



NEWFOUNDLAND AND LABRADOR

BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

IN THE MATTER OF
the *Public Utilities Act*, R.S.N. 1990, c.
P-47, as amended (the “*Act*”)

AND

An Application by Newfoundland and Labrador Hydro
 (“*Hydro*”) for approval to proceed with the construction and purchase
 of improvements and additions to its property,
 pursuant to Section 41 (3) of the *Act*.

AND

Order No. P. U. 5(2004) approving capital
 expenditures in the amount of \$1,533,800.00.

REASONS FOR DECISION

On February 5, 2004, the Board of Commissioners of Public Utilities (the “*Board*”) issued Order No. P. U. 5(2004) with reasons for decision to follow.

Order No. P. U. 5(2004) approved the following Capital Expenditures for Hydro:

- (1) The End User Evergreen Program, at a cost of \$793,000.00;
- (2) The Office Server Operating System and Productivity Tools Evergreen program, at a cost of \$638,800.00; and
- (3) An engineering study into the Upper Salmon Power Canal-Slope Stabilization, at a cost of \$102,000.00.

Prior to considering Hydro's application, notification of the Application was given by the Board to all parties who participated in Hydro's 2004 Capital Budget hearing, namely, Newfoundland Power and the Industrial Customers.

The record which was considered by the Board in making its decision included;

- (a) the Application of Newfoundland and Labrador Hydro;
- (b) supplementary information provided by Hydro in its letter of January 12th, 2004;
- (c) the responses to information requests in PUB-27-PUB-29;
- (d) the submissions of the Industrial Customers as contained in their letters dated January 26th, 2004 and February 4th, 2004; and
- (e) Hydro's responses to those submissions.

Newfoundland Power advised the Board through correspondence dated January 14th, 2004, that it had no comment on the application.

On February 5, 2004, when the Order was issued, the Board undertook to provide written reasons. The following, therefore, are the reasons for the Board's decision in this matter.

In their submissions, the Industrial Customers opposed the Application of Newfoundland and Labrador Hydro on two broad grounds.

The first ground went to the Board's jurisdiction to hear the application.

The second ground went to the lack of evidentiary justification for the proposed expenditures.

An alternative argument to the two broad grounds of opposition was that, should the Board find jurisdiction to hear the matters and sufficient justification for the projects, then the Board should direct Hydro to propose off-setting deductions in other areas of the approved capital expenditures approved in P. U. 29(2003), in an amount sufficient to permit the projects outlined in the instant application to proceed.

While some of these arguments overlap, the Board proposes to deal with these matters under the headings of:

- (1) **Jurisdiction**
- (2) **Justification**
- (3) **Off-setting capital budget deductions**

Reference will be made to the following Orders in these reasons for decision:

P. U. 29(2002-2003) November 29th, 2002, regarding Newfoundland Hydro's Capital Budget.

P. U. 29(2003), September 5th, 2003, regarding Newfoundland Hydro's 2004 Capital Budget.

Hydro's application is for the approval of three separate projects, the End User Evergreen Program, the Office Server Operating System and Productivity Tools Evergreen Program, and the Upper Salmon Power Canal-Slope Stabilization Project. To simplify matters the first two projects will be referred to collectively as "*the Evergreen Projects*". The third project will be referred to as "*the Power Canal Study*".

JURISDICTION

In their submission, the Industrial Customers characterized the application by Newfoundland and Labrador Hydro as a supplementary application. They explained that this application was supplementary to the Newfoundland and Labrador Hydro 2004 Capital Budget Application where several projects including an IT project similar to the Evergreen Project were denied. [See Order No. P. U. 29(2003)].

The third project, namely, the Power Canal Study, was not previously submitted for the Board's consideration. The argument with respect to the Power Canal Study is that this project should not be allowed as a separate project but should be funded from the allowance for unforeseen events. This Project is addressed below under the sub-heading Upper Salmon Power Canal/Slope Stabilization.

