

July 11, 2014

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**Via Electronic Mail and Courier**

Newfoundland and Labrador Board  
of Commissioners of Public Utilities  
120 Torbay Road  
P.O. Box 21040  
St. John's, NL A1A 5B2

**Attention: Ms. G. Cheryl Blundon, Director of Corporate Services  
and Board Secretary**

Dear Ms. Blundon:

**Re: Second Application by Newfoundland and Labrador Hydro pursuant to Sections  
70 and 75 of the *Public Utilities Act* for the interim approval of customer electricity  
rates for 2014 pursuant to Order No. P.U. 13 (2014)**

These are the submissions of the Island Industrial Customer (IIC) Group (Corner Brook Pulp and Paper Limited, North Atlantic Refining Limited and Teck Resources Limited) in the above Application.

In the view of IIC Group, the issues to be addressed by the Board in this Application are as follows:

1. Should the Board order new interim rates for the industrial customers, and if so, what should those new interim rates be?
2. Should the Board order a transfer from the Hydraulic RSP surplus, in Hydro's requested amount of \$29.4 million or in any amount, for the purpose, as characterized by Hydro, that *"the approval of an interim order by the Board presently which provides additional revenue for 2014 while awaiting the conclusion of the GRA would, in Hydro's opinion, send a positive message to Hydro's investors concerning: (i) Hydro's opportunity to earn a reasonable return in 2014; and (ii) the regulatory environment in which Hydro operates"* (per SIR-PUB-NLH-016)?

The IIC Group hereby make submissions on both of these issues.

**New Interim Rates**

The IIC Group submit that if new interim rates are ordered for the industrial customers, this should be implemented, to the extent reasonably possible, in manner that promotes rate stability and avoids rate shock and intergenerational inequity. The IIC Group submits that these regulatory objectives would be best achieved by ordering new interim rates in accordance with the allocation, on an interim basis, of the segregated load variation balance, and revision of rate riders, identified in the response to SIR-IC-NLH-015.

The Board's statutory jurisdiction to make an interim rate order is founded in section 75 of the *Public Utilities Act*:

***Interim order***

**75.** (1) *The board may make an interim order unilaterally and without public hearing or notice, approving with or without modification, a schedule of rates, tolls and charges submitted by a public utility, upon the terms and conditions that it may decide.*

(2) *The schedule of rates, tolls and charges approved under subsection (1) are the only lawful rates, tolls and charges of the public utility until a final order is made by the board under section 70.*

(3) *The board may order that the excess revenue that was earned as a result of an interim order made under subsection (1) and not confirmed by the board be*

*(a) refunded to the customers of the public utility; or*

*(b) placed in a reserve fund for the purpose that may be approved by the board.*

Jurisdictionally, the Board is not limited by what has been proposed by Hydro in its present Application, nor by the absence of full evidence (or of an application by the industrial customers), in respect of what the Board may order as interim rates arising from Hydro's Application. For the Board to hold otherwise would be, respectfully, an error in law. As stated by the Court of Appeal in *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, 2012 NLCA 38:

[61] *The power of the Board to authorize interim rates is granted in s. 75 of the PUB Act. That section allows the board to set rates expeditiously without full evidence and submissions, such rates being subject to review and possible modification in the final order of the Board, as is expressly provided for in subsections 75(2) and (3).*

.....

[126] *The Board noted that Hydro's applications for the interim rates for its Industrial Customers and its 2009 GRA had not sought any changes to the RSP rules, nor had Hydro filed any application for RSP reviews prior to the end of 2009 as had been indicated in the covering letter to its 2009 application. In the absence of an application, the Board declined "to consider suspending the operation of the load variation allocation rules as suggested by Hydro in its correspondence" (p. 9).*

[127] *The phraseology of that portion of the decision suggests that either the Board believed it could not act on that matter without an application or that the absence of an application was a sufficient reason for the Board not to exercise its jurisdiction. It is not clear which. With respect to the first possible interpretation, in our view the PUB Act, including s. 82, confers broad powers upon the Board to investigate rates and take remedial action if appropriate. Exercise of such powers is not dependent upon receipt of an application. Procedure cannot determine jurisdiction. It may affect its exercise but not its existence. With respect to the second interpretation of the Board's statement we consider the statement to be conclusory only, lacking an explanation of why the stated factor would be sufficient.*

