

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

**AN ORDER OF THE BOARD**

**NO. P.U. 17(2018)**

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** a general rate  
8 application by Newfoundland and Labrador  
9 Hydro to establish customer electricity rates  
10 for 2018 and 2019; and  
11

12 **IN THE MATTER OF** a motion by the  
13 Consumer Advocate for an order declaring  
14 whether two Orders-in-Council restrict the  
15 Board’s jurisdiction to allow Newfoundland  
16 and Labrador Hydro’s application to recover  
17 any costs relating to components of the  
18 Muskrat Falls Project.  
19  
20

21 **Application**

22  
23 On July 28, 2017 Newfoundland and Labrador Hydro (“Hydro”) filed its 2017 general rate  
24 application with the Board of Commissioners of Public Utilities (the “Board”).  
25

26 On April 5, 2018 Dennis Browne, Q.C., (the “Consumer Advocate”) filed an application  
27 requesting an order of the Board declaring whether OC2013-342 (the “Muskrat Falls Project  
28 Exemption Order”) and OC2013-343 restrict the Board’s jurisdiction to allow Hydro’s application  
29 to recover any costs related to components of the Muskrat Falls project (the “Application”). The  
30 Consumer Advocate submitted that the effect of the Orders-in-Council purged the Board of its  
31 jurisdiction. According to the Consumer Advocate Hydro’s request to recover any costs related to  
32 components of the Muskrat Falls project has no jurisdictional basis before the Board. In the  
33 Consumer Advocate’s view the Orders-in-Council prohibit recovery of costs relating to the  
34 Muskrat Falls project pending certain conditions which have not been met. The Consumer  
35 Advocate also raised a number of other concerns, including that the costs pertaining to the Muskrat  
36 Falls project were imprudently incurred, that Hydro’s proposed Off-Island Purchases Deferral  
37 Account offends regulatory standards, and that Hydro has not provided evidence that the

1 requirements of the Nalcor Energy and Emera Inc. Newfoundland and Labrador Development  
2 Agreement related to regulation by the Board have been satisfied.

3  
4 The Application was circulated to Hydro and the intervenors in the 2017 general rate application,  
5 including Newfoundland Power Inc. (“Newfoundland Power”); a group of Island Industrial  
6 customers: Corner Brook Pulp and Paper Limited, NARL Refining Limited Partnership and Vale  
7 Newfoundland and Labrador Limited (the “Industrial Customer Group”); the communities of  
8 Sheshatshiu, Happy Valley-Goose Bay, Wabush, and Labrador City (the “Labrador Interconnected  
9 Group”) and the Iron Ore Company of Canada (“IOC”).<sup>1</sup>

10  
11 On April 30, 2018 Hydro filed submissions on the Application.

12  
13 On May 4, 2018 Newfoundland Power and the Industrial Customer Group filed submissions on  
14 the Application.

15  
16 On May 16, 2018 the Consumer Advocate filed a reply submission.

17  
18 No other submissions were received by the Board.

## 19 20 **Submissions**

21  
22 It was Hydro’s position that the Board has authority to approve the proposed Off-Island Purchases  
23 Deferral Account and that it would not contravene OC2013-342 or OC2013-343 in doing so.  
24 Hydro submitted that these Orders-in-Council should be interpreted in accordance with the  
25 “modern approach of statutory interpretation” which directs that the words be read in the entire  
26 context and in the grammatical and ordinary sense harmoniously with the scheme and object of  
27 the legislation and intention of government. Hydro submitted that it is also necessary to consider  
28 the words granting the authority to issue the Orders-in-Council, and that the words conferring the  
29 Order-in-Council must be considered in the context of the authorizing statute. Hydro stated:

30  
31 As regards ambiguities in an Order-in-Council, one must consider the entire context of the  
32 provision before one can determine if it is reasonably capable of multiple interpretations.  
33 It is necessary, in every case, to undertake the contextual and purposive approach set out  
34 in the “modern approach”, and thereafter to determine if the words are ambiguous.<sup>2</sup>  
35

36 Hydro set out its views in relation to the history and context of the Orders-in-Council. According  
37 to Hydro the intent of the Lieutenant-Governor in Council was to exclude the Muskrat Falls project  
38 costs from the Board’s oversight and to provide direction regarding the manner of the recovery of  
39 these costs. Hydro submitted that the words in OC2013-342 are clear in their meaning that the  
40 Lieutenant-Governor in Council intended the Deferral Account Scenario payments to be exempt  
41 from the requirement of Board approval. Hydro stated that the Deferral Account Scenario  
42 payments are eventually to be included in the cost of service calculation without disallowance,  
43 reduction or alteration consistent with OC2013-342. In Hydro’s view the words in section 1 of  
44 OC2013-343 make it clear that the Deferral Account Scenario payments are *prima facie* to be

---

<sup>1</sup> The intervenors were established in Order No. P.U. 30(2017).

