

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

AN ORDER OF THE BOARD

NO. P. U. 17(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 Power Inc. pursuant to
10 Section 48 of the *Act* for an Order approving
11 the sale by Newfoundland Power of certain
12 support structures to Bell Aliant Regional
13 Communications Inc.

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16
17 **The Application**

18
19 On February 4, 2011 Newfoundland Power Inc. (“Newfoundland Power”) filed an application
20 with the Board of Commissioners of Public Utilities (the “Board”) requesting approval of the
21 sale to Bell Aliant Regional Communications Inc. (“Bell Aliant”) of certain support structures in
22 its service territory (the “Application”).

23
24 Notice of the Application was published in newspapers in the province on April 2, 2011
25 following a series of information requests to Newfoundland Power from the Board concerning
26 the Application. Direct notice was also sent to various cable operators in the Province,
27 specifically Eastlink, Rogers Cable, MTS Allstreams Inc., and Benoit Bros. Contracting Ltd.
28 The only Intervenor in the Application was the Consumer Advocate, Mr. Thomas Johnson.
29 Newfoundland and Labrador Hydro (“Hydro”) advised that it would not be participating in the
30 process but requested that it remain on the documentation distribution list.

31
32 Information requests were sent to Newfoundland Power during the period February 18 to May
33 10, 2011, and all responses were filed by May 13, 2011. Both Newfoundland Power and the
34 Consumer Advocate filed written submissions on May 26, 2011 and Newfoundland Power filed
35 a reply submission on May 30, 2011. Oral submissions from both the Consumer Advocate and
36 Newfoundland Power were heard on June 1, 2011.

1 **Background**

2
3 Prior to 2001 Newfoundland Power and Bell Aliant (then Aliant Telecom Inc.) each owned
4 support structures in Newfoundland Power's service territory and shared the use of each others
5 support structures. Ownership and costs were shared on the basis of 60% Newfoundland Power
6 and 40% Bell Aliant.

7
8 On May 8, 2001 Newfoundland Power applied to the Board for approval of supplementary
9 capital expenditures for 2001 associated with the purchase of Bell Aliant's support structures in
10 Newfoundland Power's service territory at a total aggregate price of \$45,858,000. The total
11 number of support structures to be purchased from Bell Aliant was 101,875 (32,027 non-joint
12 use; 69,848 joint use). As part of the arrangement Newfoundland Power and Bell Aliant
13 proposed to enter into a Joint Use Facilities Partnership Agreement as of January 1, 2001
14 governing Bell Aliant's use of support structures in Newfoundland Power's service territory.

15
16 Following a public hearing the Board, in Order No. P. U. 6(2001-2002), denied Newfoundland
17 Power's application on the basis that the non-joint use support structures did not meet the used
18 and useful criteria for the purpose of being included in the rate base. In its Order the Board
19 indicated that it would consider a subsequent application from Newfoundland Power with respect
20 to the approval of the capital expenditure for the joint use support structures only.

21
22 On July 26, 2001 Newfoundland Power requested the Board reopen the application to receive
23 further evidence with respect to Newfoundland Power's purchase of Bell Aliant's joint use
24 support structures in Newfoundland Power's service territory. The new purchase price was
25 \$40,439,669, the net book value of these assets.

26
27 The Joint Use Facilities Partnership Agreement established comprehensive terms for the joint use
28 of the Support Structures by the parties over the 10-year period of the agreement. Under the
29 terms of the Joint Use Facilities Partnership Agreement Newfoundland Power, as owner of all
30 joint use support structures in its service territory, would provide Bell Aliant with services
31 related to its support structures requirements, including the maintenance and replacement of the
32 support structures acquired from Bell Aliant and the design, construction and maintenance of
33 additional support structures to meet Bell Aliant's ongoing support structure requirements in the
34 service territory. The Joint Use Facilities Partnership Agreement also provided, in the event it
35 was not renewed, that Bell Aliant would purchase from Newfoundland Power 40% of the joint
36 use support structures, subject to Board approval.

37
38 In Order No. P. U. 17(2001-2002) the Board approved the acquisition by Newfoundland Power
39 of all joint use support structures in its service territory that had been owned by Bell Aliant.
40 Since 2001 Newfoundland Power has owned and maintained all of the joint use support
41 structures in its service territory. In June 2010, pursuant to the terms of the Joint Use Facilities
42 Partnership Agreement, Bell Aliant gave notice to Newfoundland Power of its intention not to
43 renew the Joint Use Facilities Partnership Agreement upon its expiration on December 31, 2010.
44 In December 2010 Newfoundland Power and Bell Aliant executed:

- 1 (i) a Joint Use Support Structures Purchase Agreement pursuant to which
 2 Newfoundland Power agreed to sell, and Bell Aliant agreed to purchase, 40% of
 3 the joint use support structures for the price of \$45,698,000, subject to
 4 adjustments, effective January 1, 2011; and
 5 (ii) a Joint Use Agreement which provides the terms of continuing joint use of
 6 support structures, effective January 1, 2011, including 60/40 cost sharing
 7 between the parties.
 8

9 The sale of the support structures by Newfoundland Power is subject to the approval of the
 10 Board under s. 48 of the *Act*. Approval of the Application will result in the sale of 40% of poles
 11 and anchors and related equipment which are currently owned by Newfoundland Power and used
 12 jointly with Bell Aliant. Service and maintenance of these joint use support structures will be the
 13 responsibility of Bell Aliant which is subject to regulation by the Canadian Radio and
 14 Telecommunications Commission ("CRTC"). The remaining joint use support structures will be
 15 retained by Newfoundland Power, which is subject to regulation by the Board, and will be
 16 serviced and maintained by Newfoundland Power.
 17

