

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

**AN ORDER OF THE BOARD**

**NO. P.U. 29(2021)**

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** an application by  
8 Newfoundland Power Inc. for an Order  
9 pursuant to sections 41 and 78 of the *Act*:

- 10 (a) approving a 2021 Capital Budget of  
11 \$111,298,000;  
12 (b) approving certain capital expenditures  
13 related to multi-year projects commencing  
14 in 2021; and  
15 (c) fixing and determining a 2019 rate base of  
16 \$1,153,556,000; and  
17

18 **IN THE MATTER OF** Order No. P.U. 37(2020)  
19 in relation to Newfoundland Power Inc.’s 2021  
20 Capital Budget Application; and  
21

22 **IN THE MATTER OF** Order No. P.U. 12 (2021)  
23 issued on April 7, 2021 in relation to Newfoundland  
24 Power Inc.’s proposed capital expenditures to replace  
25 its customer service system, in the amount of \$9,903,000  
26 in 2021, \$15,826,000 in 2022, and \$5,917,000 in 2023;  
27 and  
28

29 **IN THE MATTER OF** an application by the Consumer  
30 Advocate, Dennis Browne, Q.C., for an order pursuant to  
31 subsections 100(3) and 118(2) of the *Act* staying Order No.  
32 P.U. 12(2021).  
33  
34

35 **Stay Application**

36  
37 On June 23, 2021 the Consumer Advocate, Dennis Browne, Q.C. (the “Consumer Advocate”),  
38 filed an application with the Board, pursuant to subsections 100(3) and 118(2) of the *Act*, for a stay  
39 of Order No. P.U. 12(2021), issued on April 7, 2021, pending a final determination of the Court  
40 of Appeal of Newfoundland and Labrador in the Consumer Advocate’s appeal of the order (the  
41 “Application”).

1 The Application stated that, unless there is a stay of Order No. P.U. 12(2021), Newfoundland  
2 Power Inc. (“Newfoundland Power”) would needlessly and without lawful authority spend, and in  
3 effect waste, capital expenditures of \$9,903,000 in 2021. The Application further stated that there  
4 is no reason to believe that a stay would cause irreparable harm to customers or Newfoundland  
5 Power, or result in power being delivered other than at the lowest possible cost consistent with  
6 reliable service.

7  
8 Submissions in relation to the Application were filed by the Consumer Advocate on July 23, 2021  
9 and by Newfoundland Power and Newfoundland and Labrador Hydro (“Hydro”) on August 6,  
10 2021. On August 18, 2021 the Consumer Advocate filed a reply submission.

## 11 **Background**

12  
13 Newfoundland Power filed its 2021 Capital Budget Application for the approval of the Board on  
14 July 9, 2020. This application requested approval of, among other things, capital expenditures in  
15 the amount of \$31.6 million, to be expended over three years, to replace Newfoundland Power’s  
16 existing customer service system which was implemented in 1993. Notice of the application was  
17 published and the Consumer Advocate and Hydro participated as parties in this proceeding.

18  
19 On October 9, 2020 the Board advised the parties that the proposed capital expenditures related to  
20 the customer service system replacement project would be considered separately from the  
21 remainder of the 2021 Capital Budget Application. The Board also decided that a technical  
22 conference would be held in relation to the project. On November 10, 2020 Newfoundland Power  
23 conducted a technical conference, following which 38 requests for information (“RFIs”) were filed  
24 in addition to the 44 RFIs previously answered in relation to the project. On December 1, 2020  
25 Newfoundland Power answered the additional RFIs.

26  
27 On December 16, 2020 the Consumer Advocate requested that a public hearing be held in relation  
28 to the customer service system replacement project. On January 6, 2021 the Board advised that an  
29 oral public hearing would not be held as there was a full opportunity to gather information and  
30 challenge Newfoundland Power’s proposals through the public written hearing process. The Board  
31 allowed the parties to file additional RFIs to request further information. On January 11, 2021 the  
32 Consumer Advocate requested that the Board reconsider its decision to allow further RFIs but did  
33 not request reconsideration of the decision to proceed without an oral hearing. On January 14,  
34 2021 the Board affirmed its decision to allow further RFIs. Forty-three additional RFIs were filed  
35 in relation to the project which were answered by Newfoundland Power on January 26, 2021. In  
36 total 125 RFIs were filed and answered by Newfoundland Power with respect to the project.

37  
38 Submissions were filed by the parties in February 2021 and, on April 7, 2021, the Board issued  
39 Order No. P.U. 12(2021) approving capital expenditures in the amount of \$9.9 million in 2021,  
40 \$15.8 million in 2022 and \$5.9 million in 2023 for Newfoundland Power to replace its existing  
41 customer service system.