<sup>2</sup> Hydro Submission, page 10

1 included in Hydro's cost of service calculation in the general rate application so that they will be  
2 fully recovered by Hydro in rates. According to Hydro the words of section 3 of OC2013-343 are  
3 clear that the costs are prohibited from inclusion and recovery until the Muskrat Falls project is  
4 commissioned or nearing commissioning and Hydro is receiving services. Hydro further submitted  
5 that, if it is found that the Deferral Account Scenario payments are not payments to which OC2013-  
6 342 applies, then the Board's jurisdiction to approve the Off-Island Purchases Deferral Account is  
7 entirely unencumbered by either Order-in-Council.  
8

9 It was Hydro's position that the proposed Off-Island Purchases Deferral Account does not offend  
10 OC2013-343 as the Muskrat Falls project costs are not included in the cost of service calculation  
11 for recovery in rates. Hydro submitted that the cost of service presented in the Deferral Account  
12 Scenario to be recovered in rates reflects the costs of the continued supply of power from existing  
13 island generation with the costs and savings of off-island purchases deferred for Board ordered  
14 dissemination at a later date. Hydro explained that, to access off-island power purchases, Hydro is  
15 required to enter into agreements which will permit the use of the Labrador Island Link ("LIL")  
16 and Labrador Transmission assets ("LTA") and require Hydro to pay operating and maintenance  
17 costs ("O&M") for this use. Hydro noted that it has proposed that these costs be treated as deferred  
18 regulatory expenses to be charged to the Off-Island Purchases Deferral Account. Hydro submitted  
19 that the eventual recovery of these costs through the deferral account is consistent with OC2013-  
20 343 as there would be no recovery in rates until after commissioning of the Muskrat Falls project.  
21

22 In relation to the timing of the recovery in rates of the costs at issue, Hydro argued that it has not  
23 yet been triggered as the Muskrat Falls project has not yet achieved "commissioned or near  
24 commissioning" status. Hydro stated:

25  
26 The agreements do not anticipate, or in any way contemplate, the various component assets  
27 of the Muskrat Falls Project coming into service and achieving "commissioning or near  
28 commissioning" status separately at different times.<sup>3</sup>  
29

30 In Hydro's view the Muskrat Falls project will not achieve near commissioning status until, at a  
31 minimum, the first power date under the Muskrat Falls Power Purchase Agreement when one  
32 generation unit of the Muskrat Falls plant is ready for sale and reliable provision of energy. In the  
33 alternative Hydro submitted that, if the Board finds that the LTA and the LIL have achieved "near  
34 commissioning" status and that each provide service, the cost recovery scheme of OC2013-343 is  
35 triggered and the proposed Off-Island Purchases Deferral Account costs are appropriately included  
36 in the general rate application.  
37

38 Hydro noted that the prudence of the costs is exempt from the Board's jurisdiction pursuant to  
39 OC2013-342 and OC2013-343 and the proposed Off-Island Purchases Deferral Account is in  
40 accordance with established regulatory principles as addressed in the evidence of J.T. Browne.  
41

42 Hydro summarized its position as follows:  
43

- 44 1. The costs to be paid by Hydro for use of the LTA and the LIL, including the operating  
45 and maintenance costs of those assets, are costs exempted from the Board's review and

---

<sup>3</sup> Hydro Submission, page 16

1 approval pursuant to OC2013-342 and therefore captured by section 1 of OC2013-343.  
 2 As such, they are *prima facie* required to be included as costs in Hydro's cost of service  
 3 calculation, for recovery in rates, subject to the timing set out in section 3 of OC2013-  
 4 343.

