided by North Atlantic do not substantiate a liability limit higher than \$1,000,000.

### 13 14 **Board Findings**

15  
16 As explained by Hydro it is an unfortunate but inevitable fact that unplanned outages will occur  
17 from time to time due to system events or more localized transmission events. North Atlantic  
18 accepts that it cannot recover damages for all service interruptions but argues that it should be  
19 entitled to recover if the service interruption was caused by Hydro's negligence. North Atlantic  
20 further argues that a unilateral limitation of liability would act as a disincentive for Hydro to take  
21 reasonable and prudent measures to avoid negligent service. Hydro acknowledges responsibility  
22 for direct losses caused by its negligence but argues that the amount of a claim should be limited  
23 to \$1,000,000, as it is for the other Island Industrial customers.

24  
25 The Board accepts that service interruptions that are longer than three minutes result in  
26 significant losses for North Atlantic. Hydro suggests that North Atlantic could purchase back-up  
27 generation and questions whether it is reasonable to expect Hydro to be exposed to potentially  
28 large damage claims because North Atlantic decided against taking steps that will protect its  
29 assets from damage. The Board agrees that it is appropriate for North Atlantic to take all  
30 reasonable steps to minimize losses flowing from a power interruption. However, the Board  
31 finds that Hydro has not shown that North Atlantic has failed to take all reasonable steps in the  
32 circumstances. North Atlantic provided evidence that it has investigated available alternatives.  
33 Based on the evidence the approach taken by North Atlantic does not seem markedly different  
34 than that taken by refineries in other areas as set out by Hydro in answer to NA-NLH-012.

35  
36 In relation to the issue of insurance, Hydro has demonstrated that its insurer excluded coverage  
37 for claims by North Atlantic because there was no contractual or regulatory limit on these claims.  
38 However, the Board notes that Hydro did not provide evidence as to what specific limitations on  
39 liability would be required by its insurer. In addition, Hydro did not demonstrate that it  
40 investigated the potential availability of insurance coverage from other insurers. The Board notes  
41 Hydro's insurance broker's explanation in NA-NLH-002, Attachment 1, that the insurer  
42 interprets the struck out passages in the North Atlantic contract as possibly meaning that the  
43 Board wishes Hydro to have unlimited liability including consequential/loss of revenue. In  
44 addition Hydro's insurance broker wrote to Hydro on June 12, 2013, stating:

1           *"Is this addressed in the Act or Regulations or in your rates? Is there any exclusion or*  
2 *limitation with respect to indirect/consequential/loss of revenue etc? Is there anything that*  
3 *limits your liability to damages arising out of gross negligence, or only for events "beyond*  
4 *your reasonable control", or due to "failure to follow good duty practice". These are*  
5 *typical of the terms of service we see in some other provinces."* (NA-NLH-002,  
6 Attachment 3)  
7

8 The evidence suggests that Hydro's insurer expected to see a provision which limited claims to  
9 direct damages or gross negligence but does not demonstrate that the insurer requires a monetary  
10 limit on liability.  
11

12 The Board agrees with North Atlantic that it is significant to restrict the common law right to sue  
13 in negligence. However, the Board notes that rules and regulations or contract provisions which  
14 limit the liability of public utilities for negligence are often approved by Canadian regulators. In  
15 particular, it appears that liability provisions limiting negligence claims to direct damages  
16 flowing from an event are very common as are restrictions which preclude all but gross  
17 negligence or willful misconduct. In addition, some limitation provisions impose a set monetary  
18 limit on the amount of damages that can be recovered. These limitation provisions protect the  
19 utility and ultimately customers from losses which may cause a shock to utility earnings or rates.  
20 In the absence of a limit on liability it is conceivable that a loss may be so large in some  
21 circumstances that the ongoing operation of the system may be negatively impacted.  
22

23 The Board is satisfied that the North Atlantic service agreement should contain a provision  
24 limiting Hydro's liability to direct losses. This limitation is standard practice in the industry,  
25 seems to be expected by insurers, and would serve to protect Hydro and its customers from  
26 extensive and unpredictable losses. The Board also believes that it is reasonable to expect that  
27 North Atlantic be required to take all reasonable steps to mitigate losses and this requirement  
28 should be included as proposed by Hydro. In addition the Board believes that it is appropriate to  
29 establish a monetary threshold on liability for each loss so as to avoid a loss which may cause  
30 undue hardship to Hydro or its customers.  
31

32 While Hydro submits that the proposed monetary limit of \$1,000,000 is appropriate, the Board  
33 finds that Hydro did not provide evidence as to the rationale for the proposed amount. Other than  
34 to be consistent with the other Island Industrial customers' service agreements, there appears to  
35 be no basis upon which to conclude that \$1,000,000 is an appropriate monetary limit for Hydro's  
36 liability to North Atlantic. Hydro argues that the service agreements for all the Island Industrial  
37 customers should be the same on the basis of section 73 of the *Act*. The Board does not agree and  
38 notes that the terms of service for the Island Industrial customers are not necessarily always the  
39 same. Each of the Island Industrial customers has its own service agreement with Hydro, which  
40 reflects the fact that each customer has a separate and unique relationship with the utility. The  
41 Board notes that the service agreements and rates are not currently identical for all the Island  
42 Industrial customers.  
43

