

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

AN ORDER OF THE BOARD

NO. P.U. 13(2018)

1 **IN THE MATTER OF** the Electrical Power
2 *Control Act, 1994*, SNL 1994, Chapter E-5.1
3 (the “*EPCA*”) and the *Public Utilities Act*,
4 RSNL 1990, Chapter P-47 (the “*Act*”), as
5 amended, and regulations thereunder; and
6

7 **IN THE MATTER OF** a general rate
8 application by Newfoundland and Labrador
9 Hydro to establish customer electricity rates
10 for 2018 and 2019; and
11

12 **IN THE MATTER OF** an application by
13 Newfoundland and Labrador Hydro for an
14 order that its responses to two information
15 requests be considered confidential.
16
17

18 **Background**
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20 On July 28, 2017 Newfoundland and Labrador Hydro (“Hydro”) filed its 2017 general rate
21 application with the Board of Commissioners of Public Utilities (the “Board”). In Order No. P.U.
22 30(2017) the Board established that the Consumer Advocate, Dennis Browne, Q.C., (the
23 “Consumer Advocate”); Newfoundland Power Inc. (“Newfoundland Power”); a group of Island
24 Industrial customers: Corner Brook Pulp and Paper Limited, NARL Refining Limited Partnership,
25 and Vale Newfoundland and Labrador Limited (the “Industrial Customer Group”); the
26 communities of Sheshatshiu, Happy Valley-Goose Bay, Wabush, and Labrador City (the
27 “Labrador Interconnected Group”) and the Iron Ore Company of Canada (“IOC”) are intervenors
28 in this proceeding.
29

30 In Order No. P.U. 2(2018), issued on January 26, 2018, the Board directed that Hydro file
31 additional information in the general rate application proceeding related to Hydro’s expected
32 supply scenario for the 2018 and 2019 test years. On March 22, 2018 Hydro filed the additional
33 information. On March 29, 2018 requests for information (“RFIs”) related to this information were
34 filed by the Consumer Advocate, the Industrial Customer Group, the Labrador Interconnected
35 Group, Newfoundland Power, IOC, and the Board.
36

37 On April 6, 2018 Hydro filed its responses to two of the RFIs on a confidential basis and requested

1 that the Intervenor's counsel and any Intervenor's consultants who wish to receive these responses
2 be required to execute a confidentiality undertaking document. Hydro explained that the
3 confidential nature of these documents arises from questions concerning energy purchases
4 accessed over the Maritime Link. Hydro stated that it is necessary to withhold this commercially
5 sensitive trading information from public distribution to protect the interests of Hydro's customers.
6

7 **Application**

8

9 On April 13, 2018 Hydro filed an application for an order of the Board that its responses to PUB-
10 NLH-149 and CA-NLH-254 be considered confidential and that the Intervenor's access to the
11 confidential information be governed by the terms of the undertaking to be executed by the
12 Intervenor's representatives prior to the receipt of the confidential information (the "Application").
13

14 Hydro explained that its response to PUB-NLH-149 contains information relating to energy
15 purchases made by Nalcor Energy Marketing Corporation ("NEM") on behalf of Hydro from
16 suppliers outside of the province and transmitted on the Maritime Link. Hydro submitted that it
17 is necessary to withhold this commercially sensitive trading information from public distribution
18 to protect the interests of its customers. Hydro noted that bilateral transactions that occur between
19 energy traders are treated as highly confidential in the competitive energy markets and disclosure
20 of information related to these transactions can be damaging to the parties. According to Hydro
21 disclosure would provide competitors with information that could prejudice Hydro's ability to
22 procure the most cost effective energy. Hydro stated:

23
24 Maintaining competition amongst energy suppliers is essential in order to achieve the
25 lowest energy costs for Hydro's customers. Disclosure of trading strategies and
26 experiences would have the effect of impairing or removing competitive pricing, thereby
27 potentially increasing ratepayer costs.¹
28

29 In relation to CA-NLH-254 Hydro claimed that its response should be considered confidential on
30 the basis that it contains information regarding the contractual arrangements between NEM and
31 energy suppliers outside the province which are subject to confidentiality agreements and which
32 are commercially sensitive. According to Hydro disclosure of this information would have a
33 "chill-effect" upon the free flow of information and could damage the trading relationship
34 between NEM and its counter parties.
35

36 Hydro acknowledged the importance of transparency but argued that the public's interest in
37 transparency is outweighed by the value to the parties and their customers of maintaining the
38 information as confidential. Hydro submitted that it is reasonable to require that the Intervenor's
39 representatives execute the proposed undertaking to assure the protection of this confidential
40 information. According to Hydro this will ensure that the Board and the parties have the
41 opportunity to fully view and scrutinize the confidential information.
42

43 On April 23, 2018 the Consumer Advocate and the Industrial Customer Group filed submissions
44 on the Application. In addition IOC advised that it will make no submission on the Application.