- 5 2. The timing for recovery of these payments, set out in section 3 of OC2013-343, has not  
 6 yet been triggered as the Muskrat Falls Project is not yet "commissioned or nearing  
 7 commissioning". Achievement of this triggering status requires all the component assets  
 8 of the Muskrat Falls Project to reach this stage contemporaneously.
- 9 3. The proposed deferral account complies with OC2013-343 in that the costs to be paid  
 10 by Hydro for the use of the LTA and the LIL are not presently being included in Hydro's  
 11 cost of service calculation and are not presently being sought for recovery in rates. As  
 12 such, the proposed deferral account does not contravene the prohibition in section 3  
 13 against recovery prior to the triggering event.
- 14 4. In the alternative, Hydro states that the Board may find that upon the LIL and the LTA  
 15 each reaching the status of commissioned or near commissioning and providing service  
 16 to Hydro, in which case it may permit the recovery of those costs in rates charged by  
 17 Hydro, or if the Board sees fit, it may recognize those costs for later disposition in a  
 18 deferral account.<sup>4</sup>

19  
 20 In Newfoundland Power's view a plain and general reading of the Orders-in-Council suggests that  
 21 they were issued for the purposes of (i) exempting Muskrat Falls project costs from Board review;  
 22 and (ii) directing the Board on policies to be adopted for recovery of Muskrat Falls project costs.  
 23 Newfoundland Power submitted that the Orders-in-Council should be interpreted in accordance  
 24 with the modern principle of statutory interpretation which requires that the words be read in the  
 25 entire context and in their grammatical and ordinary sense harmoniously with the scheme and  
 26 objects of the legislation. Newfoundland Power also referenced section 16 of the *Interpretation*  
 27 *Act* which requires a liberal construction that best ensures the attainments of the objects of the  
 28 provision according to its true meaning. Newfoundland Power submitted that it may not be  
 29 possible for the Board to make findings regarding the context in which the Orders-in-Council were  
 30 issued without additional evidence being examined at the hearing.

31  
 32 In Newfoundland Power's view it is unclear at this stage whether the LIL and LTA O&M Costs  
 33 are wholly exempted from review. Newfoundland Power submitted that the evidence on the record  
 34 is unclear with respect to the entity which would receive the payments and it is possible that the  
 35 evidence presented in the general rate application hearing may lead the Board to conclude that  
 36 some of the costs are not captured by OC2013-342.

37  
 38 Newfoundland Power argued that the question of recovery of the costs is not a question of true  
 39 jurisdiction and largely turns on the Board's exercise of its jurisdiction in accordance with the  
 40 *EPCA*, the *Act* and OC2013-343. Newfoundland Power submitted that issues for the Board to  
 41 consider would include:

- 42 (i) Whether the costs are included in Hydro's cost of service or general rate  
 43 application.
- 44 (ii) Whether offsetting the costs in the Off-Island Purchases Deferral Account  
 45 would constitute recovery in rates.

---

46  
<sup>4</sup> Hydro Submission, pages 23-24

- 1 (iii) Whether “commissioning or near commissioning” refers to the Muskrat Falls  
2 plant, the LiL and the LTA individually or collectively.  
3 (iv) Whether energy, capacity or other threshold applies to the determination when  
4 Hydro is “receiving service.”  
5

6 In relation to Hydro’s position that the costs are not included in the cost of service Newfoundland  
7 Power stated:  
8

9 In Newfoundland Power’s submission, it is difficult to accept Hydro’s logic that the rates  
10 proposed under Hydro’s deferral Account Scenario do not include the LiL and LTA O&M  
11 Costs. The OIPDA, as proposed, includes assumptions for off-island purchases, as well as  
12 for LiL and LTA O&M Costs. Whether recovery of these costs is deferred to a later date,  
13 the costs themselves appear to be provided for in amounts proposed to be collected from  
14 customers in the Test Years.<sup>5</sup>  
15

16 Newfoundland Power submitted that Hydro’s argument that the intent of OC2013-343 was to  
17 prohibit recovery of Muskrat Falls costs until the full Muskrat Falls project achieved  
18 commissioning or near commissioning appears to be based on a narrow interpretation of the Order-  
19 in-Council. In Newfoundland Power’s view applying a broad, liberal and purposive approach to  
20 the interpretation of OC2013-343, the Board could come to a conclusion that is more in line with  
21 Hydro’s alternate submission. Newfoundland Power stated:  
22