42  
43 On April 22, 2021 the Consumer Advocate filed an application in the Court of Appeal of  
44 Newfoundland and Labrador for leave to appeal Order No. P.U. 12(2021).<sup>1</sup> On May 18, 2021 the  
45 Court of Appeal established the filing dates for the application for leave, setting September 21,  
46 2021 for the hearing.

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47  
<sup>1</sup> Newfoundland and Labrador Court of Appeal, cause 2021 01H 0026.

1 **Submissions**

2  
3 The Consumer Advocate’s submission set out the following three-part test to be utilized when  
4 determining whether a stay should be granted pending the outcome of an appeal:

- 5  
6 i. Is there a serious issue to be argued on the intended appeal?  
7 ii. Will the applicant for the stay suffer irreparable harm if the stay is not granted?  
8 iii. What is the balance of convenience?  
9

10 The Consumer Advocate submitted that the written submissions in the intended appeal set out a  
11 “strong prima facie case”. According to the Consumer Advocate the grounds of appeal are neither  
12 frivolous nor vexatious as a breach by the Board of its duty of procedural fairness and the principles  
13 of natural justice is clearly a matter which cannot be termed frivolous or vexatious.  
14

15 The Consumer Advocate stated that he represents the interests of Newfoundland Power’s 271,000  
16 customers and that these customers would suffer irreparable harm as a result of the customer  
17 service system capital expenditures being expended before Order No. P.U. 12(2021) can  
18 potentially be set aside by the Court of Appeal. The Consumer Advocate submitted that  
19 Newfoundland Power can be expected to seek an order of the Board that customers bear the capital  
20 expenditures incurred up to the time when the order is stayed or set aside.  
21

22 The Consumer Advocate submitted that, if the stay is not issued, customers stand to incur a  
23 considerable inconvenience, namely in 2021 improperly authorized customer service system  
24 expenditures of \$9,903,000. Further the Consumer Advocate submitted that there is no reason to  
25 believe that a stay would cause irreparable harm to Newfoundland Power. The inconvenience to  
26 Newfoundland Power would be limited to suspending the customer service system project until  
27 the outcome of the appeal is known. The Consumer Advocate noted the comments of  
28 Newfoundland Power in its 2022-2023 general rate application to the effect that the customer  
29 service system supports all essential customer service functions and in 2020 customers’ overall  
30 satisfaction with Newfoundland Power’s service delivery was approximately 88%.  
31

32 Newfoundland Power submitted that the Board does not have the authority to grant the stay and  
33 that, in the alternative, if the Board does have the authority it should not grant a stay in the  
34 circumstances. Newfoundland Power submitted that the legislation does not provide the Board  
35 with the authority to grant a stay until leave to appeal has been granted by the Court of Appeal. In  
36 Newfoundland Power’s view there is a distinction between an application for leave to appeal and  
37 the appeal itself. Newfoundland Power argues that this difference is reinforced by the different  
38 procedural steps set out in sections 99 and 100 of the *Act*. Newfoundland Power stated:  
39

40 In the circumstances, when subsection 100(3) is read in the grammatical and ordinary  
41 sense, the most reasonable interpretation is that the legislature intended to limit the Board’s  
42 ability to stay its orders to situations in which leave has been granted. The extraordinary  
43 nature of this remedy warrants this more restrictive interpretation of subsection 100(3) of  
44 the *Act*.<sup>2</sup>  
45

46 In addition Newfoundland Power submitted that the Board does not have the authority to issue a  
47 stay by virtue of the doctrine of *functus officio*. According to Newfoundland Power, if the Board  
48 were to grant a stay, it would be effectively reconsidering the terms of its approval as the Board

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<sup>2</sup> Newfoundland Power’s Submission, page 5.

1 determined in Order No. P.U. 12(2021) that the customer service system replacement project  
2 should not be deferred. In Newfoundland Power's view, having ruled on the temporal criticality  
3 of the project, any stay of proceedings would violate the doctrine of *functus officio*.

4  
5 In the alternative Newfoundland Power submitted that, if the Board does have the jurisdiction to  
6 grant a stay, it should not be granted in the circumstances. Newfoundland Power cited the same  
7 three-part test for determining whether a stay should be granted and noted that the burden is on the  
8 Consumer Advocate to establish that a stay is appropriate. Newfoundland Power submitted that  
9 the Consumer Advocate has not established that there is a serious issue to be argued on appeal and  
10 that there is no merit to any of the grounds for appeal set out by the Consumer Advocate.

