

IN THE MATTER of the *Public Utilities Act*, R.S.N.L. 1990, Chapter P-47; and

IN THE MATTER OF an Application by Newfoundland and Labrador Hydro for the approval pursuant to Sections 70(1) and 76 of the *Act*, of the Rate Stabilization Plan components of the rates to be charged to Industrial Customers

SUBMISSIONS OF THE CONSUMER ADVOCATE ON JURISDICTIONAL MATTERS

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Facts

On 20 December, 2007 Hydro applied to the Board for an Order “that the Board approve and make an Interim Order that the rates currently in effect for Industrial Customers, which were approved in Order No. P.U. 8 (2007) and which are set out in Schedule “A”, continue in effect on an interim basis until such time as the Board issues a final order with respect to Industrial Customers’ rates for 2008”.

Reference: 20 December 2007 Application, at NP-NLH-19, Attachment 4, page 3 of 11, paragraph 5

In its Application, Hydro provided the Board with its rationale for the requested Order. For ease of reference, Hydro stated as follows:

2. By Order No. P.U. 40 (2003) the Board approved the manner by which the Rate Stabilization Plan (RSP) is calculated and by which RSP adjustments are applied to the rates charged by Hydro to its Island Interconnected Industrial Customers. Under that Order, Hydro is required to provide an Industrial Customer fuel price projection to the Board and to certain of Hydro’s customers by the tenth working day of October each year.
3. Due initially to a projected increase in the RSP rate and subsequently to a significant load change of one of Hydro’s Industrial Customers, Hydro determined that there was potential volatility in its Industrial Customers’ rates both for 2008 and in future years. The impact of these changes was deemed to be significant and it was judged to be prudent to further analyze and consider their impact, in conjunction with also determining the final level of year end hydraulic balances, prior to making application to the Board with respect to an appropriate treatment of this issue.
4. Hydro wishes to have further opportunity to consider the appropriate means to address Industrial Customers’ rates issues.

1 **Reference:** 20 December 2007 Application, pp 2-3, paras. 2-4.

2 On 21 December, 2007, the Board issued an Interim Order of the Board, No. P.U. 34 (2007).,
3 which ordered *inter alia*:

4 “1. Pursuant to Section 75 of the Act, the Board approves, on an interim basis,
5 the Industrial Customer rates as attached in Schedule “A”, to be effective for
6 consumption on and after January 1, 2008, until a final Order of the Board
7 with respect to Industrial Customers’ rates for 2008.”

8 On 11 December, 2008, Hydro applied to the Board for an Order approving:

9 “(a) a continuation of the interim rates currently in effect for Industrial
10 Customers which were approved on an interim basis in Order No. P.U. 34
11 (2007) and which are set out in Schedule A; and
12 (b) that the rates for Teck Cominco Limited be the same as are in effect for all
13 other Island Industrial Customers; and
14 (c) a revision to the rules and regulations for the RSP to address the completion
15 of the five-year collection period of the Historical Plan Balance.”

16 **Reference:** 11 December 2008 Application, NP-NLH-13, Attachment 13, pp 3-8 of 23

17 On 24 December, 2008, the Board issued An Interim Order of the Board, No. P.U. 37 (2008).

18 The Interim Order recited that the Board was “satisfied that it is reasonable and prudent to:

19 (i) Continue on an interim basis until March 31, 2009 the existing rates for the
20 Island Industrial class of customers;
21 (ii) Continue the current RSP rules on an interim basis until final rates are
22 established; and

1 (iii) *Require Hydro to file an application for approval of final rates, rules and*
2 *regulations for the Island Industrial Customers allowing sufficient time for*
3 *a full examination of the matter."*

4 The Interim Order ordered that:

5 "1. *The continuation of the rates, rules and regulations for Hydro's Island*
6 *Industrial Customers is approved on an interim basis from January 1, 2009*
7 *to March 31, 2009, with the Schedule of Rates as attached in Schedule A.*

8 2. *Hydro shall make application to finalize the interim rates, rules and*
9 *regulations for the Island Industrial Customers by January 30, 2009.*

10 3. *Hydro shall pay all expenses of the Board arising from this Application."*

11 On 16 January, 2009 Hydro applied to the Board for an Order:

12 "(1) *extending the Application filing deadline set in Order No. P.U. (2008) until*
13 *June 30, 2009; and (2) approving a continuation of the existing rates, rules*
14 *and regulations for Hydro's Island Industrial Customers on an interim basis*
15 *until such time as the Board has dealt with the above referenced application."*

16 **Reference:** 16 January 2009 Application, NP-NLH-19, Attachment 22, page 1 to 10 of 10.