23 Ultimately, it is Newfoundland Power’s view that the Board’s consideration of whether or  
24 not Hydro’s OIPDA proposal triggers the recovery scheme may be more informed by  
25 evidence adduced during the remainder of the public hearing of Hydro’s 2107 GRA. The  
26 hearing is still at an early stage and it is conceivable that the additional evidence relevant  
27 to the Board’s analysis of the Motion may be forthcoming.<sup>6</sup>  
28

29 Newfoundland Power questioned whether the Off-Island Purchases Deferral Account may violate  
30 the cost of service standard and stated:  
31

32 That said, the question of whether the Board should approve such a deferral account is not  
33 a question of *vires*. Rather, it is a question of whether, and how, the Board should exercise  
34 its jurisdiction. Such a question should be considered by the Board on the basis of a  
35 complete evidentiary record which, at this preliminary stage of the proceeding, is not  
36 available.<sup>7</sup>  
37

38 Newfoundland Power submitted that a declaratory order on the Consumer Advocate’s question is  
39 premature.  
40

41 The Industrial Customer Group also submitted that it is premature for the Board to render a final  
42 decision on the Consumer Advocate’s motion at this time. The Industrial Customer Group stated:  
43

44 The Board should defer its final decision on the Consumer Advocate’s Application as the

---

<sup>5</sup> Newfoundland Power Submission, page 7

<sup>6</sup> Ibid., page 8

<sup>7</sup> Ibid.

1 issue is not whether the Board has the jurisdiction to make a decision interpreting the  
2 Orders-in-Council OC2013-342 and OC2013-343, but rather whether the Board will be in  
3 a position to make a more reasoned interpretation based on a more complete factual context  
4 and at a future time when the factual context will have evolved and developed sufficiently  
5 to permit a reasoned decision;<sup>8</sup>  
6

7 The Industrial Customer Group argued that Hydro's position ignores the language of the Order-  
8 in-Council which states that no amounts should be included in Hydro's cost of service calculation  
9 "or in any rate application or rate setting process". The Industrial Customer Group stated:

10  
11 It is submitted that seeking an order for the inclusion of costs in a deferral account, where  
12 they will be set off against savings (from Recapture Energy) that would otherwise wholly  
13 accrue to Hydro's customers, is the very essence of a circumstance where costs are being  
14 included in a *rate application or rate setting process*, even if they are not being included  
15 in the present cost of service calculation or in the immediately-applicable rates.<sup>9</sup>  
16

17 According to the Industrial Customer Group the proposition that the Off-Island Purchases Deferral  
18 Account ought not to be considered a component of the rates being sought by Hydro in the 2017  
19 general rate application needs to be examined in light of the statements of the Court of Appeal that  
20 indicate that deferral accounts can be considered to be a component of rates.  
21

22 It was the position of the Industrial Customer Group that it is premature for the Board to determine  
23 whether the conditions of subsection 3(b) of OC2013-343 have been met. The Industrial Customer  
24 Group referenced the evidence that there remains a great deal of uncertainty from an engineering  
25 and operational perspective as to when the LIL and LTA will be able to be considered to be  
26 commissioned and suggested that subsequent Hydro witnesses may address this issue. The  
27 Industrial Customer Group noted that Hydro implicitly recognized that the "commissioning or near  
28 commissioning" determination may require findings of fact. The Industrial Customer Group also  
29 noted that Hydro referenced agreements "to be concluded" to allow for pre-commission use of the  
30 LIL and the LTA and that the Board should consider whether a decision in respect of 3(b) should  
31 be made before these agreements are concluded.  
32

33 Further the Industrial Customer Group raised the timing of the Board's determination in relation  
34 to whether the LIL and LTA are commissioned or near commissioning. The Industrial Customer  
35 Group stated:  
36

37 Further, there is no necessity, nor it is respectfully submitted is it the most reasonable  
38 course, to decide now whether the LIL and LTA (or the Muskrat Falls Project considered  
39 as a whole) are "near commissioning". The issues are whether LIL and LTA (or the  
40 Muskrat Falls Project considered as a whole) will be reasonably considered to be "near  
41 commissioning" for the purposes of the Board's final Order in the 2017 GRA and if so  
42 from what date (which may be later than 2018). As the testimony of Mr. Haynes indicates,  
43 there are a number of uncertainties around even whether or when the LIL and LTA will be  
44 able to (sic) considered "used and useful" (let alone "commissioned or near  
45 commissioning") in 2018.