For its part, Hydro referred to the application as an application for approval of additional 2004 Capital Budget Expenditures. For the reasons stated below, the Board does not feel that the characterization of the application as supplemental or additional is pertinent to the question of the Board's jurisdiction to hear this application. While Section 41 of the *Act* requires a public utility to submit an annual capital budget for approval by the Board not later than December 15th in each year for the next calendar year, and while all capital expenditures in excess of \$50,000.00 must be approved by the Board, there is nothing in that section, indeed there is nothing in the *Act*, precluding an application for the approval of a capital expenditure in excess of \$50,000.00 at anytime. The relevant parts of Section 41 of the *Act* state as follows:

“41.(1) A public utility shall submit an annual capital budget of proposed improvements or additions to its property to the board for its approval not later than December 15 in each year for the next calendar year, and the budget shall include an estimate of contributions toward the cost of improvements or additions to its property the public utility intends to demand from its customers...”

41.(3) A public utility shall not proceed with the construction, purchase or lease of improvements or additions to its property where

- (a) the cost of the construction or purchase is in excess of \$50,000;*
- or*
- (b) The cost of the lease is in excess of \$5,000 in a year of the lease*

without the prior approval of the board...”

The Board is guided by Section 118 of the *Act* in its interpretation of this Section. Section 118 reads as follows:

“118.(1) This Act shall be interpreted and construed liberally in order to accomplish its purposes, and where a specific power or authority is given the board by this Act, the enumeration of it shall not be held to exclude or impair a power or authority otherwise in this Act conferred on the board.

(2) The board created has, in addition to the powers specified in this Act, all additional, implied and incidental powers which may be appropriate or necessary to carry out all the powers specified in this Act.

(3) A substantial compliance with the requirements of this Act is sufficient to give effect to all the rules, orders, acts and regulations of the board, and they shall not be declared inoperative, illegal or void for an omission of a technical nature....”

The Board is also guided by the comments of Green, J.A. (as he then was) in **Reference re. Section 101 of the *Public Utilities Act*, Newfoundland (1998), 164 Nfld. & P.E.I.R. 60 at pages 72 & 73**, where he discussed the interpretation of the *Act* and the *Electrical Power Control Act, 1994, c.E-5.1, S.N.L.* (“EPCA”) in the following terms:

16. *It is necessary to examine the specific legislative provisions in the larger regulatory context and against the background of the purposes of the legislation and the general principles which have been developed as part of regulatory practice. This approach follows from s. 118 of the Act which provides. (Section 118 is reproduced in the Judgment)*
17. *In addition, the EPCA provides that the Board, in carrying out its duties and exercising its powers under the Public Utilities Act must implement the power policy of the province, as declared in s. 3 of the Act, and in so doing must “apply tests which are consistent with generally accepted sound public utility practice”...*
18. *It follows from these provisions that a literal and technocratic interpretation and application of the provisions of the Act is to be avoided, in favour of an interpretation which will advance the underlying purpose of the legislation as well as the power policy of the province and be consistent with generally accepted sound public utility practice.”*

Section 4 of the *EPCA* states as follows:

- “4. *In carrying out its duties and exercising its powers under this Act or under the Public Utilities Act, the public utilities board shall implement the power policy declared in section 3, and in doing so shall apply tests which are consistent with generally accepted sound public utility practice.*”

The Power Policy of the Province is set out in Section 3 of *EPCA*. For purposes of this decision we can summarize the duty of the Board as being one to ensure that all resources and facilities for the production, transmission and distribution of power in the Province are managed and operated in a manner that would result in the most efficient production, transmission and distribution of power at the lowest possible cost consistent with reliable service.

The question, therefore, as to whether or not the Board has jurisdiction to consider the instant application must be considered in light of the Board’s duties and responsibilities as outlined in the *Act* and the *EPCA*. While the submission and consideration by the Board of annual capital budgets is mandated in Section 41 of the *Act*, the Board is mindful of the fact that capital expenditures may be required which have not been anticipated or for some other reason not included in an annual capital budget. In recognition of this fact, the Board, in previous capital budget applications, has ordered the inclusion of an allowance for unforeseen events in the amount of \$1,000,000 for Hydro, and \$750,000 for Newfoundland Power. In P. U. 7(2002-2003), conditions for the use of funds characterized as “*allowance for unforeseen events*” were imposed.

The Board agrees with the submission of Hydro that a third broad category of applications may from time to time arise which Hydro has coined as ad hoc applications. The Board would make the observation, however, that such applications must still meet the Board’s requirements, as outlined in previous orders, for justification of any capital expenditure, briefly summarized as prudent and reasonable, consistent with the provision of efficient power at the lowest possible cost consistent with reliable service.