17 On 30 January, 2009, the Board issued an Order of the Board, No. P.U. 6 (2009) which
18 ordered that:

19 "1. *Hydro shall make application to finalize the interim rates, rules and*
20 *regulations for the Island Industrial Customers by June 30, 2009.*

21 2. *The continuation of the rates, rules and regulations for Hydro's Island*
22 *Industrial Customers is approved on an interim basis until a final Order of*

1 *the Board with respect to the finalization of rates.*

2 3. *Hydro shall pay all expenses of the Board arising from the Application."*

3 On 30 June, 2009, Hydro applied to the Board for an Order approving:

4 *"(a) that the rates for Tech Cominco Limited be the same as are in effect for all*
5 *other Island Industrial customers; and*

6 *(b) that the existing Island Industrial Customer interim rates, except that rates*
7 *for Tech Cominco Limited (formerly Aur Resources) be made final."*

8 In its cover letter, Hydro stated:

9 *"Although the attached Application does not contain any proposed changes, the*
10 *Board may wish to consider suspension of the existing load variation allocation rules*
11 *and holding in abeyance current and future load variation amounts until such time*
12 *as Hydro can develop a proposal to address the current anomalies in the RSP. Hydro*
13 *anticipates that an application with regard to the RSP load variation can be made*
14 *prior to the end of 2009."*

15 Notices of Intervention were filed by the Island Industrial Customers (representing Corner
16 Brook Pulp and Paper Limited, North Atlantic Refining Limited, Teck Cominco Limited,
17 and Vale Inco Newfoundland and Labrador Limited) Newfoundland Power Inc, and the
18 Consumer Advocate. On March 16, 2010 Abitibi-Consolidated Company of Canada
19 advised that it would also be participating in the Application.

20 The parties have thus far participated in an interrogatory process through the filing of
21 Requests for Information and replies thereto. The parties have also filed expert reports in
22 relation to the matters in Hydro's Application.

1 On 7 May, 2010, the parties to the application filed their respective Issues Lists.

2 The Issues

3 The Board has determined¹ that it shall have a preliminary hearing into its jurisdiction and
4 authority. The issues related to the Board's jurisdiction are as outlined in correspondence
5 from Hydro to the Board on 2 June, 2010, a copy of which is attached as Schedule A hereto.

6 The Legislative Framework

7 In the Stated Case, Green, J. A. observed that the answers to the jurisdictional questions
8 posed by the Board in that proceeding had to be given taking account of the legislative
9 framework within which the Board operates. Green, J. A. stated:

10 *"The Board is a creature of statute and its jurisdiction and powers to deal with*
11 *matters brought before it, and the manner of dealing with such matters must be*
12 *found, either expressly or impliedly, within the statutes conferring jurisdiction on*
13 *and governing the operation of the Board."*²

14 **Reference:** *re S. 101 of the Public Utilities Act (Nfld.) (1998), 164 Nfld & PEIR 60, at para 13 (NL.*
15 *C.A.), Tab 3 of CA's Book of Authorities*

¹S. 27 of the Board of Commissioners of Public Utilities Regulations, 1996 (O.C. 96-476) provides:

"s. 27 If it appears to the board that there is a question or issue of law or of jurisdiction or of practice or procedure that shall be decided before a proceeding continues, the Board may,
(a) direct the question or issue to be raised for determination by the board. . ."

²Reference *re S. 101 of the Public Utilities Act (Nfld.) (1998), 164 Nfld & PEIR 60, at para 13 (NL. C.A.)*

1 From page 69-72 of the Court's Opinion, Green, J. A. proceeds to set out the various
2 provisions of both the Public Utilities Act³ and the Electrical Power Control Act⁴ which
3 related to the questions of jurisdiction which arose in the stated case. It is submitted that
4 the following statutory provisions would appear to be particularly pertinent to the issues
5 to be addressed in the present proceeding:

6 *"S. 70 (1) A public utility shall not charge, demand, collect or receive*
7 *compensation for a service performed by it whether for the public or*
8 *under contract until the public utility has first submitted for the*
9 *approval of the board a schedule of rates, tolls and charges and has*
10 *obtained the approval of the board and the schedule of rates, tolls and*
11 *charges so approved shall be filed with the board and shall be the only*
12 *lawful rates, tolls and charges of the public utility, until altered,*
13 *reduced or modified as provided in this Act.*