11  
12 Newfoundland Power submitted that the harm described by Consumer Advocate is not irreparable  
13 and, in the circumstances, it cannot be said that the harm could not be remedied if the appeal is  
14 successful. Newfoundland Power further submitted that the harm is speculative and, even if the  
15 appeal is set aside, further proceedings would be required to assess the customer service system  
16 replacement project. Newfoundland Power noted that the application for a stay was filed 77 days  
17 after the Board's order approving the capital expenditures and this delay undermines the Consumer  
18 Advocate's submission that irreparable harm would be suffered if a stay is not granted.

19  
20 According to Newfoundland Power the customer service system is essential to the delivery of  
21 electrical service to customers. The existing system was implemented in 1993 with an expected  
22 service life of twenty years and all core hardware and software components are now obsolete and  
23 its internal capacity to support the system is greatly diminished. Newfoundland Power stated:

24  
25 The criticality of the CSS in delivering service to customers requires that the system be  
26 replaced before obsolescence exposes it to a high degree of operational risk. While  
27 contingency plans are in place to manage short-term interruptions, these measures would  
28 not mitigate the effects of a prolonged system failure.<sup>3</sup>

29  
30 Newfoundland Power submitted that a decision on the appeal may not be rendered until late 2022  
31 or early 2023 and the existing system would be subject to high operational risks and additional  
32 costs in this timeframe. In Newfoundland Power's view the risks to its customers with a delay in  
33 the project are substantial, including a required complex upgrade and substantial costs to provide  
34 a minimum level of service in the event of a failure. In addition Newfoundland Power set out that  
35 a delay would increase execution risks. Newfoundland Power stated:

36  
37 When one considers the inevitability that the CSS needs to be replaced, the risks associated  
38 with granting the stay (i.e. the otherwise avoidable maintenance and capital costs as well  
39 as the potential service reliability risks) outweigh the risks associated with the status quo  
40 (i.e. costs being incurred in implementing the CSS Replacement Project while awaiting an  
41 appellate decision).<sup>4</sup>

42  
43 In Newfoundland Power's view the Consumer Advocate has not established that the balance of  
44 convenience favours a stay and the balance of convenience weighs against a stay in the  
45 circumstances.

46  
47 Hydro submitted that the Board has the discretion as to whether to order a stay of proceedings.  
48 Hydro had no specific comments with respect to the merits of the Application and agreed with the

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<sup>3</sup> Newfoundland Power's Submission, page 5.

<sup>4</sup> Newfoundland Power's Submission, page 13.

1 test set out by the Consumer Advocate to be used by the Board to determine whether to grant a  
2 stay of proceedings.

3  
4 The Consumer Advocate’s reply submission addressed the issues raised by Newfoundland Power  
5 with respect to the authority of the Board to order a stay. The Consumer Advocate stated:

6  
7 As section 100(3) bestows the power to grant a stay pending an appeal, section 118(2)  
8 accords the Board additional, incidental power to grant a stay pending the outcome of an  
9 application for leave to appeal. Such a conclusion accords with the statement in *Rizzo &*  
10 *Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) that a statute’s words must be read “in their  
11 entire context and in their grammatical and ordinary sense harmoniously with the scheme  
12 of the Act, to object of the Act, and the intention of Parliament.”<sup>5</sup>

### 13 14 **Board Findings**

15  
16 There are two issues to be addressed in relation to the Consumer Advocate’s request for a stay of  
17 Order No. P.U. 12 (2021):

- 18  
19 i. Does the Board have jurisdiction to order the stay?  
20 ii. Should the Board order a stay?

#### 21 22 *Jurisdiction of the Board*

23  
24 The jurisdiction of the Board to order a stay was questioned by Newfoundland Power on the basis  
25 of sections 99 and 100 of the *Act* and the doctrine of *functus officio*. Based on Newfoundland  
26 Power’s interpretation of sections 99 and 100 the Board does not have the authority to order a stay  
27 until leave to appeal has been granted by the Court of Appeal. The Board does not agree with this  
28 interpretation. Subsection 100(3) clearly indicates the legislature’s intention that the Board has the  
29 authority to order a stay. The legislation does not state that the Board has no jurisdiction to grant  
30 a stay until leave to appeal has been granted, but rather sets out that an appeal does not operate as  
31 a stay of proceedings except as ordered by the Board. Newfoundland Power’s narrow reading of  
32 sections 99 and 100 of the *Act* may defeat the purpose of a stay and render it futile since the costs  
33 associated with the customer service system replacement project may be incurred by  
34 Newfoundland Power and passed on to customers before the leave to appeal decision is made. The  
35 Board believes that this interpretation is inconsistent with the requirement to read the words of the  
36 *Act* in the entire context, in their grammatical and ordinary sense, harmoniously with the scheme  
37 of the *Act* and intention of Parliament. Section 118 of the *Act* provides that the Board has all  
38 additional implied and incidental powers which may be appropriate or necessary to carry out the  
39 powers specified in the *Act*. Reading the *Act* as a whole, harmoniously with the scheme of the *Act*  
40 and intention of Parliament, leads the Board to the conclusion that it has the authority to order a  
41 stay before leave to appeal is granted.