---

<sup>8</sup> Industrial Customer Group Submission, page 1

<sup>9</sup> Ibid., page 6

1 In the submission of the IIC Group, it is reasonable to expect that deferring a final decision  
 2 on the Consumer Advocate’s Application and allowing for the opportunity for further  
 3 evidence to be elicited in the 2017 GRA hearing, should provide a more complete factual  
 4 context to assist the Board in its interpretation of “*commissioning or near commissioning*”  
 5 as used in subsection 3(b) of OC2013-343.<sup>10</sup>  
 6

7 In reply, the Consumer Advocate stated that the combined effect of OC2013-342 and OC2013-  
 8 343 denies the Board’s jurisdiction to consider Hydro’s present request to recover the LIL or LTA  
 9 O&M costs. The Consumer Advocate submitted that the “modern approach” to statutory  
 10 interpretation is applicable only if there is in fact an ambiguity in the words in the legislative  
 11 provision. According to the Consumer Advocate OC2013-343 is unambiguous and prohibits any  
 12 recovery by Hydro of any costs related to the LIL and LTA O&M costs “in any event” until the  
 13 Muskrat Falls project is commissioned or near commissioning, and there is no such evidence  
 14 before the Board. The Consumer Advocate stated:

15  
 16 Hydro’s Deferral Account has the intended effect of circumventing the legislative  
 17 prohibition present in OC-2013-343 by prematurely collecting money in 2018 and 2019  
 18 from consumers for LIL and LTA O & M costs, even though the Muskrat Falls Project is  
 19 not commissioned or near commissioning, even though Hydro is prohibited from collecting  
 20 these costs “in any event” as stated in OC2013-343.<sup>11</sup>  
 21

22 The Consumer Advocate submitted that Hydro’s position is that the Board has no ability to deny  
 23 recovery of LTA and LIL costs. In the Consumer Advocate’s view, the proposed Deferral Account  
 24 is an attempt to circumvent the timing recovery problem that OC2013-343 created and has little to  
 25 do with the interests of consumers or “rate smoothing” as has been represented. The Consumer  
 26 Advocate noted that if the Board remains uncertain as to jurisdiction, and having regard to both  
 27 the significant monetary amount involved and the significant jurisdictional issue, the Board has  
 28 the discretion to refer this matter to the Court of Appeal pursuant to section 101 of the *Act*.  
 29

### 30 **Board Findings**

31  
 32 The Application seeks an order of the Board declaring whether OC2013-342 and OC2013-343  
 33 restrict the Board’s jurisdiction to allow Hydro’s recovery of any costs related to components of  
 34 the Muskrat Falls project. The first issue to be addressed by the Board relates to the approach to  
 35 be taken in the interpretation of the Orders-in-Council. The parties agree that the modern approach  
 36 to statutory interpretation should be adopted, though the Consumer Advocate suggested that this  
 37 approach should be used only where it has been determined that the language is ambiguous. The  
 38 modern approach requires that the words be read in their entire context and in their grammatical  
 39 and ordinary sense harmoniously with the scheme and object of the legislation and intention of  
 40 government.<sup>12</sup> The Board notes that the provisions of the *Public Utilities Act* and the *Interpretation*  
 41 *Act*, RSNL 1990, C. I-19, require that a broad and liberal interpretation be adopted to attain the  
 42 objects and purposes of the legislation.<sup>13</sup> The Court of Appeal of this province has also confirmed

---

<sup>10</sup> Industrial Customer Group Submission, page 8

<sup>11</sup> Consumer Advocate Reply, page 5

<sup>12</sup> *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 S.C.R. 27, para. 21; *Amarantunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, para. 36

<sup>13</sup> *Tuck v. Supreme Holdings*, 2016 NLCA 40

1 that a broad and liberal approach is to be taken to the interpretation of the *Act* to achieve its  
2 purposes as well as the implementation of the power policy of the province.<sup>14</sup> The Board is satisfied  
3 that it is not necessary to find an ambiguity before adopting a broad, liberal, and purposive  
4 approach in the consideration of the Orders-in-Council.