18 Discussion

19
 20 The central issue in this Application relates to the ownership of support structures, specifically
 21 sole ownership verses joint ownership. An analysis of the benefits of the joint use of these
 22 support structures is not required since the benefits are clear and, in any event, are separate and
 23 apart from the ownership issue. Currently Newfoundland Power owns all of its support structures
 24 even those that are used jointly with Bell Aliant. In this Application Newfoundland Power
 25 requests the Board's approval under s. 48 of the *Act* to sell 40% of its joint use support structures
 26 to Bell Aliant. If approved, this sale will return the parties to the ownership structure that was in
 27 place in 2001 prior to the Board's approval for Newfoundland Power to purchase all of Bell
 28 Aliant's joint use support structures. It is in this context that the Board begins its discussion of
 29 the issues raised in this Application.
 30

31 Legislation

32
 33 The relevant provisions of the legislation are set out below for ease of reference.
 34

35 Section 3 of the *EPCA* states:
 36

- 37 (b) *all sources and facilities for the production, transmission and distribution of power in the*
 38 *province should be managed and operated in a manner*
 39 (i) *that would result in the most efficient production, transmission and distribution*
 40 *of power,*
 41 (ii) *that would result in consumers in the province having equitable access to an*
 42 *adequate supply of power,*
 43 (iii) *that would result in power being delivered to consumers in the province at the*
 44 *lowest possible cost consistent with reliable service..."*

1 The *Public Utilities Act* states:

2
3 "37.(1) *A public utility shall provide service and facilities which are reasonably safe and*
4 *adequate and just and reasonable.*"

5 "48. *A public utility shall not sell, assign or transfer the whole of its undertaking or a part of it*
6 *to a person or corporation until the approval of the board has been obtained.*"

7 "53.(1) *A public utility having conduits, poles, wires or similar equipment shall, for reasonable*
8 *compensation,*

9 (a) *permit the use of its conduits, poles, wires and similar equipment by another*
10 *public utility; and*

11 (b) *permit the use of its conduits and poles by a licensed cable television system,*

12
13 *if public convenience and necessity require that use and it will not result in a substantial*
14 *detriment to the service rendered by the public utility owning the equipment.*"

15
16
17 The Provisions of the 2001 Joint Use Facilities Partnership Agreement

18
19 Newfoundland Power stated in the Application that it is selling the support structures because it
20 agreed to do so as part of the Joint Use Facilities Partnership Agreement and that the proposed
21 sale provides additional economic benefits to Newfoundland Power and its customers. The
22 relevant provisions of the Joint Use Facilities Partnership Agreement established between
23 Newfoundland Power and Bell Aliant in 2001 [Consent 2(iii)], are set out below:

24
25 "9.05 *Notwithstanding any other provisions of this Agreement, Aliant may terminate this*
26 *Agreement at any time by providing at least twelve (12) months written notice to NP.*

27
28 9.06 *Upon any termination of this Agreement, other than pursuant to Article XII:*

29 (a) *either Party may require confirmation of the number of Poles to which Aliant is*
30 *attached. In the absence of agreement between the Parties as to the appropriate*
31 *methodology to obtain this confirmation, the Parties shall participate equally in*
32 *the completion of a Pole count survey and shall share equally in any expenses*
33 *reasonably incurred in connection with the survey for services rendered by any*
34 *Third Party;*

35 (b) *subject to this Clause, Aliant shall purchase from NP the Non Joint Use Support*
36 *Structures occupied by Aliant at their Net Book Value and a forty percent (40%)*
37 *interest in the Joint Use Support Structures at forty percent (40%) of the Net*
38 *Book Value of the Joint Use Support Structures;*

39 (c) *NP shall transfer to Aliant:*

40 (i) *all licenses, permits, approvals, consents, certificates, registrations and*
41 *authorizations, whether governmental, regulatory or otherwise, relating*
42 *to the Pole and Support Structures to be purchase by Aliant;*

43 (ii) *all books, records, lists, material, data, manuals and files relating to the*
44 *Pole and Support Structures to be purchased by Aliant; and*

45 (iii) *the right to bill and collect monies from Third Parties with respect to*
46 *Attachments to the Support Structures to be purchased by Aliant; and*

47 (d) *existing Support Structures shall continue to be covered by the provisions of this*
48 *Agreement including the billing and payment provisions of this Agreement until*
49 *either:*

- 1 (i) the use of Support Structures has been discontinued by Aliant; or
 2 (ii) a new revenue-neutral joint use agreement in relation to Support
 3 Structures, using the JUA as a model, is reached between the Parties.
 4

5 "18.01 Except as otherwise provided in this Agreement, this Agreement shall continue in force
 6 for the period from January 1, 2001 to December 31, 2010 and shall not be terminable
 7 during this period.
 8

9 18.02

- 10 (a) Following the expiration of the term of this Agreement, this Agreement shall
 11 continue in force for further ten (10) year renewal terms, upon the same terms
 12 and conditions as the initial term or upon such other terms and conditions as the
 13 Parties may agree, unless written notice of either an intention not to renew the
 14 Agreement or an intention to renew the Agreement for a different term or upon
 15 different terms and conditions is given by either Party to the other Party, no later
 16 than six (6) months before the expiration of the term of the Agreement.
 17 (b) Notwithstanding the foregoing, the Annual Rental Rate for the initial year of a
 18 renewal term shall be re-calculated using the same methodology used to
 19 calculate the Annual Rental Rate for the previous term of this Agreement
 20 (embedded cost of Pole times carrying charge) with the exception of:
 21 (i) the embedded cost of the Poles shall be reduced by the total amount of
 22 capital contributions paid by Aliant to NP pursuant to Clause 6.02
 23 during the previous term of this Agreement; and
 24 (ii) the re-calculated rate shall be adjusted to reflect a notional allocation of
 25 Third Party revenues on the basis of a ratio of sixty-two point five per
 26 cent (62.5%) for Aliant and thirty-seven point five per cent (37.5%) for
 27 NP;
 28 provided that the Annual Rental Rate as calculated shall not be greater than the
 29 rate derived from using the Annual Rental Rate in effect in year one of the
 30 previous term of the Agreement, inflated annually over the previous term by sixty
 31 per cent (60%) of GDPPI."
 32

33 "18.06 In the event either Aliant or NP elects not to renew this Agreement after the initial term
 34 or any subsequent renewal term, the termination provisions in Clause 9.06 shall apply."
 35