¹Application, page 3.

1 On April 24, 2018 Newfoundland Power and the Labrador Interconnected Group advised that they
2 had no comments on the Application.

3
4 On April 27, 2018 Hydro filed a reply submission.

5
6 **Submissions**

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8 The Consumer Advocate submitted that Hydro has not presented sufficient evidence for the Board
9 to determine that the responses to the RFIs should remain confidential. In the Consumer
10 Advocate's view the alleged harm to Hydro and the rate payers is vague and speculative and as
11 such the Board should order that Hydro's replies to the RFIs be fully disclosed to all Intervenors
12 without qualification. The Consumer Advocate raised the *Access to Information and Protection of*
13 *Privacy Act*, SNL 2002, Chapter A-1.1 (the "ATIPPA"), citing Order No. P.U. 30(2017) and
14 *Corporate Express Canada Inc. v. Memorial University of Newfoundland et. al* (2015) NLCA 52.
15 According to the Consumer Advocate the precedent provided by Hydro from the Nova Scotia
16 Utility and Review Board is not relevant on the basis that Hydro's RFI responses relate to energy
17 that has already been purchased while the Nova Scotia case involved information related to a
18 capital project to be built. The Consumer Advocate noted that the potential concerns in relation to
19 confidentiality were acknowledged in CA-NLH-254 which stated that the requested power
20 purchase information could be provided in aggregate form. According to the Consumer Advocate
21 the power purchase agreements referred to in the RFIs are no different than Hydro's oil supply
22 purchase information and, insofar as its oil supply purchase information does not attract
23 confidentiality, these power purchase agreements should not either. The Consumer Advocate
24 concluded:

25
26 The Consumer Advocate repeats all of the foregoing and submits that in the interests of
27 transparency and full disclosure, and based on the fact that Hydro has not demonstrated
28 that the alleged harm arising from the release of the information at issue is anymore than
29 "possible or speculative", its answers to CA-NLH-254 and PUB-NLH-149 should be
30 released to all of the Intervenors without the requirement of confidentiality undertakings.²

31
32 The Industrial Customer Group supported Hydro's Application for confidential treatment of the
33 RFI responses. The Industrial Customer Group submitted that the information sought to be kept
34 confidential by Hydro, *prima facie*, falls within the categories for which disclosure may be refused,
35 pursuant to the ATIPPA. According to the Industrial Customer Group, Hydro's willingness to
36 disclose this information subject to confidentiality conditions is a reasonable and justifiable
37 measure.

38
39 In its reply, Hydro submitted that the Board is not bound to adopt the test and standard applicable
40 to the ATIPPA for the purpose of confidentiality orders, noting that the Board controls its own
41 process. According to Hydro were the Board to take the approach suggested by the Consumer
42 Advocate it would "unreasonably negate other statutory exceptions to access", including section
43 5.4 of the *Energy Corporation Act*, SNL 2007, Chapter E-11.01 (the "ECA"). Hydro cited a
44 decision of the Privacy Commissioner of Newfoundland and Labrador where the commissioner
45 concluded that Nalcor was entitled to refuse to disclose the records on the basis of this provision.

² Consumer Advocate Submission, page 3.

1 Hydro argued that it is abundantly clear that the information contained in the RFI responses is
 2 commercially sensitive information that warrants protection from disclosure.

3 4 **Board Findings**

5
6 The Application raises issues related to balancing transparency and full disclosure in regulation
 7 with the protection of confidential information. Transparency and full disclosure are essential for
 8 effective regulation to ensure the full participation of the parties and to maintain public trust in the
 9 regulatory process. At the same time there are occasions where it is necessary to restrict access to
 10 certain information which is filed with the Board on the basis that the information is confidential,
 11 for example where it is commercially sensitive or contains personal information. Where there is a
 12 conflict between the interests of transparency and full disclosure and the protection of confidential
 13 information the Board must weigh these interests to determine whether it should make the difficult
 14 decision to place restrictions on the parties' and/or public access to the information.