5  
6 In considering the proper interpretation to be given to OC2013-342 and OC2013-343 consistent  
7 with the modern approach the Board must look to the entire context, considering the intent of  
8 Government. While Hydro provided submissions in relation to the context of the Orders-in-  
9 Council, the Board shares the view expressed by Newfoundland Power that additional evidence  
10 and submissions in this regard would be of assistance to the Board in considering the objects of  
11 the scheme and the purpose of the Orders-in-Council. With this concern in mind the Board will  
12 address each of the Orders-in-Council separately below.

13  
14 *OC2013-342*

15 The Muskrat Falls Project Exemption Order (OC2013-342) provides that Hydro is exempt from  
16 the application of the *Act* and Part II of the *EPCA* in respect of certain expenditures and activities  
17 related to the Muskrat Falls project. Hydro submitted that, pursuant to OC2013-342, the costs to  
18 be paid for the use of the LTA and LIL, including the O&M costs, are exempt from the Board's  
19 review and are *prima facie* required to be included in Hydro's cost of service calculation for  
20 recovery in rates subject to the timing set out in OC2013-343. Newfoundland Power submitted  
21 that the evidence is unclear with respect to the entity which would receive payment of the costs  
22 and that some of the costs may not be captured by OC2013-342. The Board agrees with  
23 Newfoundland Power that the evidence provided to date in the general rate application does not  
24 provide an understanding of the basis of Hydro's payment of the LTA and LIL O&M costs. In  
25 particular, the evidence is not sufficient to demonstrate to whom the payments are to be made,  
26 whether there is a contract in place requiring the payments, what services are to be provided and  
27 how the costs are related to those services. In the circumstances the Board finds that the evidence  
28 filed to date in this proceeding is inadequate to make a determination at this time as to whether  
29 some or all of the costs at issue are exempted from the Board's review pursuant to OC2013-342.

30  
31 *OC2013-343*

32 If it is found that OC2013-342 does apply to some or all of the LTA and LIL O&M costs then  
33 OC2013-343 requires that these costs be included in Hydro's cost of service and rate setting  
34 process so that they are recovered fully through rates once the condition set out in subsection 3(b)  
35 of this Order-in-Council is satisfied.

36  
37 It is Hydro's position that the proposed deferral account complies with OC2013-343 because the  
38 costs to be paid by Hydro for the use of the LTA and the LIL are not presently being included in  
39 Hydro's cost of service calculation and are not presently being sought for recovery in rates.  
40 Newfoundland Power's view was that this position is difficult to accept. According to  
41 Newfoundland Power whether the recovery of these costs is deferred to a later date, the costs  
42 themselves appear to be provided for in amounts proposed to be collected from customers in the  
43 test years. The Consumer Advocate submitted that the proposed deferral account will take money  
44 from customers in the test years for the purpose of recovering Hydro's 2018-2019 LTA and LIL  
45 O&M costs. The Industrial Customer Group noted the statements of the Court of Appeal that

---

<sup>14</sup> In *Reference RE Section 101 of the Public Utilities Act (NFLD)*(1998), 164 NFLD. & P.E.I.R 60, para. 36



1 indicate that deferral accounts can be considered to be a component of rates. The Industrial  
2 Customer Group also noted that the words in OC2013-343 set out that no costs shall be included  
3 in “in any rate application or rate setting process.” The Board shares the concerns expressed by  
4 the intervenors with respect to Hydro’s argument that the LTA and LIL O&M costs are not  
5 presently included in the cost of service calculation and are not presently being sought for recovery  
6 in rates. The Board notes that the language in section 3 of the Order-in-Council is slightly different  
7 than the language used in section 1 and believes that further evidence and submissions may be of  
8 assistance in considering the meaning to be given to these two provisions. The Board also notes  
9 that Hydro did not explain how this Order-in-Council should be interpreted in relation to the  
10 Expected Supply Scenario given that the 2018 and 2019 cost of service in this scenario also include  
11 the LTA and LIL O&M costs. In the circumstances, the Board believes that the issue of whether  
12 the LTA and LIL O&M costs can be considered to be included in the 2018 and 2019 test year cost  
13 of service should be considered at the conclusion of the general rate application.  
14

15 The interpretation to be given to subsection 3(b) of OC2013-343 in the circumstances was also  
16 raised in the Application. This provision sets out that no costs shall be included:

17  
18 b) in any event, in respect of each of Muskrat Falls, the LTA or the LiL, until such time as  
19 the project is commissioned or nearing commissioning and Newfoundland and Labrador  
20 Hydro is receiving services from such project.<sup>15</sup>  
21

22 It was Hydro’s position that the timing for recovery has not yet been triggered as this provision  
23 requires that all the component assets of the Muskrat Falls project reach the commissioned or near  
24 commissioning stage. In the alternative, Hydro stated that the Board may find that, upon the LIL  
25 and the LTA each reaching commissioned or near commissioning and providing service to Hydro,  
26 it may permit the recovery of those costs in rates. The Consumer Advocate stated that the language  
27 unambiguously prohibits any recovery until the Muskrat Falls project is commissioned or near  
28 commissioned. Newfoundland Power submitted that applying a broad, liberal and purposive  
29 approach Hydro’s alternate position is arguable, and questioned the proper interpretation to be  
30 given to “receiving services.” In Newfoundland Power’s view additional evidence may inform the  
31 Board’s considerations on this issue. The Industrial Customer Group argued that the issue to be  
32 determined relates to whether the LTA and the LIL will be reasonably considered to be “near  
33 commissioning” when the Board makes its final order in the 2017 general rate application. The  
34 Industrial Customer Group suggested that there remains a great deal of uncertainty as to when the  
35 LTA and LIL will be considered to be commissioned. Further the Industrial Customer Group  
36 questioned whether a decision in respect of subsection 3(b) should be made before the agreements  
37 referenced by Hydro are concluded. The Industrial Customer Group submitted that the  
38 interpretation of “commissioning or near commissioning” may require findings of fact by the  
39 Board and that it is premature to come to a conclusion on this issue.  
40

41 The Board believes that there are both factual and legal issues associated with the determinations  
42 to be made with respect to subsection 3(b) of OC2013-343. The evidence provided in the general  
43 rate application is not clear in relation to the timing of the commissioning of the various aspects  
44 of the Muskrat Falls project, either individually or collectively, or in relation to what services will  
45 be received by Hydro, from whom and when. The Board finds that the evidence on the record

---

<sup>15</sup> OC2013-343

1 relating to the commissioning of these facilities is not sufficient to make a determination at this  
2 time. Further there is also an issue in relation to when this determination should be made. In the  
3 Board's view additional evidence and submissions are required in relation to the how the language  
4 in subsection 3(b) should be interpreted and whether the LTA and LIL should be considered to be  
5 commissioned or near commissioning at the relevant time.  
6

7 The Board acknowledges that the Application filed by the Consumer Advocate raises significant  
8 issues which must be addressed related to Hydro's proposals and the interpretation of the Orders-  
9 in-Council. Nevertheless, as discussed above, the Board believes that the appropriate time to make  
10 this assessment is at the end of the general rate application when all of the evidence has been  
11 presented and the parties have provided their final submissions. The Board believes that making a  
12 determination at this time with respect to the factual and legal issues raised in this Application  
13 would be premature. The Board also believes that the other issues raised in the course of this  
14 Application, including the prudence of the costs and whether the Deferral Account Scenario is  
15 consistent with regulatory principles, should be addressed in the context of the full record in the  
16 general rate application proceeding. While the Board will not approve this Application, the Board  
17 expects that the issues raised in this Application will be addressed further in the general rate  
18 application proceeding.  
19  
20

21 **IT IS THEREFORE ORDERED THAT:**  
22

- 23 1. The Application for an Order of the Board declaring whether OC2013-342 and OC2013-343  
24 restrict the Board's jurisdiction to allow Hydro's application to recover any costs relating to  
25 components of the Muskrat Falls project is denied.  
26
- 27 2. Hydro shall pay all expenses of the Board arising from this Application.

**DATED** at St. John's, Newfoundland and Labrador, this 14<sup>th</sup> day of June, 2018.



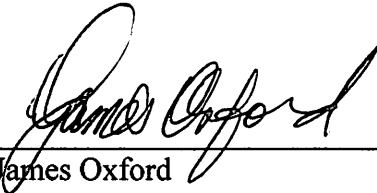
---

Darlene Whalen, P. Eng.  
Chair & CEO



---

Dwanda Newman, LL.B.  
Vice-Chair



---

James Oxford  
Commissioner



---

Cheryl Blundon  
Board Secretary