36 Bell Aliant gave notice to Newfoundland Power in June 2010 of its intention not to renew the
 37 existing joint use arrangement. According to the terms of the Joint Use Facilities Partnership
 38 Agreement, failing the renewal of the existing joint use arrangement, Bell Aliant was required to
 39 repurchase 40% of Newfoundland Power's joint use support structures and to renegotiate terms
 40 for joint use on principles consistent with those in effect prior to 2001. (Newfoundland Power
 41 Company Evidence, pg. 2/7-15)
 42

43 Newfoundland Power argues that the Board knew that Bell Aliant had a right to repurchase the
 44 support structures at the end of the Joint Use Facilities Partnership Agreement term when it
 45 approved the purchase in 2001. Specifically, Newfoundland Power states:
 46

47 "The Board approved the initial acquisition by Newfoundland Power, being aware that Bell
 48 Aliant had that right to repurchase at the end of the term. Newfoundland Power's customers
 49 have benefited from the transaction, which included that right of repurchase. So having received
 50 the benefit in good faith, we took that ten million dollars to the benefit of our customers, we must

1 *in good faith fulfil the obligation to reconvey the structures to Bell Aliant. And the Board, while*
 2 *it has an oversight duty here, can't simply willy nilly say "look, we don't like this and we're*
 3 *going to exercise our powers in a manner that will frustrate Bell Aliant's contractual right of*
 4 *reacquisition. That's got to be respected. The Board needs to focus on the key issues: is there any*
 5 *evidence of material harm in this transaction? And when you look at it, it doesn't meet that test."*
 6 (Transcript, June 1, 2011, pg. 45/13-pg. 46/8)

7
 8 The Consumer Advocate states:

9
 10 *"The first point I'd wish to make is that this proposed sale is fully reviewable by the Board at this*
 11 *time as a utility cannot sell the whole or part of its undertaking until the approval of the Board*
 12 *has been granted under Section 48, full stop.*

13
 14 *As I read the Company's materials and argument, they appear to be saying that because the*
 15 *Board recognized the existence of the repurchase obligation in order No. PU 6(2001/02) and*
 16 *ultimately approved Newfoundland Power's acquisition of the joint use support structures in PU*
 17 *17 (01/02), then the Board's proper take on this is that an application under Section 48 would be*
 18 *necessary to "finalize" the obligation upon Newfoundland Power to sell the joint use support*
 19 *structures. They use the term "finalize" at page 25 of their brief. I'm not sure, frankly, what*
 20 *Newfoundland Power is getting at with this finalize language, but if it is to suggest that the*
 21 *Board's scrutiny of this sale application is to be somehow lessened to attenuated in light of the*
 22 *existence of a sale obligation in the facilities partnership agreement, they are, with all due*
 23 *respect, wrong."*

24 (Transcript, June 1, 2011, pg. 3/24-pg. 4/25)

25
 26 The Consumer Advocate goes on to point out that the Board declined to give its approval of the
 27 Joint Use Facilities Partnership Agreement in its 2001 Order approving the sale which
 28 Newfoundland Power had argued at the time the Board must approve because it contained terms
 29 and conditions regarding the potential transfer of assets. He states that the parties must have
 30 been put on notice that the sale would be fully subject to s. 48 of the *Act* and presumably they
 31 were prepared to proceed on this basis. (Transcript, June 1, 2011, pg. 5/1-pg. 6/23)

32
 33 In Order No. P. U. 17(2001-2002) the Board approved the purchase of the joint use support
 34 structures but did not approve the Joint Use Facilities Partnership Agreement and specifically
 35 stated:

36
 37 *"WHEREAS it is the opinion of the Board that approval of the Facilities Partnership Agreement*
 38 *is not required and that Newfoundland Power will have to apply to the Board of Commissioners*
 39 *of Public Utilities for approval under s. 48 of the Act before the sale of any of the Support*
 40 *Structures as contemplated in the modified Facilities Partnership Agreement is finalized..."*

41
 42 The Board believes that, with Order No. P. U. 17 (2001-2002), both Newfoundland Power and
 43 Bell Aliant were put on notice that Newfoundland Power would have to satisfy the requirements
 44 under s. 48 of the *Act* for any sale of these assets. The Board acknowledges that Newfoundland
 45 Power has contractual obligations to Bell Aliant and trusts that Newfoundland Power has acted
 46 in good faith in fulfilling its obligations. The Board is not subject to these contractual
 47 obligations and, instead, is obliged to fulfill its jurisdiction, in accordance with the legislation
 48 and in particular s. 48. The Board agrees with the Consumer Advocate that the proposed sale is
 49 *"fully reviewable"* and will therefore exercise the jurisdiction set out in s. 48.

1 Test to Be Applied
2

3 This Application was filed in accordance with s. 48 of the *Act* which requires that Newfoundland
4 Power obtain the approval of the Board before selling all or a part of its undertaking. There are
5 no specific requirements set out in the legislation as to the matters to be considered by the Board
6 in reference to such a request. The Board has not had occasion in the past to establish specific
7 guidelines despite the fact that this section or one like it has been a part of the regulatory
8 framework of this province since the introduction of the *Public Utilities Act* in 1949. Without
9 guidelines or relevant precedent from this province to suggest the appropriate considerations,
10 several decisions in relation to similar legislation in Alberta were referenced in this Application.
11

12 The Consumer Advocate argues that the Board should develop a test under s. 48 of the *Act* which
13 would originate from the "...Board's authority to safeguard the public's interest in the nature
14 and quality of the service provided." (Consumer Advocate, Written Submission, pg. 4) He says
15 this is referred to as the "no-harm test" in Alberta and quotes the Alberta EUB in *Re Fortis*
16 *Alberta Inc.*, Disposition of High River Services Centre [Decision 2010-615], December 23,
17 2010, at paras 7 and 8, as follows:
18

19 *"The no-harm test balances the potential positive and negative effects of the proposed sale to*
20 *determine whether it is in the overall public interest. That test originates from the Commission's*
21 *authority to safeguard the public interest in the nature and quality of the service provided to the*
22 *community by public utilities, an authority reaffirmed in the ATCO Ltd. V. Calgary Power Ltd.,*
23 *where the Supreme Court stated that the Commission's authority in this regard is of the widest*
24 *proportions."*
25