14 71. *A public utility shall submit for the approval of the board the rules*
15 *and regulations which relate to its service, and amendments to them,*
16 *and upon approval by the board they are the lawful rules and*
17 *regulations of the public utility until altered or modified by order of*
18 *the board.*

19 75. (1) *The board may make an interim order unilaterally and without public*
20 *hearing or notice, approving with or without modification, a schedule*
21 *of rates, tolls and charges submitted by a public utility, upon the*
22 *terms and conditions that it may decide.*

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

³Public Utilities Act R.S.N.L. 1990 Chapter P-47, Tab 1 of CA's Book of Authorities

⁴Electrical Power Control Act, 1994 S.N.L. 1994 Chapter E-5.1, Tab 2 of CA's Book of Authorities

1 (3) *The board may order that the excess revenue that was earned as a*
2 *result of an interim order made under subsection (1) and not*
3 *confirmed by the board be*
4 (i) *refunded to the customers of the public utility; or*
5 (b) *placed in a reserve fund for the purpose that may be approved*
6 *by the board."*

7 S. 80 provides:

8 "80. (1) *A public utility is entitled to earn annually a just and reasonable*
9 *return as determined by the board on the rate base as fixed and*
10 *determined by the board for each type or kind of service supplied by*
11 *the public utility but where the board by order requires a public*
12 *utility to set aside annually a sum for or towards an amortization*
13 *fund or other special reserve in respect of a service supplied, and does*
14 *not in the order or in a subsequent order authorize the sum or a part*
15 *of it to be supplied, and does not in the order or in a subsequent order*
16 *authorize the sum or a part of it to be charged as an operating expense*
17 *in connection with the service, the sum or part of it shall be deducted*
18 *from the amount which otherwise under this section of the public*
19 *utility would be entitled to earn in respect of the service, and the net*
20 *earnings from the service shall be reduced accordingly.*

21 (2) *The return shall be in addition to those expenses that the board may*
22 *allow as reasonable and prudent and properly chargeable to operating*
23 *account, and to all just allowances made by the board according to*
24 *this Act and the rules and regulations of the board.*

25 (3) *Reasonable payments each year to former employees of a public utility*
26 *who have retired and are receiving payments of supplemental income*
27 *from the public utility are expenses that the board may allow as*
28 *reasonable and prudent and properly chargeable to the operating*
29 *account of the public utility.*

30 (4) *The board may use estimates of the rate base and the revenues and*
31 *expenses of a public utility."*

1 s. 118 provides:

- 2 “118 (1) *This Act shall be interpreted and construed liberally in order to*
3 *accomplish its purposes, and were a specific power or authority is*
4 *given the board by this Act, the enumeration of it shall not be held to*
5 *exclude or impair a power or authority otherwise in this Act*
6 *confirmed on the board.*
- 7 (2) *The board created has, in addition to the powers specified in this Act,*
8 *all additional, implied and incidental powers which may be*
9 *appropriate or necessary to carry out all the powers specified in this*
10 *Act.*
- 11 (3) *A substantial compliance with the requirements of this Act is*
12 *sufficient to give effect to all the rules, orders, acts and regulations of*
13 *the board, and they shall not be declared inoperative, illegal or void*
14 *for the omission of a technical nature.”*

15 In the EPCA, the power policy of the province is declared in these terms:

- 16 “3. *It is declared to be the policy of the province that*
- 17 (a) *the rates to be charged, either generally or under specific contracts,*
18 *for the supply of power within the province*
- 19 (i) *shall be reasonable and not unjustly discriminatory,*
- 20 (ii) *should be established, wherever practicable, based on forecast*
21 *costs for the supply of power for 1 or more years,*
- 22 (iii) *should provide sufficient revenue to the production or*
23 *retention of the power to enable it to earn a just and*
24 *reasonable return as construe under the Public Utilities Act*
25 *so that it is able to achieve and maintain a sound credit rating*

in the financial markets of the world, and

(iv) should be such that after December 31, 1999 industrial customers shall not be required to subsidize the cost of power provided to rural customers in the province, and those subsidies being paid by industrial customers on the date this Act comes into force should be gradually during the period prior to December 31, 1999;

(b) all sources and facilities for the production, transmission and distribution of power in the province should be managed and operated in a manner

(i) that would result in the most efficient production, transmission and distribution of power,

(ii) that would result in consumers in the province having equitable access to an adequate supply of power,

(iii) that would result in power being delivered to consumers in the province at the lowest possible cost consistent with reliable service,

(iv) that would result in, subject to Part III, a person having priority to use, other than for resale, the power it produces, or the power produced by a producer which is its wholly-owned subsidiary,

(v) *where the objectives set out in subparagraphs (i) to (iv) can be achieved through alternative sources of power, with the least possible interference with existing contracts,*

and, where necessary, all power, sources and facilities of the of the province are to be assessed and allocated and re-allocated in the manner that is necessary to give effect to this policy."