The Board prefers to adopt a common sense approach to capital expenditure applications which are made outside of the annual capital budget process. It is the Board's view that, when circumstances exist where capital expenditures will result in greater efficiencies and the delivery to consumers in the Province of power at the lowest possible cost consistent with reliable service, it has a duty to hear such applications.

The Board, therefore, concludes that it has jurisdiction to hear an application for approval of capital expenditures in excess of \$50,000 outside of the annual capital budget approval process.

The Second Argument raised by the Industrial Customers in support of their submission that the Board does not have jurisdiction to entertain this application is in terms of Regulation 28 of the Board of Commissioners of Public Utilities Regulations, 1996. That Regulation is reproduced and reads as follows:

“Rehearings

- 28(1) *Applications for re-opening an application after final submission, or for rehearing after final order, must state the grounds upon which the application is based; if the application is to re-open the matter to receive further evidence, the nature and purpose of the evidence must be stated; if the application is for rehearing or argument, the applicant must state the findings of fact or of law claimed to be erroneous and a brief statement of the alleged error.*
- (2) *When any decision or order of the Board is sought to be reversed, changed, or modified by reason of facts and circumstances arising subsequent to the hearing, or to the order, or by reason of consequences resulting from compliance with that decision, order or requirement which are claimed to justify or entitle a reversal, change or modification thereof, the facts, circumstances or consequences must be fully set forth in the application.”*

Regulation 28(1) is not raised by Hydro as there is no allegation of any erroneous finding of fact or law in order P. U. 29(2003).

The position of the Industrial Customers is that an order of the Board should not be reversed, changed or modified except for some compelling change in circumstances or new

evidence. They argue that decisions of the Board, absent exceptional circumstances, should be final. They further argue that principles of regulatory efficiency and procedural fairness militate against the re-opening or re-hearing of an order once made. To allow a rehearing in these circumstances would be an abuse of the process of the Board and would work an unfairness on the Industrial Customers by requiring the Industrial Customers to incur expense in order to be heard on such an application.

While the Board agrees with the statements of principle as put forth by the Industrial Customers, these principles do not exist in a vacuum and are to be applied to the facts and circumstances of each individual application. The Board also agrees that multiple applications should be discouraged and that frivolous or vexatious applications should be denied. Dissatisfied parties should not be allowed to re-apply in circumstances where the application is simply a “*second kick at the can*”. That being said, however, the Board finds the Industrial Customers’ interpretation of Regulation 28(2) to be too narrow and in the words of Green, J. A. “*too literal and technocratic an interpretation which tends to frustrate the underlining purpose of the legislation.*” Regulation 3(2) of the Regulations addresses the Board’s discretion in terms of the interpretation and application of the regulations and reads as follows:

“Regulation 3(2)

In any application or other proceeding, the Board may dispense with, vary or supplement any provisions of these Regulations on such terms, if any, as the Board considers necessary.

The Board is therefore of the view that it has, in actual fact, a fairly broad discretion when considering Regulation 28(2), and, on the facts as found in this application, does have jurisdiction to consider the Evergreen Projects. The evidence leading to this conclusion will be dealt with more fully under the heading “*Justification*”. The question as to whether or not a particular panel will exercise its discretion to reverse change or modify a previous Order must, of necessity, be decided on the facts of the particular case being considered.

With respect to the Evergreen Projects, the Industrial Customers argue that, because these two projects were disallowed by P. U. 29(2003), the Board has no jurisdiction to reverse, change

or modify that Order as it relates to these two projects. As will be seen under the heading “*Justification*” the Evergreen Projects, as presented in this application differ quite considerably from the application presented in Hydro’s 2004 Capital Budget Application. It is the Board’s view that the present application is, in actual fact, a new application. Facts and circumstances have now been presented to the Board’s satisfaction warranting consideration of these projects.

While the Industrial Customers have characterized the Evergreen Projects as a reconsideration amounting to “*cherry picking*” on the part of Hydro, the Board has analyzed the record and disagrees with the characterization of these applications as “*cherry picking*” or a “*second kick at the can*”.