42  
43 Newfoundland Power also argued that the Board has no authority to order a stay on the basis that  
44 it would violate the doctrine of *functus officio*. According to Newfoundland Power in granting a  
45 stay the Board would be effectively reconsidering the terms of its approval since the Board found  
46 in Order No. P.U. 12(2021) that the customer service system should not be deferred. The Board  
47 does not agree with Newfoundland Power. The Court of Appeal will determine whether the order  
48 of the Board should be set aside and, until this determination is made, the legislation provides that

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<sup>5</sup> Consumer Advocate’s Reply Submission, page 2.

1 the Board has the authority to order a stay. The legislation does not suggest that this power is any  
 2 way limited by the subject matter of the decision. In ordering a stay the Board does not believe  
 3 that it would be altering its decision or sitting in appeal of its own order as to the “temporal  
 4 criticality” of the approved project. Rather the Board would be exercising the authority to order a  
 5 stay, as expressly provided for in the *Act*, and it would make this determination based on the  
 6 common law test to be applied when considering a stay. This test is different than the  
 7 considerations to be made on appeal. The Board concludes that the doctrine of *functus officio* does  
 8 not limit its authority to consider whether a stay of its decision should be granted in the  
 9 circumstances.

10 *Should a Stay be Granted*

11  
 12  
 13 The accepted test to be applied by the Board in determining whether a stay should be granted  
 14 involves a determination as to whether:

- 15  
 16 i. there is a serious issue to be tried on appeal;  
 17 ii. the applicant will suffer irreparable harm if a stay is not granted; and  
 18 iii. the balance of convenience favours the granting of a stay.  
 19

20 In the first instance the Board is required to assess the strength of the Consumer Advocate’s case  
 21 on appeal. The Board must determine whether there is a serious issue to be tried which requires an  
 22 assessment as to whether the appeal is frivolous or vexatious. The standard to be applied in this  
 23 branch of the test is a low one which is to be based on a preliminary and not detailed or extensive  
 24 investigation of the merits of the appeal.  
 25

26 According to the Consumer Advocate the appeal is not frivolous or vexatious as the Board  
 27 breached its duty of procedural fairness and the principles of natural justice. The Board agrees that  
 28 a breach of procedural fairness or the principles of natural justice is a serious issue; however, the  
 29 mere allegation of such a breach is insufficient to satisfy the test, even given the low threshold to  
 30 be applied. There must be grounds for these allegations, at least on a preliminary basis.  
 31

32 The Consumer Advocate’s grounds for appeal of Order No. P.U. 12(2021) relate to the processes  
 33 established and followed by the Board in Newfoundland Power’s 2021 Capital Budget Application  
 34 proceeding. These grounds include the Board’s use of its capital budget application guidelines, the  
 35 “incoherent” procedures which were followed, the failure to allow cross-examination and the  
 36 failure to hold an oral hearing without providing principles or a threshold test.  
 37

38 The Board does not believe that there is serious issue to be tried in relation to the use of its capital  
 39 budget application guidelines or in the decision to vary from the established process to provide an  
 40 additional opportunity to request information from the utility. The legislation provides the Board  
 41 with broad authority with respect to the processes to be followed in its proceedings. The Board is  
 42 responsible for the general supervision of the utilities and has all the additional, implied and  
 43 incidental powers which may be appropriate or necessary to carry out all the powers specified in  
 44 the legislation.<sup>6</sup> In addition the Board may make, revoke and alter rules and regulations for the  
 45 effective execution of its duties.<sup>7</sup> While the regulations set out certain procedures to be followed,  
 46 the Board has the authority to dispense with, vary or supplement the provisions of the regulations

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<sup>6</sup> Sections 16 and 118 of the *Act*.

<sup>7</sup> Section 20 of the *Act*.

1 on those terms as the Board considers necessary.<sup>8</sup> The legislation clearly provides the Board with  
2 the authority to adopt capital budget application guidelines and establish processes based on these  
3 guidelines and to vary from these processes as it determines appropriate. The Consumer  
4 Advocate's submission that the Board breached its duty of procedural fairness or the principles of  
5 natural justice in establishing procedures based on its capital budget application guidelines and in  
6 varying from these procedures is frivolous and without merit.