1 S. 2(p) defines “rates” to include “prices, charges, tolls or conditions applying to prices for
2 power or other consideration given for the supplying of power;”

3 S.4 provides:

4 “S.4. In carrying out its duties and exercising its powers under the act or under
5 the Public Utilities Act, the public utilities board shall implement the power
6 policy declared in section 3, and in doing so shall apply tests which are
7 consistent with generally accepted sound public utility practice.”

8 Approach to Interpretation

9 Having set out the foregoing legislative provisions, it is necessary to consider the approach
10 to interpretation of the legislation more generally. Justice Green addressed the need to
11 consider the context of the legislation, as follows:

12 “[15] The Court was not referred to my decisions in this or other jurisdiction which
13 directly addressed, let alone answered, the specific types of questions which
14 have been posed. To answer the questions, therefore it is necessary to develop
15 a theoretical frame of reference within the context of the general language of
16 the existing legislation so as to determine the approach to be taken to its
17 application in concrete situations.

18 [16] It is necessary to examine the specific legislative provisions in the larger
19 regulatory context and against the background of the purposes of the
20 legislation and the general principles which have been developed as part of
21 regulatory practice.”

22 Green, J.A. (at para 36) outlined “some general principles to be used in the interpretation and
23 application of the local legislation:

- 1 1. *The Act should be given a broad and liberal interpretation to achieve its*
2 *purposes as well as the implementation of the power policy of the province;*
- 3 2. *The Board has broad discretion, and hence a large jurisdiction, in its choice*
4 *of the methodologies and approaches to be adopted to achieve the purposes of*
5 *the legislation and to implement provincial power policy;*
- 6 3. *The failure to identify a specific statutory power in the Board to undertake a*
7 *particular impugned action does not mean that the jurisdiction of the Board*
8 *is thereby circumscribed; so long as the contemplated action can be said to be*
9 *'appropriate or necessary' to carry out an identified statutory power and can*
10 *be broadly said to advance the purposes and policies of the legislation, the*
11 *Board will generally be regarded as having such an implied or incidental*
12 *power;*
- 13 4. *In carrying out its functions under the Act, the Board is circumscribed by*
14 *the requirement to balance the interests, as identified in the legislation, of the*
15 *utility against those of the consuming public;*
- 16 5. *The setting of a 'just and reasonable' rate of return is of fundamental*
17 *importance to the utility and must always be an important focus of the*
18 *Board's deliberations; however, the 'entitlement' of the utility to a just and*
19 *reasonable rate of return does not guarantee it that level of return., the*
20 *'entitlement' is to have the Board address that issue and to make it best*
21 *prospective estimate, based on its full consideration of all available evidence,*
22 *for the purpose of setting rates, tolls and charges;*
- 23 6. *The Board has jurisdiction , which will not generally be interfered with on*
24 *judicial review, to make a determination of what is a just and reasonable rate*
25 *of return within a 'zone of reasonableness' and in so doing is not constrained*
26 *in its choice of applicable methodologies, so long as they can be rationally*
27 *justified in accordance with sound utility practice and are not inconsistent*
28 *with the achievement of the purposes and policies of the legislation."*

1 Other Jurisprudence

2 In considering the Board's jurisdiction in relation to the issues raised in this application, one
3 must have regard to jurisprudence that has developed in Canada.

4 Bell Canada (1989)

5 In Bell Canada (1989)⁵, the Supreme Court of Canada considered an appeal which had as
6 its issue the question of whether the CRTC had jurisdiction to order Bell Canada to grant
7 a one-time credit to its customers⁶. At the heart of the appeal was a discussion about the

⁵Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission) [1989] 1 S.C.R. 1722, Tab 4 of the CA's Book of Authorities

⁶The headnote in the Supreme Court reports provides the following description of the case on appeal:

"In March 1984, Bell Canada filed an application with the CRTC for a general rate increase. To prevent a serious deterioration in Bell Canada's financial situation while awaiting the hearing and the final decision on the merits, the CRTC granted Bell Canada an interim rate increase of 2 per cent effective January 1, 1985. The interim rate increase was calculated on the basis of financial information provided by Bell Canada. In its decision, however, the CRTC clearly expressed the intention to review this interim rate increase in its final decision on Bell Canada's application on the basis of complete financial information for the years 1985 and 1986. In 1985, given Bell Canada's improved financial situation, the CRTC ordered Bell Canada to file revised tariffs effective before its application for a rate increase filed in March 1984. These new rates too were interim in nature. In October 1986, notwithstanding Bell Canada's request to withdraw its initial application for a general rate increase, the CRTC reviewed Bell Canada's financial situation and the appropriateness of its rates. The CRTC established appropriate levels of profitability for Bell Canada on the basis of its return on equity and found that, in 1985 and 1986, it had earned excess revenues for a total of \$206 million. Although Bell Canada always charged rates approved by the CRTC, the latter decided that Bell Canada could not retain these excess revenues and ordered it to distribute the excess revenues through a one-time credit to be granted to certain classes of customers. On appeal, the Federal Court of Appeal quashed the CRTC's order. This appeal is to determine (1) whether the CRTC had the legislative authority to review the revenues made by Bell Canada during the period when interim rates were in force; and (2) whether the CRTC had jurisdiction to make an order compelling Bell Canada to grant a one-time credit to its customers.

1 effect of interim orders and retroactivity. Justice Conthier delivered the judgment of the
2 unanimous panel.

3 The CRTC's impugned decision in Decision 86-17 did not seek to establish rates to replace
4 or be substituted to those which were charged during the period when the interim rates
5 were in force; i.e. from January 1, 1985 to October 14, 1986. However, the one-time credit
6 order was, in the words of Justice Gonthier, "retrospective in the sense that its purpose is
7 to remedy the imposition of rates approved in the past and found in the final analysis to
8 be excessive. Thus the question before this Court is whether the appellant has jurisdiction
9 to make orders for the purpose of remedying the inappropriateness of rates which were
10 approved by it in a previous interim decision⁷."

11 Justice Gonthier stated that the foregoing question "involves a determination of whether
12 rates approved by interim orders are inherently contingent as well as provisional or
13 whether the statutory scheme established by the Railway Act and the National
14 Transportation Act is so prospective that it precludes such a retrospective review of interim
15 rates approved by the appellant. Finally, it is also necessary to determine whether the
16 appellant has jurisdiction to order the reimbursement of amounts which exceed the
17 revenues actually collected as a direct result of the interim rates"⁸.

18 In the course of his reasons, Gonthier, J. notes that the CRTC derives its power to regulate
19 the telephone industry from ss 334-340 of the Railway Act and from ss 47 et seq. of the

⁷See section of judgment of Court titled, "(c) The Power to Revisit the Period During Which Interim Rates Were In Force", at p. 1749

⁸Ibid, p. 1749

1 National Transportation Act⁹. Gonthier, J., having reviewed these provisions, observed:

2 *"It is obvious from the legislative scheme set out in the Railway Act and the National*
3 *Transportation Act that the appellant has been given broad powers for the purpose*
4 *of ensuring that telephone rates and tariffs are, at all times, just and reasonable. The*
5 *appellant may revise rates at any time, either of its own motion or in the context of*
6 *an application made by an interested party. The appellant is not even bound by the*
7 *relief sought by such applications and may make any order related thereto provided*
8 *that the parties have received adequate notice of the issues to be dealt with at the*
9 *hearing. Were it not for the fact that the appellant has the power to make interim*
10 *orders, one might say that the appellant's powers in this area are limited only by the*
11 *time it takes to process applications, prepare for hearings and analyze all the*
12 *evidence. However, the appellant does have the power to make interim orders and*
13 *this power must be interpreted in light of the legislator's intention to provide the*
14 *appellant with flexible and versatile powers for the purpose of ensuring that*
15 *telephone rates are always just and reasonable."*

16 Gonthier, J. next found that there was "no clear provision" in either the Railway Act or
17 N.T.A. which addresses the issue presented on appeal and therefore found that it would
18 "be necessary to determine whether this power is derived by necessary implication from
19 the regulatory schemes set out in these statutes".

20 Justice Gonthier concluded that interim orders were inherently reviewable and remediable
21 and stated as follows:

⁹There are obvious similarities that may be observed in the provisions which Gonthier, J. examined and those which apply in the present matter. For example, s. 335 of the Railway Act is broadly similar to sections 70-71 of the P.U. Act; s. 340(1) is essentially similar to sections 3 a(i) of the EPCA and 73 of the P.U. Act; s. 52 of the N.T.A. finds its equivalent in s. 82 of the P.U. Act; as regards the power to make interim orders, s. 60(2) of the N.T.A. has its counterpart in s. 75 of the P.U. Act; as regards the power to review past decisions or orders, s. 66 of the N.T.A. has its counterpart in s. 76 of the P.U. Act.