The Board finds that it does in fact have jurisdiction to hear capital budget applications outside of the annual capital budget process, that it has jurisdiction to reconsider the End User Evergreen Program and the Office Server Operating System and Productivity Tools Evergreen Program and also the Upper Salmon Power Canal/Slope Stabilization Study.

JUSTIFICATION

End User Evergreen Program and Office Server Operating System and Productivity Tools Evergreen Program

A project similar to this project was denied by the Board, as was recited above, in P. U. 29(2003). The reason for the rejection of the Program at that time was stated as follows:

“The Board is not persuaded by the evidence and argument offered by Hydro that this project must be carried out in 2004. There has not been any convincing evidence or argument to suggest that all of the equipment proposed to be replaced or refreshed is necessary at this time. As a matter of fact, the cross examination of Hydro’s witnesses determined that the \$2,811,400 was not fully accounted for in the information they provided and the Board is not convinced that the project was thoroughly analyzed before being presented. Approval of this project is, therefore, denied.”

The history of these programs is that they formed part of Hydro’s 2003 Capital Budget Application. What was proposed by Hydro and approved by the Board in P. U. 29(2002-2003)

was that end user hardware (End User Evergreen Program in this application) would be refreshed on a three to five year cycle and that servers and operating systems (Office Server Operation System and Productivity Tools Evergreen Program in this application) would be refreshed on a five-year cycle. The first year of that program was approved. In preparing its application for the 2004 Capital Budget, Hydro may well have proceeded on the unfounded assumption that, because the first year of these programs was approved for the 2003 Capital Budget, the programs would automatically be approved in subsequent capital budgets. The Board's jurisdiction under Section 41 of the *Act*, is to approve capital budgets on an annual basis. The Evergreen Projects, therefore, must still be justified in each and every subsequent capital budget application.

In argument at the 2004 Capital Budget Hearing, the Industrial Customers argued that the Evergreen Projects should be rejected at that time and disallowed unless and until Hydro produced evidence at a subsequent capital budget hearing to support the application and that Hydro be directed to re-file a project intended to replace only the equipment which, on a balance of probabilities, would become nonfunctional before the end of 2004. In the instant application, the Industrial Customers agree that to have some type of evergreen strategy is appropriate for an operation of the size and sophistication of Hydro both in respect of end user devices and servers. The Industrial Customers' real objection was that the expenditures were not justified and they questioned the timing of these expenditures. They state that the assumptions on which the strategy is based are erroneous and are not demonstrated to be prudent and appropriate for Hydro's situation.

The Board finds that what Hydro is doing in the instant application with respect to the Evergreen Program portion of the application is precisely what was suggested by the Industrial Customers at the 2004 Capital Budget Hearing. What is proposed by Hydro is to replace 232 computers, servers and licenses in 2004 as the second part of Hydro's five-year strategy to migrate to a thin client technology. The computers to be replaced are presently leased and can be returned to the vendor in the first quarter of 2004. Hydro has the option of extending the leases and upgrading the operating systems to handle the latest software releases. Based upon the program approved by the Board in 2003, and the industry standard life cycles for various computer devices, the computers will have to be replaced at some point in the future.

Hydro's analysis of the various options available indicates that, while there are potential savings in the 2004 year by delaying the replacement "*and deviating from industry practices*", not to replace as proposed will, in the long run, actually be the most expensive option. The Board therefore finds, on the evidence, that the year 2004 is the most appropriate time to proceed with this portion of Hydro's End User Evergreen strategy and that the purchase of the 232 computers, servers and licenses in 2004 is the least cost option as was approved by the Board for the year 2003. As was indicated earlier, three options were considered by Hydro, the first being to continue the refresh program and thin client strategy, the second to buy the leased devices and upgrade the operating systems to the latest release, and the third option being to extend the lease and upgrade the operating systems while continuing the refresh program. While the replacement option was not the least cost option in the short run, it proves to be the least cost option in the long run.

With respect to the server project, the Industrial Customers agree that it is appropriate for Hydro to begin its migration to Windows 2003 and they further agree that there is no benefit to moving to Windows 2000 at this point. The real bone of contention is with Hydro's server replacement strategy as justification for the server replacement. Hydro's evidence indicates that the real reason is obsolescence, the inability to be upgraded, together with lack of vendor support beyond the end of 2004. The Board is satisfied with the evidence tendered by Hydro that this project is necessary and is required for the year 2004. The total project cost is \$788,700 with 19%, or \$149,800, being recovered from CF(L)Co. as its share of the overall program.