As well, it necessarily follows from the Board's decision in P.U. 25 (2010) that the Board has the jurisdiction, when making interim rates, to make interim orders with respect to the operation of the RSP rules, including the allocation of RSP balances. At page 13 of P.U. 25 (2010), the Board stated that:

*The interim orders clearly provide the Board with the full jurisdiction to, in the words of the Supreme Court of Canada, "modify in its entirety the rate structure" for the Industrial Customer group, which includes all aspects of the Industrial Customers' rate, including the RSP rate. The Board does not accept the position of the Industrial Customers that the Board has no power to change the rules and regulations affecting the RSP.*

Since September 1, 2013, the Island Industrial Customers have been subject to an escalating, unstable and unpredictable rate regime. This, unfortunately, promises to remain the case into at least mid-2015. This rate instability is, paradoxically, occurring in a context where the various RSP surpluses are substantially in a credit position vis-à-vis Hydro's customers, and are forecasted to continue in that credit position: reference SIR-IC-NLH-11.

There is evidence that interim rate relief for the industrial customers (and the retail customers) may be achieved, by an interim allocation of just one of these accruing RSP surpluses, the segregated load variation balance, per SIR-IC-NLH-015.

The 2013 Orders-in-Council do not prohibit such interim rate relief by application of RSP surpluses. Indeed it is Government's direction that: "... effective January 1, 2014, the Island industrial customers will be subject to Rate Stabilization Plan rate changes in accordance with the Board of Commissioners of Public Utilities-approved methodology". The Board-approved RSP methodology, on a go-forward basis from September 1, 2013, is not frozen or dictated by the 2013 Orders-in-Council nor by the Board's own orders made since September 1, 2013. The Board has full, and untrammelled, jurisdiction to make an interim order to apply the segregated load variation balance, in a manner that would achieve the interim rate relief, as identified by SIR-IC-NLH-015.

The Board's consideration of such interim rate relief should not be held hostage to the canard that it can only be ordered if all parties agree that the segregated load variation balance be allocated, on an interim basis, as identified by SIR-IC-NLH-015. Rather, the IIC Group submit that the Board should consider whether any party has raised a reasoned and principled objection to the interim allocation identified by SIR-IC-NLH-015. It is submitted that it is implicit in the positions of both Hydro (per SIR-CA-NLH-010) and Newfoundland Power (SIR-IC-NP-001) that they are not raising any substantive objection to such interim allocation. The Consumer Advocate's expert has declined to provide any reasoned or principled objection, other than to state that he will take a position once Hydro files its amended GRA (SIR-IC-CA-1).

There is a reasoned and principled basis for allowing the RSP to operate, on an interim basis, rather than postpone any consideration of the matter to some indefinite time in the future; Hydro's response to SIR-PUB-NLH-019 can do nothing but inject considerable uncertainty as to when Hydro will be filing its amended GRA. This uncertainty squarely raises the concern for intergenerational inequity (succinctly identified by Newfoundland Power's expert in the 2006 Hydro GRA evidence cited in SIR-NLH-NP-009) arising from allowing RSP surpluses to continue to accrue, and from allowing parties to sit on their hands on the question as to how these RSP surpluses should be allocated on even an interim basis.

In making the foregoing submissions, the IIC Group wish to make clear that they are only submitting that the allocations of the post-September 1, 2013 segregated load variation balance identified by SIR-IC-NLH-015 be ordered on an interim basis. The IIC Group are prepared to clearly state that this will not preclude any of the parties, including the Consumer Advocate and the IIC Group, from submitting that a different allocation of the post-September 1, 2013 segregated load variation balance should be ordered, on a final basis, in Hydro's GRA proceeding or some other future proceeding before the Board.

#### **Additional (interim) revenue for Hydro in 2014**

Hydro has applied for a transfer from the Hydraulic RSP surplus, in the amount of \$29.4 million, for the purpose, as characterized by Hydro, that *"the approval of an interim order by the Board presently which provides additional revenue for 2014 while awaiting the conclusion of the GRA would, in Hydro's opinion, send a positive message to Hydro's investors concerning: (i) Hydro's opportunity to earn a reasonable return in 2014; and (ii) the regulatory environment in which Hydro operates"* (per SIR-PUB-NLH-016).

