

P.U. 33 (2002-2003)

IN THE MATTER OF the *Public Utilities Act*
R.S.N. 1990, Chapter 47 (the “*Act*”);

AND IN THE MATTER OF a General Rate
Application by Newfoundland Power Inc.,
filed pursuant to Order No. P.U. 22
(2002-2003);

AND IN THE MATTER OF a Motion by the
Consumer Advocate.

BEFORE:

Robert Noseworthy
Chair and Chief Executive Officer

Darlene Whalen, P.Eng.
Vice-Chairperson

John William Finn, Q.C.
Commissioner

Newfoundland Power, pursuant to Order No. P.U. 22 (2002-2003) filed an application (the “Application”) with the Board of Commissioners of Public Utilities (the “Board”) on October 11, 2002 for an Order or Orders of the Board approving, among other things, the proposed rates for the various customers of Newfoundland Power, to be effective May 1, 2003. As part of the Application Newfoundland Power filed with the Board the pre-filed evidence and testimony of the witnesses it intends to call in support of the Application, including the pre-filed testimony of two cost of capital witnesses, Ms. Kathleen McShane and Dr. Roger Morin.

On November 25, 2002 the Consumer Advocate filed a Notice of Motion with the Board requesting that a) the Board strike Ms. McShane’s evidence from the record; or b) in the alternative, if Ms. McShane’s evidence is allowed, that the cost related to Ms. McShane’s evidence should not be the responsibility of the ratepayers but be the responsibility of Newfoundland Power’s shareholders; and c) that the Board provide direction to the parties as to the number of experts a party should be permitted to call on any particular issue.

The Board convened on December 4, 2002 to hear from the parties regarding the motion. Submissions were made by the Consumer Advocate, Mr. Dennis Browne, by Newfoundland and Labrador Hydro’s counsel Mr. Geoff Young, and by Newfoundland Power’s counsel Ms. Gillian Butler. In this decision the Board will deal with each request of the Consumer Advocate separately.

The Consumer Advocate has requested that the Board strike the evidence of Ms. McShane from the record on the basis that “*The evidence is not relevant, having been adopted by no party, and is superfluous to this proceeding...*”. The Consumer Advocate further argued that the calling of two cost of capital experts in the same proceeding is without precedent in previous applications before the Board, that it adds to the cost of the hearing, and that the ratepayers should not have to bear the costs of two experts on the same issue. It was also stated by the Consumer Advocate that the evidence of Ms. McShane is not being relied upon by Newfoundland Power, since they have not accepted her recommendation with respect to the rate of return on equity and have instead relied on the recommendations of their other cost of capital witness, Dr. Morin.

Counsel for Newfoundland Power responded by stating that Ms. McShane’s evidence is relevant to the issue of what constitutes a just and reasonable rate of return on rate base for the utility. Ms. Butler reviewed Ms. McShane’s pre-filed testimony and the issues to be addressed by the witness, which will include capital market conditions, change in capital market conditions, the capital structure of the utility, returns on equity, and the automatic adjustment mechanism. It was argued by Newfoundland Power that since the process of determining what constitutes a just and reasonable rate of return is not an exact science, it is not unusual for experts to disagree on the type of tests and methodologies to be used. The procedural appropriateness of the request was also questioned, with Newfoundland Power arguing that, as the applicant in this matter, they should have the latitude to call and examine the witnesses it feels necessary to prove its case. Ms. Butler stated that “...*to strike out Kathleen McShane’s evidence on an issue this important*

would be not only an extraordinary exercise of the Board's authority but would definitely be procedurally unfair and deny the Applicant natural justice."

Without hearing the substance of the direct evidence and benefiting from the scrutiny of cross-examination on that evidence, the Board is not in a position to concur with the Consumer Advocate that Ms. McShane's evidence is either irrelevant, redundant or superfluous. The Board finds that, from a preliminary examination of Ms. McShane's prefiled evidence, it does pertain to the range of issues to be considered by the Board.

While the Board does have the authority to establish its own procedures, the Board does not, of its own motion, exercise this authority to vet and weigh the potential value of evidence in advance of hearing the evidence itself. The Board does not, for example, review or vet questions asked of the applicant by parties during a proceeding for their relevancy or potential value to the determination to be made by the Board. It is the Board's view that the questions are asked to enhance the parties' understanding of the matter and that it would be unfair, except in unusual circumstances, for the Board to prejudge the need for the information requested. The Board must be equally, if not more judicious, in its approach regarding the pre-filed evidence of expert witnesses.

The Board may exclude evidence upon hearing a motion from a party where it is satisfied that the information is not required for a full understanding of the matter before it. It is the Board's view, however, that given its duty of fairness, there would have to be compelling reasons for the Board to exercise this discretion. While the Board is very conscious of the costs associated with public hearings, the Board, without equivocation,

must defer to its primary duty of fairness and natural justice, both to the applicant and to the intervenors. As the applicant has the burden of proof to make and defend any application before the Board, the Board agrees that the applicant should have the latitude to determine which witnesses it feels it needs to call to make its case.

Accordingly the Board will not strike the evidence of Ms. McShane as requested by the Consumer Advocate.

The Consumer Advocate has also requested that, if the Board should allow Ms. McShane's evidence, that the cost related to Ms. McShane's evidence should not be the responsibility of the ratepayers but be the responsibility of Newfoundland Power's shareholder. Newfoundland Power contends that this request is premature. The Board has no basis upon which to base a decision on costs in advance of hearing the evidence itself. Section 90 of the Act gives the Board the authority and discretion to decide and award costs related to a proceeding before the Board. The Board does not view this authority as one that can be exercised in advance of a proceeding, which has been reflected in Board Orders on similar motions in past hearings. The Board will hear argument from all parties on the issue of costs at the end of the evidentiary portion of the hearing and the parties may argue the value and contribution to the proceeding of any of Newfoundland Power's expert witnesses, or those of any other party.

The issue of the costs related to Ms. McShane's evidence will be dealt with by the Board as part of its final decision on costs.

The Consumer Advocate has also requested that the Board provide directions to the parties as to the number of experts a party should be permitted to call on any particular issue. Upon questioning from the Board Chair, the Consumer Advocate clarified that he wished this direction to apply for this hearing and for all future proceedings before the Board. Again, the Board wishes to reiterate its desire to balance the right of any party to a fair hearing with the right of other parties, including consumers, to not have to bear any unnecessary costs. While the Board has the discretion to set its own procedures, the Board will not arbitrarily set in place a rule as to the number of experts an applicant or intervenor should be permitted to call on any particular issue. Consistent with the Board's ruling in this case, without the benefit of considering the particular circumstances involved, such a decision may compromise one of the Board's most fundamental underpinnings, that of fairness and natural justice. It is also the Board's view that, in light of the complexity of the many of the issues that come before the Board, such an order may actually limit the ability of the Board to gain a full understanding of the issue at hand. The Board expects all parties to be reasoned and judicious in terms of the value of the evidence to be brought before the Board on any matter, including that of expert witnesses.

The Board will not limit the number of experts a party should be permitted to call on any particular issue.

IT IS THEREFORE ORDERED THAT:

The motion of the Consumer Advocate is denied.

DATED at St. John's, Newfoundland and Labrador this 11th day of December, 2002.

Robert Noseworthy,
Chair and Chief Executive Officer.

Darlene Whalen, P.Eng.,
Vice-Chairperson.

J. William Finn, Q.C.,
Commissioner.

G. Cheryl Blundon,
Director of Corporate Services
and Board Secretary.