7  
8 Neither does the Board believe that there is a serious issue to be tried with respect to the fact that  
9 the matter was considered in a written hearing process without oral cross examination. The  
10 legislation does not require an oral hearing and in recent years capital budget applications have  
11 been considered in public written proceedings. Written hearings provide a fair and reasonable  
12 opportunity for interested persons to participate and allow for effective and efficient oversight of  
13 utility capital expenditures with shorter timeframes and less costs than would be associated with  
14 an oral hearing. The Consumer Advocate had a full opportunity through the written process to  
15 understand the nature and scope of Newfoundland Power's proposals and to test the evidence and  
16 provide submissions for the Board's consideration. Given the Board's broad authority with respect  
17 to its own processes and the interests of both customers and Newfoundland Power in effective and  
18 efficient processes, the Board believes that the Consumer Advocate's grounds for appeal are  
19 frivolous and without substance, even applying a low threshold and considering the issue on a  
20 preliminary basis.

21  
22 In relation to the second part of the test the Consumer Advocate submitted that the customers he  
23 represents will suffer irreparable harm if the stay is not granted as it is likely that Newfoundland  
24 Power will seek to recover the capital expenditures incurred for the customer service system  
25 replacement project up to the date that the appeal is granted. The Board agrees that, in the absence  
26 of a stay, the customer service system replacement project will proceed in 2021 and expenditures  
27 may be incurred by Newfoundland Power before the appeal is concluded. In the ordinary course  
28 the expenditures associated with this project would ultimately be reflected in rates unless they are  
29 denied by the Board on the basis that the costs are imprudent.<sup>9</sup> Though the expenditures associated  
30 with the customer service system replacement project are significant, the impact of these costs on  
31 the rates paid by a customer is not expected to be significant since the costs would be recovered  
32 from customers over the service life of the assets through depreciation charges, utility return and  
33 other associated costs. Nevertheless the Board accepts that this may be considered irreparable harm  
34 for purposes of the determination as to whether a stay should be granted.

35  
36 While the Board accepts that there is the potential for irreparable harm to customers if a stay is not  
37 granted, the Board believes that there may be irreparable harm to customers as well as  
38 Newfoundland Power if a stay is granted. The existing customer service system is critical to the  
39 provision of service. It was implemented in 1993 and will be 30 years old when it is replaced even  
40 if there is no deferral. It is clear that the existing system will have to be replaced in the near future  
41 and delaying the project increases the risk of failure of the system and may lead to higher  
42 replacement costs. A failure of the existing system could result in costs being incurred to provide  
43 a lower level of service to customers. These risks are significant and may be considered irreparable  
44 harm to customers given the potential impacts on service and costs. The Board notes that, to the  
45 extent that Newfoundland Power cannot recover all of the increased costs from customers, it would

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<sup>8</sup> Subsection 3(2) of the regulations.

<sup>9</sup> Newfoundland Power's 2022 and 2023 general rate application currently before the Board reflects the costs of this project and a decision can be expected in relation to this application before the conclusion of the Consumer Advocate's appeal, if leave is granted.

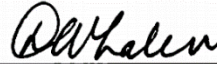
1 also suffer irreparable harm. The Board believes that the harm associated with granting a stay is  
2 greater than the harm of denying the stay and that the balance of convenience favours the denial  
3 of the application for a stay of Order No. P.U. 12(2021).  
4

5 The Board finds that the Consumer Advocate has not shown that there is a serious issue to be tried  
6 on appeal and that the balance of convenience does not favour a stay in the circumstances.  
7

8  
9 **IT IS THEREFORE ORDERED THAT:**

- 10  
11 1. The Consumer Advocate's request for a stay pending a final determination of the Court of  
12 Appeal of Newfoundland in the Consumer Advocate's appeal of Order No. P.U. 12(2021) is  
13 dismissed.

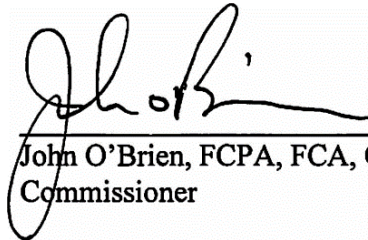
**DATED** at St. John's, Newfoundland and Labrador, this 15<sup>th</sup> day of September, 2021.



Darlene Whalen, P. Eng., FEC  
Chair and Chief Executive Officer



Dwanda Newman, LL.B.  
Vice-Chair



John O'Brien, FCPA, FCA, CISA  
Commissioner



Cheryl Blundon  
Board Secretary