1 *"I agree with Hugessen, J. and with the reasons of Laycroft, J. A. in Re Coseka where*
2 *he made a careful review of the previous cases. The statutory scheme established by*
3 *the Railway Act and National Transportation Act is such that one of the differences*
4 *between interim and final orders must be that interim decisions may be reviewed and*
5 *modified in a retrospective manner by a final decision. It is inherent in the nature*
6 *of interim orders that their effect as well as any discrepancy between the interim*
7 *order and the final order may be reviewed and remedied by the final order. I hasten*
8 *to add that the words 'further directions' do not have any magical retrospective*
9 *content. Under the Railway Act and National Transportation Act, final orders are*
10 *subject to 'further [prospective] directions' as well. It is the interim nature of the*
11 *order which makes it subject to further retrospective directions."*¹⁰ (emphasis
12 added)

13 Clearly, the "effect" of an interim order is open to review, it is submitted.

14 Justice Gonthier noted that "traditionally" interim rate orders are granted for the purpose
15 of "relieving the applicant from the deleterious effects caused by the length of the
16 proceedings". The Consumer Advocate submits that whether interim rates are approved
17 on the basis of preventing a utility from having serious financial difficulties or whether they
18 are granted, as here, due to concerns related to rate volatility effects arising from the
19 normal functioning of the Rate Stabilization Plan, they plainly remain subject to
20 retrospective review and remedial orders.

21 It bears noting that the respondent - Bell Canada - submitted that the Board lacked the
22 authority under its statutes to "revisit the period during which interim rates were in force".
23 This argument was soundly rejected with the Court holding that this power of review was
24 necessarily implied. The submission was addressed by Gonthier, J:

¹⁰Bell Canada (1989), page 1752:

1 *"The respondent argues that the power to revisit the period during which interim*
2 *rates were in force cannot exist within the statutory scheme established by the*
3 *Railway Act and the National Transportation Act because these statutes do not*
4 *grant such a power explicitly, unlike s. 64 of the National Energy Board Act, R.S.C.,*
5 *1985, c. N-7. The powers of any administration tribunal must of course be stated in*
6 *its enabling statute but they may also exist by necessary implication from the*
7 *wording of the act, its structure and its purpose. Although courts must refrain from*
8 *unduly broadening the powers of such regulatory authorities through judicial law-*
9 *making, they must also avoid sterilizing these powers through overly technical*
10 *interpretations of enabling statutes. I have found that, within the statutory scheme*
11 *established by the Railway Act and the National Transportation Act, the power to*
12 *make interim orders necessarily implies the power to revisit the period during which*
13 *interim rates were in force. The fact that this power is provided explicitly in other*
14 *statutes cannot modify this conclusion based as it is on the interpretation of these*
15 *two statutes as a whole."*¹¹

16 The Consumer Advocate submits that the Board has the 'power to revisit the period during
17 which interim rates were in force'. In this case rates were made interim "to be effective for
18 consumption on and after January 1, 2008"¹² and have remained interim to date. It would
19 therefore appear that the Board would have jurisdiction to revisit the period from January
20 1, 2008 onward¹³. The following statement from Bell Canada (1989) at page 1760 is
21 applicable in this regard:

22 *". . . However, the power to make interim orders necessarily implies the power to*
23 *modify in its entirety the rate structure previously established by final order. As a*

¹¹Bell Canada (1989), page 1756

¹²See An Interim Order of the Board No. P.U. 34 (2007)

¹³This conclusion would appear from Coseka Resources Ltd. v. Saratoga Processing Co. (1980) 126 D.L.R. (3d) 705 (Alta. C.A.), see paras. 31-33 and 38, where Laycroft, J.A. for the Court stated: "In my view the board was empowered by the provisions of s. 52 of the Public Utilities board Act to replace the rates in the interim order with different rates with effect from any time back to the date of the interim order."

result, it cannot be said that the rate review process begins at the date of the final hearing; instead the rate review begins when the appellant sets interim rates pending a final decision on the merits. As was stated in obiter in Re Eurocan Pulp & Paper co. with respect to a similar though not identical legislative scheme, the power to make interim orders effectively implies the power to make orders effective from the date of the beginning of the proceeding.”