44 The Board accepts the evidence that the potential direct damages to North Atlantic for a service  
45 interruption are higher than \$1,000,000. North Atlantic argues that, on at least two occasions, the  
46 direct damages suffered were close to \$10,000,000. However, the Board notes that one of the  
47 two referenced claims, in the amount of \$9,000,000, relates to several separate outages over the

1. course of two years, 1995 and 1996. North Atlantic does not provide evidence as to the loss  
2 flowing from each of the outages and does not explain on what basis three or four separate  
3 incidents over the course of two years should be combined for purposes of considering the  
4 monetary limit on liability. The Board notes that the provision proposed by Hydro would  
5 establish a limit of \$1,000,000 in respect of a "single occurrence". In relation to North Atlantic's  
6 other claims, the Board notes that one claim was less than \$1,000,000 and the other in the  
7 amount of \$8,600,000 relates to a 2013 outage which is too recent to have been fully assessed. In  
8 terms of the suggested \$10,000,000 limit, the Board notes the evidence of Mr. Mifflin where he  
9 states:

10  
11 *"The nature of it is that we potentially have, the consequence of something like that, it will*  
12 *expose us to damages that may exceed the \$1 million. The probability that it will exceed the*  
13 *\$10 million on any one occurrence is less probable, but it's highly probable that it's going*  
14 *to be more than \$1 million. For most of Hydro's customers, I would argue that the \$1*  
15 *million will fully fund 100 percent in all probability all the losses with respect to their other*  
16 *customers, but the reason for our application is that we're caught in a circumstance that*  
17 *physical damage to the plant, to the refinery is much more probable to be greater than \$1*  
18 *million and less probable to be more than \$10 million."* (North Atlantic Submissions,  
19 Tab 2, Transcript, January 10, 2002, page 42, line 62)  
20

21 While the Board does not wish to unduly restrict North Atlantic's common law right to pursue a  
22 claim in negligence for losses, the Board finds that North Atlantic has not shown that a limit as  
23 high as \$10,000,000 is necessary or appropriate in the circumstances. In addition, the Board is  
24 concerned about the impact on Hydro and its customers of a monetary limit as high as  
25 \$10,000,000. Considering the evidence as to North Atlantic's past direct damages claims and  
26 considering potential impacts on Hydro and its customers the Board finds that Hydro's liability  
27 should be limited to direct damages for negligence up to \$5,000,000. The Board notes that no  
28 submissions were filed in relation to the lower limit of the monetary threshold so the Board will  
29 accept the proposed amount of \$100,000.  
30

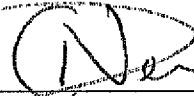
31  
32 **IT IS THEREFORE ORDERED THAT:**  
33

- 34 1. The amendment of Newfoundland and Labrador Hydro's service agreement with North  
35 Atlantic Refining Limited to add a provision to limit Hydro's liability, as set out in the  
36 attached Schedule A, is approved.  
37
- 38 2. Newfoundland and Labrador Hydro shall pay all expenses of the Board arising from this  
39 Application

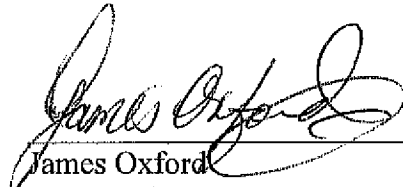
DATED at St. John's, Newfoundland and Labrador, this 3<sup>rd</sup> day of February, 2014.



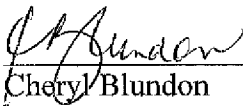
\_\_\_\_\_  
Darlene Whalen, P.Eng.  
Vice-Chair



\_\_\_\_\_  
Dwanda Newman, LL.B.  
Commissioner



\_\_\_\_\_  
James Oxford  
Commissioner



\_\_\_\_\_  
Cheryl Blundon  
Board Secretary



**NEWFOUNDLAND AND LABRADOR HYDRO  
SERVICE AGREEMENT  
NORTH ATLANTIC REFINING LIMITED**

**ARTICLE 9**  
**LIABILITY FOR SERVICE**

- 9.04 (1) Subject to subclause 9.04(2) hereof, Hydro shall be liable for and in respect of only that direct loss or damage to the physical property of the Customer caused by any negligent act or omission of Hydro its servants or agents. The Customer agrees that for the purpose of this Clause 9.04, "direct loss or damage to the physical property of the Customer" shall not be construed to include damages for inconvenience, mental anguish, loss of profits, loss of earnings or any other indirect or consequential damages or losses.
- (2) Hydro's liability under subclause 9.04(1) applies only when the direct loss or damage arising from a single occurrence exceeds the sum of \$100,000. In no event shall the liability of Hydro exceed the sum of \$5,000,000 for any single occurrence.
- (3) The Customer further agrees that any damages to which it may be entitled pursuant to subclause 9.04(1) shall be reduced to reflect the extent to which such losses or damages could reasonably have been reduced if the Customer had taken reasonable protective measures.