26 The Consumer Advocate further quotes the EUB Decision 2000-41, *TransAlta Utilities*
27 *Corporation, Sale of Distribution Business* (July 5, 2000) which states at pg. 4:
28

29 *"As a result, rather than simply asking whether customers will be adversely impacted by some*
30 *aspect of the transactions, the Board concludes that it should weigh the potential positive and*
31 *negative impacts of the transactions to determine whether the balance favours customers or at*
32 *least leaves them no worse off, having regard to all of the circumstances of the case."*
33

34 The key question according to the Consumer Advocate is "...whether the proposed sale
35 transaction is in the overall public interest having regard to all of the relevant circumstances."
36 (Consumer Advocate, Written Submission, pg. 5) The Consumer Advocate cautioned the Board
37 against being tied down to a particular formulation, arguing that the overall public interest was to
38 be considered, stating:
39

40 *"So at the end of the day, the Board has to take into account both the positive and the negative*
41 *effects of the proposed sale in all of the circumstances in their totality. The Board should satisfy*
42 *itself that the customers of the utility will experience no adverse impact as a result of the*
43 *transaction. You must weigh the positive and negative impacts of the transaction to determine*
44 *whether the balance favours customers or at least leaves them no worse off, having regard to all*
45 *of the circumstances."*
46

(Transcript, June 1, 2011, pg. 26/8-19)

1 Newfoundland Power offers a somewhat different view of the approach which should be taken
 2 by the Board in this matter. Newfoundland Power suggests that the Board should have reference
 3 to the *Act* and the *EPCA* in evaluating this Application and specifically to the standard of
 4 “substantial detriment” which is set out in s. 53 of the *Act*. (Newfoundland Power, Written
 5 Submission, pgs. 14-15) Newfoundland Power makes specific reference to the no-harm test,
 6 arguing that this test as implemented in Alberta includes a second requirement for the Board to
 7 consider whether any potential adverse impacts could be dealt with in future regulatory
 8 proceedings. (Newfoundland Power, Reply Submission, pgs. 1-2) In Oral Submissions
 9 Newfoundland Power clarified its position that the Board should determine if there is substantial
 10 detriment or material harm, and specifically:

11
 12 *“The test for joint use under 53 is substantial detriment. But having said that, I do recognize that*
 13 *the Board is exercising the power under Section 48 and so the no harm test, which is the Alberta*
 14 *test and sanctioned by the Supreme Court of Canada, and I think that obviously cannot simply*
 15 *mean no harm if you calculated it to the penny. Obviously it means something material in the*
 16 *circumstances. So no material harm, no substantial detriment. These things are more or less*
 17 *about the same.”*

18 (Transcript, June 1, 2011, pg. 62/1-11)
 19

20 The Board agrees that, in deciding this Application, consideration must be given to the relevant
 21 provisions of the legislation. The Board does not believe however that the substantial detriment
 22 language set out in s. 53 of the *Act* informs the analysis under s. 48. Section 53 codifies a
 23 utilities’ obligation to permit access to support structures and cannot be seen to be relevant or
 24 helpful in addressing issues surrounding the sale of assets, even where the assets happen to be
 25 support structures. The purpose of the sections are different and it is notable that the legislature
 26 did not use the substantial detriment language in s. 48. The Board believes that the obligation on
 27 a utility to provide access to support structures unless it can show substantial detriment codifies
 28 the principle that there should be joint use where reasonably practicable. Section 48 however
 29 involves balancing the interests of customers with the utility’s right to manage its assets.
 30

31 The Board acknowledges Newfoundland Power’s comment at pg. 17 of its Written Submission
 32 that the Board cannot substitute its judgement on managerial and business issues as has been
 33 stated by the Court of Appeal in this province. However Newfoundland Power’s right to manage
 34 its property is subject to the specific limitations imposed by the *Act*. The Board cites the
 35 comments of the Supreme Court of Canada in *ATCO Gas & Pipeline Ltd. V. Alberta [Energy &*
 36 *Utilities Board]* 2006 Carswell Alta 139, at paragraph 4:

37
 38 *“As in any business venture, public utilities make business decisions, their ultimate goal being to*
 39 *maximize the residual benefits to shareholders. However, the regulator limits the utility’s*
 40 *managerial discretion over key decisions, including prices, service offerings and the prudence of*
 41 *plant and equipment investment decisions. And more relevant to this case, the utility, outside of*
 42 *the ordinary course of business, is limited in its right to sell assets it owns: it must obtain*
 43 *authorization from its regulator before selling an asset previously used to produce regulated*
 44 *services.”*

45
 46 As to the reasons that the regulator’s approval is required for a sale of assets the Supreme Court
 47 of Canada said at paragraph 76:

1 *“MacAvoy and Sidak, in their article, at pp. 234-36, suggest three broad reasons for the requirement*
 2 *that a sale must be approved by the Board:*

- 3 1. *It prevents the utility from degrading the quality, or reducing the quality, of the regulated*
 4 *service so as to harm consumers;*
- 5 2. *It ensures that the utility maximizes the aggregate economic benefits of its operations, and*
 6 *not merely the benefits flowing to some interest group or stakeholder; and*
- 7 3. *It specifically seeks to prevent favouritism toward investors.”*

8
 9 With a view to ensuring that the interests of customers can fairly be balanced with the interests
 10 of the utility to manage its property the Board accepts the approach taken with respect to the
 11 similar Alberta legislation as appropriate in the context of the legislation and regulatory
 12 framework in this province. The Board agrees that available opportunities to address any
 13 potential adverse impact in future regulatory proceedings should be considered. The Board
 14 accepts the following as the proper test to be considered in this matter:

15
 16 **Has Newfoundland Power shown on a balance of probabilities that, when the potential**
 17 **positive and negative impacts of the transaction are weighed, the balance favours**
 18 **customers or at least leaves them no worse off, having regard to all of the circumstances?**