There can be no complaint where a Board seeks to review an interim order. In *Coseka Resources Ltd.* (cited in the *Bell* case) the Court of Appeal stated:

“[36] It was also urged on behalf of Coseka that great injustice will result if interim rates once paid may subsequently be varied. . . Nevertheless, all consumers of a utility service must be aware that the rates in an interim order are subject to change and to determine their course of action upon the basis of that knowledge.” (emphasis added)

The same observation applies to this present matter, of course. Finally, Justice Côté, in the *ATCO Gas, Re* decision stated quite recently:

“... If the commission sets an interim rate which must be later adjusted and made final, then everything done in the meantime under that interim rate is tentative. That creates two needs. First, the utility company's accounts must be flagged to show that. Second, it may be informative and useful to keep track of and total any discrepancies building up in the meantime, such as the difference between anticipated gas costs and actual gas costs.”¹⁴

ATCO Gas, Re

The Board's jurisdiction in this case should also be considered in light of the recent ATCO

¹⁴ATCO Gas, Re (City of Calgary and Alberta Energy and Utilities Board and ATCO Gas and Pipelines Ltd.) 2010 Carswell Alta. 764 (Alta. C.A.), at para 163, Tab 5 of CA's Book of Authorities.

1 Gas decision of the Alberta Court of Appeal referred to above. The ATCO Gas decision
2 provides important insights into the jurisdiction of regulators in relation to deferral
3 accounts. Those insights are relevant in the context of the Rate Stabilization Plan.

4 At the heart of the ATCO Gas appeal was the Alberta Board's decision to approve ATCO's
5 application to correct balances in the Deferral Gas Account¹⁵ for its southern gas
6 distribution service territory. The proposed adjustment was sought because there had been
7 inaccurate reporting of gas being transported for other entities through ATCO's pipeline
8 network. In southern Alberta, the actual gas costs ATCO incurred from January 1999 to
9 February 2004 were understated. ATCO proposed that its present southern Alberta
10 customers would pay the shortfalls¹⁶ for these past imbalances, this being long after
11 reconciliation of DGA balances for these prior periods would have been done¹⁷. In the
12 Board's decision (Decision 2005-036) it reviewed the history of the DGA/GCRR process.
13 The majority of the Court of Appeal provided an encapsulation of the Board's decision in
14 these terms:

15 *"16. The Board defined the central issue as 'whether or not it is appropriate for the*
16 *DGA to be a vehicle of all and any updates and corrections other than for*

¹⁵At para 6 of the judgment, the majority refers to the Board's description of the GCRR/DGA:

"The effect of a Gas Cost Recovery Rate/Deferred Gas Account (GCRR/DGA) mechanism is to spread the cost of gas acquisition and management over a forecast period, keeping consumer gas prices stable during that period. The use of a DGA to keep track of differences between actual and forecast gas costs ensures that customers pay no more and no less than actual costs incurred on their behalf. . ."

¹⁶The shortfall sought was \$11.6 million (see para 85 of decision)

¹⁷see para 7 of decision - "Reconciliation of DGA balance would be done on a three-month rolling basis"

price and actual gas sales (or deliveries);: p. 10.

17. *In reviewing the history of the DGA/GCRR process, the Board noted that the DGA/GCRR process was originally approved to provide a method for adjusting for gas price volatility and that, by April 2002, the process was refined so that monthly (not seasonal) reconciliations were made: p. 10. Over time, DGAs were used without complaint to adjust gas rates for reasons unrelated to price volatility, including measurement corrections. While it had become a 'relatively common occurrence' for DGAs to be used for making prior period adjustments, most were made 'within a reasonable time period': Id.*

18. *The Board was troubled by the evolution of DGAs into a 'catch all' method for fixing all possible gas cost errors and by the timing of the adjustments. It criticized ATCO for the design errors in the System report and its delay in detecting them, reinforcing its expectation that ATCO's internal controls should detect material errors in a timely way.*

19. *Notwithstanding these misgivings, the Board permitted ATCO to recover eighty-five percent of the amounts it sought through adjustments to its DGA."*

The City of Calgary obtained leave to appeal on the following question:

*"Whether the Board erred in law or jurisdiction by allowing for the recovery, in 2005, of costs or expenses that were incurred between 1999 and 2004."*¹⁸

The appeal was heard by Justices Hunt, Paperny and Côté. Hunt, J.A. (with whom Paperny, J.A. concurred) agreed with Côté, J.A. that the orders should be vacated, but reached that conclusion "for different reasons". In a nutshell¹⁹, the majority held that the

¹⁸see para 15 of Decision

¹⁹See paras 62 and 65; similarly Côté, J.A. held that he did "not find want of jurisdiction or power on the point of the Commission. . . Instead I find a legal statutory prohibition (statutory