The following, therefore, is a summary of the Board's findings which distinguish the present application from Hydro's 2004 Capital Budget Application:

1. The leases for the 232 computers expired at the end of March 2004, a fact which was not highlighted by Hydro in the 2004 Capital Budget Application.
2. The project as proposed by Hydro for 2004 is the least cost option and is prudent and justified.

3. While these projects were rejected in P. U. 29(2003) because they were not fully accounted for, the Board is satisfied that they have been fully accounted for in this Application.
4. Proceeding with the Evergreen Projects is the most cost effective alternative.

Upper Salmon Power Canal/Slope Stabilization

This study is deemed necessary by Hydro as the result of a problem identified by Hydro's Dyke Board of Consultants, showing early signs of slope instability in the Upper Salmon Power Canal. The recommendation of the Dyke Board is to repair the canal by revising the slope from 2.0H:1.0V to 2.5H:1.0V., before a significant slump occurs. Failure to act now on stabilization of this section of the canal will result in continued deterioration until failure occurs. This will result in costly repairs with the Upper Salmon generating unit being out of service impacting the supply of power to customers, significant loss of water from the Bay d'Espoir system and possible damage to the environment.

The relevant sections of the Dyke Board's report were filed with the Board. The project proposed is for a detailed engineering study at a cost of \$102,000 to be undertaken in 2004 to determine the detailed design required and the repair cost for the repairs to be done in the year 2005.

While the Industrial Customers agree that this project is prudent and should be undertaken in 2004, they argue that it should be funded from the Allowance for Unforeseen Events. The Board disagrees. In P. U. 7(2002-2003) the Board imposed conditions upon the use of the Allowance for Unforeseen Events. These conditions are as follows:

- i The cost of the project must be greater than \$50,000.00.
- ii The project must be seen, both by NLH and subsequently by the Board, to be urgent. Circumstances must require that immediate action be taken, and it must be evident that any delay resulting from the time taken to file an application with the Board could have serious negative consequences

for the company, its customers, or the public. These consequences may be financial, or for reasons of safety or reliability.

- iii A report must be filed with the Board detailing the circumstances of the need, the alternatives that have been considered, the financial effects of each of the alternatives, and reasons for the choice. Any reliability or safety issues should be reported in detail at this time. Also included must be a time line that indicates the date of the requirement for emergency action, the date of the decision of the company, the date upon which the action was begun, and the expected date of completion of the projects.
- iv The reports on expenditures from the “*Allowance for Unforeseen Events*” for the year must be entered as part of the Application for Approval of the Capital Budget for the following year.
- v The “*Allowance for Unforeseen Events*” will be considered by the Board annually at the time it considers the NLH capital budget and may be varied from year to year. Unused balances in the account will not carry forward.

While the Board agrees with the Industrial Customers that this project is critical, it does not feel that the project is urgent in the sense that it meets the conditions outlined in P. U. 7(2002-2003). The engineering study is preliminary to corrective action which will be taken by Hydro in the year 2005, and does not meet the criteria outlined in ii above. The engineering study itself cannot be viewed as of so urgent a nature that immediate action must be taken. The real reason for the study in the Board’s view is to plan prudently the corrective action to be taken. The very fact of an application preliminary to work to be performed would indicate that it is not an unforeseen item in the sense anticipated by “*Allowance for Unforeseen Events*”.

OFFSETTING CAPITAL BUDGET DEDUCTIONS

The proposal by the Industrial Customers that the capital expenditures in this application be offset against the 2004 Capital Budget will not be ordered by the Board in this case. In P. U. 29(2003) the Board scrutinized each and every project that was approved and found those projects to be justified on the evidence and prudent capital expenditures for the year 2004. By the same token, the Board has found sufficient justification for the expenditures proposed in this application and finds those expenditures prudent. The Board will, therefore, not require Hydro to offset these expenditures against its 2004 Capital Budget.

Dated at St. John's, Newfoundland and Labrador this 23rd day of March 2004.

G. Fred Saunders,
Presiding-Chair.

Gerard Martin, Q.C.,
Commissioner.

Donald R. Powell, C.A.,
Commissioner.

G. Cheryl Blundon,
Board Secretary.