In the view of the IIC Group, Newfoundland Power's responses to SIR-NLH-NP-1 to SIR-NLH-NP-16 lay bare that the revenue relief sought by Hydro is without regulatory precedent.

However, the IIC Group would concede that this lack of regulatory precedent ought not to be ultimately determinative of this issue. In that regard, the IIC Group concur with the conclusion expressed by Newfoundland Power in SIR-NLH-NP-007 that the Board has the authority, in the sense of legal jurisdiction, to provide regulatory relief of the nature that Hydro is seeking.

Having said this, the specific regulatory relief Hydro is seeking – the transfer from the Hydraulic RSP surplus of \$29.4 million to provide for additional revenue for Hydro in 2014 – raises very significant evidentiary and procedural concerns. Those concerns have been well-canvassed by Newfoundland Power in its responses to SIR-NLH-NP-1 to SIR-NLH-NP-16, and the IIC Group will hereby state that it shares those concerns.

The IIC Group would further note that the \$29.4 million requested as the "hydraulic balance transfer" is calculated by Hydro as the difference between targeted \$33.2 million net income and \$3.8 million net income that Hydro is forecasting based on "existing rates". The derivation of \$33.2 million figure is identified in IR-PUB-NLH-21, from the first 2013 interim rates application filed by Hydro. This net income figure is noted as generating a 9.38% ROE, significantly higher than the ROE requested by Hydro, in the now aborted 2013 GRA filing, of 8.8% (based on Newfoundland Power's ROE, in accordance with Government's direction in OC2009-063). On the foregoing analysis, the \$29.4 million forecasted revenue shortfall may be considered to be overstated based on Government's direction, even before consideration is given to the additional concerns arising from the very preliminary and largely untested evidentiary basis for that forecasted revenue shortfall, and from the as-yet unexamined reasons for that the forecasted shortfall.

If \$33.2 million target revenue level were to be adjusted to reflect an 8.8% ROE, this would lower the requested hydraulic balance transfer by \$2.058 million (based on average equity of \$354.002 million per IR-PUB-NLH-21). Moreover, the IIC Group would specifically concur with Newfoundland Power that, per its response to SIR-NLH-NP-011, it is not clear that the policy

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direction contained in OC2009-063 was intended to apply in advance of the establishment by the Board of new customer rates through a completed GRA.

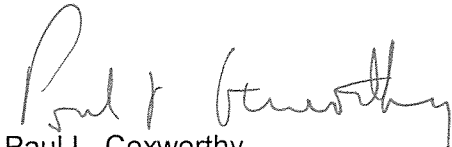
As well, as confirmed by Hydro's response to SIC-IC-NLH-12 regarding Hydro's position that there was Manitoba regulatory precedent for awarding the relief sought by Hydro, it is noteworthy that the relief awarded in that case was only a partial shortfall recovery (70%).

In the submission of IIC Group, if the Board deems fit to exercise its legal jurisdiction to grant some measure of interim 2014 revenue relief to Hydro, the foregoing concerns militate towards the granting of such relief at a level substantially less than the \$29.4 million sought by Hydro. Furthermore, to address the concern identified by Newfoundland Power in its response to SIR-NLH-NP-006, it is submitted that a Board order granting any such revenue relief must clearly address the procedural measures that will assure that what is granted is truly interim revenue relief, in the sense of its being partially or wholly reversible, even in the circumstance of Hydro's filing of its amended GRA being delayed.

All of which is respectfully submitted on behalf of the IIC Group.

Yours truly,

Stewart McKelvey



Paul L. Coxworthy

PLC/kmcd

- c. Geoffrey P. Young, Senior Legal Counsel, Newfoundland and Labrador Hydro
- Thomas J. Johnson, Consumer Advocate
- Gerard Hayes, Newfoundland Power
- Dean A. Porter, Poole Althouse
- Thomas J. O'Reilly Q.C., Vale Newfoundland and Labrador Limited
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- Yvonne Jones, MP Labrador