19
 20
 21 Application of the Test

22
 23 The Consumer Advocate addresses the circumstances to be considered by the Board in
 24 determining whether the proposed sale is in the overall public interest at pg. 5 of his Written
 25 Submission. The Consumer Advocate argues that the proffered economic benefits are at best
 26 thin and that the existence of these benefits are at risk and, when viewed reasonably, cannot be
 27 assured. The Consumer Advocate notes that there would be no benefit at all but for the annual
 28 surpluses forecast for 2011 and 2012 primarily due to transitional arrangements. He argues that
 29 any benefits are not expected to be reflected in rates and because the surplus occurs entirely in
 30 the first two years it is reasonable to expect that customers' rates will reflect only the deficiencies
 31 for 2013 onwards. (Consumer Advocate, Written Submission, pg. 11)

32
 33 In Oral Submissions the Consumer Advocate stated that he was not convinced that customers
 34 will actually receive any benefits. The Consumer Advocate noted that we are told that there will
 35 be ongoing diseconomies of scale due to shared ownership as compared to single ownership and
 36 references the evidence in 2001 which suggests that these diseconomies of scale are hard to
 37 quantify. The Consumer Advocate states that there is no analysis provided for the sale to Bell
 38 Aliant to show that the annual net contribution to revenue stays at all times positive as was
 39 shown in the evidence in support of the purchase of the poles in 2001. [Consent #2(ix)-
 40 Transcript, June 7, 2001, pgs. 17-19]

41
 42 In relation to the impact of the proposed sale on service the Consumer Advocate states that
 43 Newfoundland Power does not assert that customer service will be improved in any way with
 44 this sale. According to the Consumer Advocate the provisions of the 2011 Joint Use Agreement
 45 are aimed at compensating for the fact that Newfoundland Power will no longer have exclusive
 46 or primary responsibility for all of the support structures which was stated in 2001 to be highly
 47 desirable and efficient. The Consumer Advocate argues that regardless of the adherence to
 48 common standards in the proposed Joint Use Agreement there will be changes as to who

1 completes the work, with Bell Aliant being responsible for completing inspections on its support
2 structures, collecting inspection data and completing planned maintenance. (Consumer
3 Advocate, Written Submission, pg. 12-14)
4

5 The Consumer Advocate concluded Oral Submissions with the following statement:
6

7 *"Given the potential negative implications of a final sale of these core used and useful assets to a*
8 *party beyond the Board's regulatory powers, and in light of the lack of significant proffered*
9 *benefits, and indeed, the potential for customers to be worse off, this is not a transaction where*
10 *the balance favours customers or at least leaves them no worse off, and that's precisely why I*
11 *oppose the granting of approval."*

12 (Transcript, June 1, 2011, pg. 26/26-pg. 27/4)
13

14 The Consumer Advocate also notes that the sale is a permanent sale of core used and useful
15 assets and Newfoundland Power can only re-purchase these assets if Bell Aliant decides to sell
16 them. The Consumer Advocate submits that this proposed sale has consequences that go beyond
17 normal quality of service issues and notes that, while the Board has general supervision over
18 Newfoundland Power's operations, it has no jurisdiction over Bell Aliant's operations. The
19 Consumer Advocate argues that the Board has no role to play in the context of a sale by Bell
20 Aliant of these support structures and it is therefore unclear how the rights and interests of
21 electricity customers would be protected. (Consumer Advocate, Written Submission, pgs. 16 &
22 18) The Consumer Advocate says:
23

24 *"Considerations such as these weigh decidedly against the proposed sale of core used and useful*
25 *assets to Bell Aliant, in the Consumer Advocate's respectful submission, particularly in light of*
26 *the compelling reasons put forward for their acquisition from Bell Aliant just 10 years ago."*

27 (Consumer Advocate, Written Submission, pg. 18)
28

29 Newfoundland Power submits at pg. 16 of its Written Submission that the evidence before the
30 Board shows that the new joint use regime ensures: (i) the continuation of the economic benefits
31 associated with joint use of support structures; (ii) the continued right to use all joint use support
32 structures; and (iii) the least cost provision of service in that it provides more economic benefits
33 to Newfoundland Power and its customers than those associated with renewal of the 2001
34 agreement. Newfoundland Power also states that the proposed sale does not diminish service
35 and is consistent with current Canadian public utility practice.
36

37 Newfoundland Power submits that the sale of the support structures shows a positive net present
38 value when compared to the renewal of the Joint Use Facilities Partnership Agreement.
39 Newfoundland Power explains these impacts in its Company Evidence (pg. 12):
40

41 *"For 2011 and 2012, revenue requirement impacts are positive, primarily due to arrangements*
42 *associated with the transition to the future Joint Use regime. For 2013 through 2015, revenue*
43 *requirement impacts are negative. This primarily reflects ongoing diseconomies of scale due to*
44 *shared ownership of Joint Use Support Structures as compared to single ownership. The forecast*
45 *annual impacts for these years represent approximately 0.02% of Newfoundland Power's revenue*
46 *requirements.*

1 *The levelized revenue requirement impact for the 5-year period is forecast to be approximately*
2 *\$123,000, or 0.02%. The cumulative net present value of this benefit is approximately \$0.5*
3 *million at year-end 2010.*"

4
5 In its Reply Submission (pg. 1) Newfoundland Power says:

6
7 *"As indicated in Newfoundland Power's Written Submission (the "NP Submission"),*
8 *Newfoundland Power submits there is no evidence on the record of this Application that*
9 *customers will be worse off as a result of the proposed sale of the Joint Use Support Structures.*
10 *Under the no-harm test, the Board would be required to find, on a balance of probabilities, that*
11 *the proposed sale would harm customers, by way of either detrimental impact on service or rate*
12 *impact. However, before this would justify denial of the Application, the Board would also be*
13 *required to conclude that such harm could not be dealt with in a future regulatory proceeding.*
14 *Matters such as future operating costs are typically capable of being dealt with in future general*
15 *rate applications."*

16
17 Newfoundland Power further argues in its Reply Submission (pg. 4) that:

18
19 *"On a net present value basis, the benefits are positive on both a five-year and ten-year basis.*
20 *These positive benefits are in addition to the ongoing benefits established under the JUFPA. Put*
21 *another way, the evidence is clear that the proposal before the Board is superior to a renewal of*
22 *the JUFPA in accordance with its terms."*

23
24 Newfoundland Power also states that the revenue requirement deficiency in the years 2013-2015
25 is 0.02%, which is less than the amount that the Alberta Board found to be de minimis in Re
26 Fortis Alberta Inc., Disposition of High River Service Centre [Decision 2010-615], December
27 23, 2010.