15
16 The *Act*, and regulations thereunder, do not specifically address confidential information but s. 20
 17 of the *Act* provides that the Board can make rules for the effective execution of its duties and s. 3
 18 of the regulations provide that the Board may supplement the regulations on the terms that the
 19 Board considers necessary. In Order No. P.U. 30(2017) the Board established the Rules of
 20 Procedure for Hydro's 2017 general rate application which addressed the filing of documents and
 21 claims for confidentiality as follows:

22 23 **1. Public Record**

- 24
25 (a) Unless otherwise directed by the Board, all documents filed with the Board shall be
 26 placed on the public record.
 27
28 (b) A party may apply to the Board requesting that a document or other information filed
 29 with the Board be considered confidential and not be released or released subject to
 30 conditions set by the Board.
 31
32 (c) The Board is bound by the provisions of the *Access to Information and Protection of*
 33 *Privacy Act*, RSNL 2002 Chapter A-1.1. Documents which are determined by the
 34 Board to be confidential will be dealt with in accordance with the provisions of this
 35 legislation.
 36

37 These rules require that, in accordance with Board practice, all information filed in Hydro's 2017
 38 general rate application is placed on the public record. This information is circulated to the parties,
 39 is made available to other interested persons by request and is posted on the Board's website. A
 40 party seeking a determination that certain information is confidential must demonstrate that there
 41 is a material risk that placing the information on the public record would cause harm. In
 42 considering such a request the Board will assess whether the potential harm associated with the
 43 release of the information outweighs the interests of transparency and full disclosure and whether
 44 there are reasonable accommodations that can be made in the circumstances.

45
46 Hydro filed its responses to PUB-NLH-149 and CA-NLH-254 with the Board but applied for an
 47 order of the Board in accordance with provision 1(b) of the Rules of Procedure that these responses
 48 be considered confidential. Hydro asked that the Intervenor's access to the responses be governed

1 by the terms of an undertaking to be executed by the Intervenor's representatives prior to the
 2 receipt of the confidential information. The Board will consider Hydro's request with respect to
 3 these two RFI responses separately below.

4
 5 **PUB-NLH-149** *Provide the details for the purchases of 20 GWh over the Maritime Link referred*
 6 *to in footnote 19, including the amounts purchased per transaction, the price paid per transaction*
 7 *and any other cost associated with each transaction.*

8
 9 The response to this RFI sets out information related to Hydro's purchases over the Maritime Link
 10 up to March 31, 2018. The Board agrees with Hydro that details in relation to each purchase,
 11 including the volume and average price paid, may provide competitors with information that could
 12 prejudice Hydro's ability to procure the most cost effective energy. This is clearly in the nature of
 13 sensitive commercial information, the release of which may damage the interests of the utility and
 14 rate payers in this province. The Board accepts Hydro's request to treat this detailed information
 15 as confidential and to require that it be released to the Intervenor's representatives only after the
 16 undertaking has been executed. The Board notes, however, that this response also includes other
 17 less detailed, aggregate data, which does not set out information related to pricing or volumes for
 18 each purchase. In particular, Table 2 is an Expected Supply Scenario Test Year Price Variance
 19 Analysis which includes a comparison to Hydro's forecast savings filed in the Additional Cost of
 20 Service Information.³ The Board notes that the arguments made by Hydro in support of the
 21 confidentiality of its response to this RFI related primarily to concerns regarding pricing
 22 information and the prejudice to Hydro's ability to procure the most cost effective energy. Hydro
 23 did not address the harm that may result from the summary information in Table 2 which provides
 24 information related to the costs of monthly purchases compared to Hydro's previously filed
 25 forecast. As such the Board does not believe that Hydro has demonstrated that the information set
 26 out in Table 2 in this response should be treated as confidential. Nevertheless if Hydro continues
 27 to believe that the information in Table 2 should be considered to be confidential it may file a
 28 further application with supporting information.

29
 30 **CA-NLH-254** *Please file copies of all contracts for power purchases over the Maritime Link. If*
 31 *confidentiality is a concern, please provide a table showing power purchase contracts in*
 32 *aggregate form to eliminate such confidentiality concerns including period of purchase, type of*
 33 *contract, source of energy (i.e., gas, coal, oil, nuclear, hydro, other renewable, etc.), energy*
 34 *amounts and price.*

35
 36 The answer to this RFI includes two contracts. The first contract, between NEM and energy
 37 suppliers outside the province, includes a broad confidentiality provision. This contract contains
 38 information related to each of the parties and the transactions between the parties, including details
 39 in relation to pricing. The Board is satisfied that the contract contains sensitive commercial
 40 information which if released would raise a material risk of harm to the parties, to the relationship
 41 between them, and to rate payers in the province. The Board believes that this contract should be
 42 treated as confidential and that the Intervenor's representatives should be provided a copy only
 43 upon execution of the undertaking.