28
29 In relation to service Newfoundland Power states that Newfoundland Power's operational
30 practices for support structure inspections and maintenance and for emergency response times
31 have been incorporated in the terms of the joint use agreement which is unique in Canadian
32 multi-owner joint use arrangements. (Newfoundland Power, Company Evidence, pg. 10)
33 According to Newfoundland Power the evidence does not support the implication that joint
34 ownership might reverse the overall trend of increased system reliability. It is Newfoundland
35 Power's position that the joint use agreement preserves the uniform application of Newfoundland
36 Power's construction and maintenance practices and the only difference for pole replacements is
37 which pole contractor will be doing the work. Newfoundland Power further notes that pole
38 replacements account for less than 1% of service interruptions to Newfoundland Power
39 customers. (Newfoundland Power, Reply Submission, pg. 6)

40
41 Newfoundland Power states that it is selling the support structures because it agreed to do so and
42 because it provides additional economic benefits to Newfoundland Power and its customers. The
43 2011 sale is part and parcel of its 2001 purchase of the support structures. Newfoundland Power
44 also argues that the sale does not result in any loss or gain in any regulatory sense.
45 Newfoundland Power says that where there are agreements for joint use there has been no direct
46 regulation of the joint use by either the Board or the CRTC. (Newfoundland Power, Reply
47 Submission, pgs. 7 & 10)

1 In Oral Submissions Newfoundland Power argued:
2

3 *"So, in order to deny the transaction or make some remedial order, the Board must first find that*
4 *the transaction will result in harm, either through a detrimental impact on service or on rates.*
5 *And such a factual finding has to be based on the evidence before the Board. It can't be fanciful.*
6 *The Board has to be satisfied on the balance of probabilities that customers would be*
7 *detrimentally impacted, either in service or in rates, and there's no evidence of any harm to*
8 *Newfoundland Power's customers in this record. There is simply no evidence of harm. Indeed,*
9 *the evidence is clear and uncontradicted that service standards will be maintained. There's a*
10 *comprehensive mechanism in place to ensure service is maintained and the transaction has a*
11 *further positive net present value. The net present value is in addition to benefits that have*
12 *already been captured."*

13 (Transcript, June 1, 2011, pg. 38/13-pg. 39/7)
14

15 Newfoundland Power states that joint use arrangements are not intended to benefit one party at
16 the expense of the other. (Transcript, June 1, 2011, pg. 28/24-pg. 29/3) Newfoundland Power
17 notes the ten million dollars that customers received over the ten years of ownership during
18 which time there were also efficiency gains which it says are going to be continued in the new
19 joint use arrangement. (Transcript, June 1, 2011, pg 39/11-19) Newfoundland Power stated:
20

21 *"So, Bell Aliant has the right to repurchase its proportionate share of the structures and to revert*
22 *to the type of joint use arrangements that were in place prior to 2001. That's the given. The*
23 *Board can only deny the transaction or impose remedial orders upon proof of harm to customers*
24 *and the speculative possibilities that have been put forward simply do not meet the required*
25 *threshold of evidentiary proof."*
26

27 The Board acknowledges that, until 2001, joint ownership of support structures was the
28 longstanding practice in this province and, as set out in PUB-NP-20, joint ownership of support
29 structures continues to be the typical approach in eastern Canada. It is clear however from the
30 evidence that the move to sole ownership in 2001 with Newfoundland Power's purchase of the
31 joint use support structures was positive for Newfoundland Power and its customers. The
32 financial benefits of this purchase were far in excess of what was forecast and there were also
33 operational and maintenance improvements. (Newfoundland Power, Written Submission pg. 10;
34 PUB-NP-75) It is in this context that Bell Aliant has chosen to exercise its contractual right to
35 repurchase certain support structures and Newfoundland Power has applied, pursuant to s. 48 of
36 the *Act* for the approval of the Board to sell them. Newfoundland Power's Application proposes
37 the permanent sale of core used and useful assets which comprise 40% of its joint use support
38 structures. Once these support structures are sold Newfoundland Power does not have an option
39 to repurchase the support structures, aside from a right of first refusal.
40

41 The Board refers to s. 3 of the *EPCA* which requires that all facilities for the transmission and
42 distribution of power in the province should be managed and operated in a manner that would
43 result in the most efficient transmission and distribution of power. Newfoundland Power did not
44 provide evidence that the proposed sale results in the most efficient transmission and distribution
45 of power as it did in the 2001 purchase application. In fact, in the Company Evidence (pg. 12)
46 Newfoundland Power acknowledges the *"...ongoing diseconomies of scale due to shared*
47 *ownership..."*

1 In accordance with s. 48 of the *Act* Newfoundland Power must show that, when the potential
 2 positive and negative impacts are weighed, customers will be no worse off after this sale. The
 3 net present value analysis filed shows that the sale of the support structures is positive when
 4 compared to a renewal of the Joint Use Facilities Partnership Agreement. Exhibit 8 to the
 5 Company Evidence details the annual revenue requirement impacts for the five-year term. In
 6 PUB-NP-81 Newfoundland Power was asked to extend the Pro Forma Revenue Requirement to
 7 ten years from the five years shown in Exhibit 8. The stated Pro Forma Revenue Requirement
 8 analysis is as follows:

9

	Joint Use Regime Effective 2011 Pro forma Revenue Requirement Analysis 2011-2020 (\$)									
	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Surplus (Deficiency)	918,976	156,699	(173,662)	(156,888)	(130,679)	(106,649)	(71,669)	(31,698)	15,148	67,779

10

11 While this shows an overall positive impact on revenue requirement it is notable that after 2012
 12 the revenue impact remains negative until 2019. It is also notable that the positive financial
 13 impact on revenue requirement is primarily the result of the transitional period.

14

15 In his Written Submission (pg. 7) the Consumer Advocate questions whether customers will
 16 benefit from the surpluses in 2011 and 2012 as the next test year for rate making purposes is
 17 scheduled to be 2013. The Board agrees with the Consumer Advocate that it is unlikely that the
 18 surpluses in 2011 and 2012 will be reflected in a revenue requirement calculation for purposes of
 19 rate setting. Rather it is likely that the demonstrated negative impact on revenue requirement
 20 beginning in 2013 will be reflected in the revenue requirement in the next general rate
 21 application and perhaps even the next two general rate applications. While it is not necessary for
 22 Newfoundland Power to show that customers will be better off after the sale, measurable
 23 surpluses over the entire period would provide a clear certain benefit which would offset any
 24 potential detriments.

25

26 The Board is concerned that the overall positive impact that Newfoundland Power shows in
 27 relation to the sale of the support structures is so limited that changes to the assumptions could
 28 significantly impact the results. For example, changes to the cost of capital, administrative costs
 29 and attachment rates may impact the forecasted surplus. The Board acknowledges that it is
 30 necessary to make assumptions as part of any forecasting process and does not question the good
 31 faith and skill of Newfoundland Power in making these assumptions. The Board also
 32 acknowledges Newfoundland Power's comment that support structure joint use agreements are
 33 not intended to benefit one party over the other. (Transcript, June 1, 2011, pg. 28/4-pg. 29/3)
 34 However, it is for Newfoundland Power to show, on a balance of probabilities, that the potential
 35 benefits of the sale of the support structures weighed against the potential negatives will leave
 36 customers no worse off.

1 In 2001 Newfoundland Power showed a definite positive impact as a result of the purchase of the
2 joint use support structures from Bell Aliant. In its 2001 evidence [Consent #2(x) - PUB-
3 1(2001)] Newfoundland Power showed the following revenue requirement impacts:

4	2001	2002	2003	2004	2005
5	\$789,000	\$391,000	\$301,000	\$439,000	\$531,000

6 Newfoundland Power also filed a sensitivity analysis in support of the 2001 application which
7 showed that changes in key assumptions did not eliminate the forecast surpluses. This sensitivity
8 analysis examined the effect of factors such as increasing the inflation rate, adjusting
9 components of the Company's capital structure affecting the weighted average cost of capital,
10 increasing the projected growth in total distribution poles, increasing the projected rate of pole
11 replacements, and increasing and decreasing incremental operating costs. [Consent #2(ii) -
12 Exhibit 10 to Direct Evidence of Newfoundland Power, pg. 7 of 8] Commenting on this
13 sensitivity analysis, Mr. Barry Perry, then Vice-President and CFO of Newfoundland Power, said
14 at the time:

15
16 *"To provide an additional measure of confidence in the analysis we also conducted a sensitivity*
17 *analysis for changes in the key underlying assumptions. This is shown on Table 3 at page 8 of*
18 *the Exhibit 10, if I could ask the Board to turn to that please? So we tested our financial*
19 *assumptions to ensure that if something did occur over the ten year period that we had not*
20 *assumed or that was not, I guess, in accordance with our best analysis of what we expect, what*
21 *would be the resultant impact on NPV or on the annual contribution to revenue, and I just want*
22 *to briefly go through the first four items on Table 3."*

23 [Consent # 2(ix) - Transcript, June 7, 2001, pg. 20/78-89]

24
25 Mr. Perry went on to say that the purchase was tested very hard and still stands as a very positive
26 project. [Consent # 2(ix) - Transcript, June 8, 2011, pg. 20/53-57] Newfoundland Power's
27 expert witness in the 2001 hearing, Mr. John Browne, said that one is left *"...with the conclusion*
28 *that it is very unlikely that this proposed arrangement will have a negative impact on revenue*
29 *requirement."* [Consent #2(ix) - Transcript, June 8, 2001, pg. 30/27-29]

30
31 The Board further notes that in 2001 Newfoundland Power provided evidence of the
32 *"protections"* that had been put in place in the event that circumstances were different than
33 predicted:

34
35 *"The Facilities Agreement provides protection for Newfoundland Power and its customers*
36 *through a number of mechanisms. First, if Aliant reduces the number of poles to which it is*
37 *attached by 10,000, Newfoundland Power has the right to require Aliant to repurchase all*
38 *Support Structures transferred pursuant to the proposed acquisition at net book value. Second, if*
39 *at the end of the initial 10-year term, a renewal of the Facilities Agreement is not reached, Aliant*
40 *is obligated to repurchase its share of the joint use poles and all of its non-joint use poles at net*
41 *book value. Finally, if Aliant no longer requires a particular non-joint use pole, Aliant is*
42 *required to repurchase the pole at net book value.*

43
44 *In 2010, Newfoundland Power will either be receiving a compensatory stream of rental revenue*
45 *from Aliant or will be able to divest itself of the poles that it is now purchasing from Aliant. This*

1 *ensures that Newfoundland Power's customers will not be adversely impacted by currently*
2 *unforeseeable material changes."*

3 [Consent #2(ii) - Newfoundland Power, Direct Evidence, pg. 5]

4
5 The Joint Use Facilities Partnership Agreement also stated that if the attachment revenue from
6 the other telecommunications providers fell significantly in a given year Bell Aliant's
7 compensation to Newfoundland Power would increase. [Consent #2(ii) - Newfoundland Power,
8 Direct Evidence, pg 6] Mr Perry explained in testimony:

9
10 *"Overall, from a financial perspective, this arrangement will benefit our customers, but if*
11 *unforeseen events should occur during the term of the agreement that materially reduce the*
12 *economic benefits there are protections built into the terms of the Facilities Partnership*
13 *Agreement that will enable Newfoundland Power to return to the former arrangement whereby*
14 *pole ownership is shared with Aliant."*