44
 45 The second contract provided in this response is between NEM and Hydro and does not include a

³ Filed by Hydro on March 22, 2018.

1 confidentiality provision. While this contract does include a framework for the relationship of the
2 parties, it does not provide detailed information with respect to the circumstances of the parties or
3 the volumes or pricing of the transactions between the parties. The Board notes that the arguments
4 made by Hydro in support of the confidentiality of its response to this RFI addressed concerns
5 related to the contractual arrangements made between NEM and energy suppliers outside the
6 province but did not set out specific concerns regarding the contract between NEM and Hydro. In
7 the circumstances, the Board finds that Hydro has not demonstrated that the contract between NEM
8 and Hydro should be treated as confidential. Nevertheless, if Hydro continues to believe that the
9 contract between NEM and Hydro should be considered confidential, it may file a further
10 application with supporting information.

11
12 The Board notes that the Consumer Advocate, the Industrial Customer Group and Hydro made
13 submissions in relation to the provisions of the *ATIPPA* and the *ECA*. While the provisions of this
14 legislation do not expressly apply to Hydro's request for confidential treatment of its responses to
15 PUB-NLH-149 and CA-NLH-254, this legislation would govern a subsequent request to the Board
16 for the release of this information. As such the Board has considered the provisions of the *ATIPPA*
17 and the *ECA* and is satisfied that its determinations with respect to this Application are in keeping
18 with this legislation. In relation to ss. 35 and 39 of *ATIPPA*, the Board believes that the release of
19 the information filed in response to PUB-NLH-149, with the exception of Table 2, and in response
20 to CA-NLH-254, with the exception of the contract between NEM and Hydro, could reasonably
21 be expected to prejudice the financial or economic interests of a public body and/or may be harmful
22 to the business interests of a third party. Further in relation to the *ECA*, the Board believes that this
23 information is commercially sensitive, as i) it contains financial/commercial information
24 respecting revenues, costs and commercial arrangements, ii) contains financial/commercial
25 information of a third party, iii) includes a legal agreement relating to the nature/structure of joint
26 activities, and/or iv) contains economic and financial models used for strategic decision making.
27 The Board is satisfied that the disclosure of this information may harm the competitive position
28 of, or interfere with the negotiating position of, or result in financial loss or harm to Hydro or a
29 third party. Further Hydro has demonstrated that the risk of harm in the release of this information
30 is considerably above a mere possibility and that the likelihood of harm is genuine and conceivable.
31 The Board agrees with Hydro that a request under *ATIPPA* for access to this information would
32 most likely be determined in favour of maintaining confidentiality.

33
34 This decision to order confidential treatment of some of the information in Hydro's responses to
35 PUB-NLH-149 and CA-NLH-254 was not made lightly by the Board as it will prevent public
36 access to this information and will place conditions on Intervenor access. While the Board believes
37 that transparency and full disclosure are of paramount importance to the regulatory process, the
38 Board is satisfied that, in the circumstances, the risk of harm associated with the release of this
39 information outweighs the interests of transparency. The release of this information to the
40 Intervenors upon the execution of the proposed confidentiality undertaking is a reasonable
41 accommodation which permits full disclosure to the parties while addressing the risk of harm
42 associated with the release of this information. The Board notes that no party raised any issues
43 with respect to the specific terms of the proposed confidentiality undertaking.

1 **IT IS THEREFORE ORDERED THAT:**
 2

- 3 1. The responses to PUB-NLH-149, with the exception of Table 2, and to CA-NLH-254, with
 4 the exception of the contract between NEM and Hydro, shall be considered confidential and
 5 shall be released to the Intervenor's representatives upon the execution of the confidentiality
 6 undertaking proposed by Hydro.
 7
- 8 2. In the absence of a further confidentiality application, Hydro shall file the information
 9 included in Table 2 in its response to PUB-NLH-149, and the contract between NEM and
 10 Hydro included in its response to CA-NLH-254, within ten days of the date of this Order.
 11
- 12 3. Hydro shall pay all expenses of the Board arising from this Application.

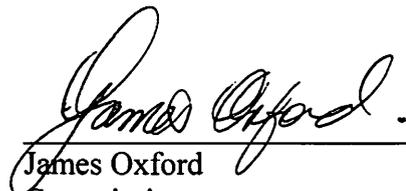
DATED at St. John's, Newfoundland and Labrador, this 10th day of May, 2018.



Darlene Whalen, P. Eng.
 Chair & CEO



Dwanda Newman, LL.B.
 Vice-Chair



James Oxford
 Commissioner



Sara Kean
 Assistant Board Secretary