15 [Consent #2(ix) - Transcript, June 7, 2001, pg. 18/69-77]

16
17 The Board notes that Newfoundland Power does not suggest in this Application that there are
18 benefits in relation to the provision of service and instead says that the proposed sale will not
19 impact any customers from a service perspective. Newfoundland Power states that its existing
20 operational practices for inspections, maintenance and emergency response times have been
21 incorporated in the terms of the joint use agreement with default provisions (Newfoundland
22 Power, Written Submission, pg. 11). The Board is concerned that these provisions can be
23 changed at any time by the parties without any notice to the Board and therefore there is no
24 assurance that these provisions will remain a part of the joint use regime in the long term. (PUB-
25 NP-15)

26
27 The Board also has concerns in relation to other aspects of the proposed joint use regime which
28 make it very difficult at this time to determine that customers will be no worse off after the sale.
29 The five-year term of the proposed joint use agreement is short in the context of a permanent sale
30 of these used and useful assets, especially given the fact Newfoundland Power advises that it is
31 usual for joint use agreements to be revised following the expiration of the initial term. (PUB-
32 NP-81) The Board notes that when the support structures were purchased in 2001 the joint use
33 agreement had a ten-year term.

34
35 In 2001 the evidence clearly showed that sole ownership of joint use support structures was
36 significantly better than joint ownership from an operations perspective. Newfoundland Power
37 stated:

38
39 *"Many of the operating benefits arising from this acquisition are difficult to quantify. However,*
40 *it is obvious that there will be greater efficiency from the elimination of duplicated administrative*
41 *services and from single ownership, construction and maintenance of pole lines. This will result*
42 *in the mutual benefit to customers of both utilities."*

43 [Consent #2(ii) - Newfoundland Power, Direct Evidence, pg. 7]

44
45 Mr. Earl Ludlow, then Vice-President, Operations and Engineering, for Newfoundland Power,
46 testified at the 2001 hearing as to the benefits of the purchase, which included the removal of
47 detailed tracking and breakdown of invoicing and costing, and more simplified calculation of
48 annual rentals, avoiding the collection and maintenance of "*tons of details with little value*", less

1 time resolving billing disputes and less delays as a result of determining which company will do
2 repairs and the associated approvals. [Consent #2(ix) - Transcript, June 7, 2001, pgs. 14-15]

3
4 The Board finds the evidence filed in this Application for approval to sell the support structures
5 to be inadequate, especially when compared to the evidence provided in the 2001 application
6 supporting the purchase of the support structures. In 2001 Newfoundland Power demonstrated
7 clear positive impacts on revenue requirement. These positive impacts were much larger than
8 those now forecast in relation to the proposed 2011 sale. In 2001 there were positive revenue
9 requirement impacts for each year of the agreement whereas the positive impacts of the 2011
10 sale are limited to the transition years. In 2001 Newfoundland Power provided a sensitivity
11 analysis which showed that the sale resulted in positive impacts even with changes to its
12 assumptions. In 2011 Newfoundland Power did not provide a sensitivity analysis. In 2001
13 certain protections were built into the agreement to address unforeseen circumstances.
14 Newfoundland Power does not demonstrate any similar protections in relation to the 2011 sale.
15 While the Board would not expect the 2011 application to mirror the 2001 application the Board
16 finds that the evidence provided in this Application falls short of the minimum that, in the
17 circumstances, would be expected to show that the sale will leave customers no worse off. This
18 is not a case where there are potential detriments which can be addressed in future regulatory
19 proceedings. Newfoundland Power has not proven that there will be benefits to customers and
20 has failed to show that there will be no detriment to customers.

21
22 As discussed by the Consumer Advocate in Oral Submissions (Transcript, June 1, 2011, pgs. 21-
23 24) this is a permanent sale of core used and useful assets to a company which is not regulated in
24 this province. It is acknowledged that after the sale Newfoundland Power would continue to be
25 responsible for the operation and maintenance of electrical transmission facilities within its
26 service territory. The Board is concerned however that, should an issue arise in relation to the
27 operation of the joint use support structures owned by Bell Aliant, the Board may have limited
28 jurisdiction. While there are default provisions these are subject to change by the parties and, in
29 any event, may not address concerns of customers. In this context the Board would have
30 expected more compelling and substantive evidence from Newfoundland Power showing clear
31 benefits and protections for customers.

32 33 Conclusion

34
35 The Board was convinced in 2001 through the presentation of comprehensive and detailed
36 evidence that sole ownership of all the joint use support structures was better for Newfoundland
37 Power and its customers. This evidence is on the record in this Application. Newfoundland
38 Power must demonstrate on a balance of probabilities that customers will be no worse off with a
39 return to pre-2001 joint ownership regime. Specifically, Newfoundland Power has the burden of
40 proof to show on a balance of probabilities that when the potential positive and negative impacts
41 of the transaction are weighed the balance favours customers or at least leaves them no worse
42 off, having regard to all of the circumstances. The Board finds that this burden has not been met,
43 whether one looks to the net present value analysis provided or the impact on rates or the other
44 specific aspects of the proposed joint ownership regime.

1 **IT IS THEREFORE ORDERED THAT:**

2
3
4
5

1. The Application is denied.
2. Newfoundland Power shall pay the expenses of the Board arising from this Application.

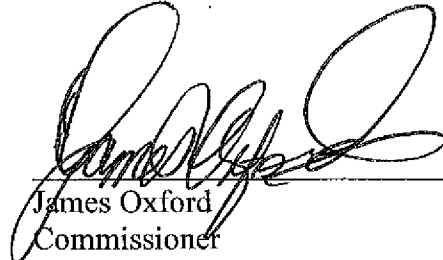
Dated at St. John's, Newfoundland and Labrador this 22nd day of July, 2011.



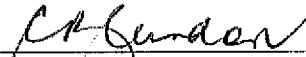
Darlene Whalen, P.Eng.
Vice-Chair



Dwanda Newman, LL.B.
Commissioner



James Oxford
Commissioner



Cheryl Blandon
Board Secretary