1 Board had the jurisdiction to make the orders about the use of the DGA and did not
2 thereby engage in prohibited ratemaking, however the decision was reviewable on the
3 reasonableness standard²⁰ and the decision breached that standard. Having assessed the
4 Board's decision using the Dunsmuir-reasonableness test, the majority stated at para 71:

5 “[71] In summary, the Board's own analysis highlights the accumulation of factors
6 that make unreasonable its decision to allow ATCO to recover eighty-five
7 percent of the transportation imbalances through the DGA. Unlike most
8 previous uses of DGAs, these charges did not result from gas price volatility.
9 Nor did they resemble other past uses of DGAs where errors were
10 attributable to measuring equipment problems and where there had been no
11 suggestion of utility fault. Here the failure to levy appropriate gas charges
12 was entirely due to deficiencies within ATCO's own system, exacerbated by
13 a long delay in discovering the problem. ATCO's destruction of data made
14 data verification impossible. As a result of the delays, at least some who were
15 not consumers when the problems originated would have to absorb the costs
16 of ATCO's carelessness. Even though this was not prohibited ratemaking per
17 se, the long delays gave rise to inter-generational equity issues which lie at
18 the heart of the prohibition against retrospective ratemaking.”

19 Madam Justice Hunt's reasons for the majority provide an analytical framework that is
20 useful in relation to the analysis of issues that the Board is considering in this proceeding.

and judge-made).” [see para 174] Côté, J.A. found that [para 183] “This charge to southern customers to reimburse ATCO for its various account deficiencies is illegal retroactive rate-making. . .”

²⁰The majority applied the reasonableness standard from New Brunswick (Board of Management) v. Dunsmuir, 2008 SCC 9, [2008] 1 SCR 190 (SCC) at para 47: “Reasonableness is a deferential standard. . . A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. . . [R]easonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defeasible in respect of the facts and law.”

1 *Epcor Generation Inc. v. Alberta (Energy & Utilities Board)*. 2003 ABCA
2 374 (Alta C.A.) at para 2, . . .

3 {D}eferral accounts. . . are accepted regulatory tools available as part of. . .
4 rate settings powers. . . [they]. . . 'enable a regulator to defer consideration
5 of a particular expense item or revenue that is incapable of being forecast
6 with certainty for the test year'. . . They have traditionally protected against
7 further eventualities, particularly the difference between forecasted and
8 actual costs and revenues, allowing a regulator to shift costs and expenses
9 from one regulatory period to another."

10 It is submitted that the foregoing description of deferral accounts captures the essence of
11 the Rate Stabilization Plan²².

12 Still to be answered in the ATCO Gas appeal was the question, "What is the source of the
13 Board's jurisdiction to permit the use of DGAs as a regulatory tool?" Hunt, J.A. stated
14 [para 41] that decisions out of the Supreme Court of Canada "suggest that the Board's
15 authority over DGAs flows from its power to set just and reasonable rates and a fair rate
16 of return on rate base found in sections 36 and 37 of the Gas Utilities Act". Hunt, J.A.
17 concluded that "the use of DGAs is required if the Board is to regulate utilities effectively"
18 and found [para 44] that the Board's rate setting authority and its ability to establish
19 deferral accounts were at the very core of the Board's competence. The question was
20 answered.

²²See Appendix A to Hydro's Application of 30 June 2009, "Review of the Operation of the Rate Stabilization Plan" dated 30 June 2006, p. 2 (Background Section): "Hydro's RSP was first established in 1986 for Newfoundland Power (NP) and the Island Industrial Customers (IC) to smooth rate impacts and test year Cost of Service (COS) estimates for: (i) hydraulic production, (ii) No. 6 fuel cost used at Hydro's Holyrood generating station, and (iii) customer load (NP and IC)"

Hunt, J.A. next turns to issue 2 - Did the Board retroactively change rates or did its decision have a prohibited effect? Hunt, J.A. summarized the Court's opinion succinctly at para 45:

"[45] Calgary argues that by permitting ATCO to use the DGA to make adjustments going back several years the Board engaged in prohibited ratemaking because, in the result, ATCO's present consumers must make up for a past shortfall. I do not agree. I have already explained why I think its power to set just and reasonable rates allowed it to authorize the use of DGAs. It follows that its further orders about how to use a DGA did not constitute prohibited ratemaking. As discussed at paras 69-71, however, this does not mean that the effect of its decision on future ratepayers is irrelevant in determining whether the Board reasonably exercised its powers over the DGA."

In analyzing the "retroactivity" issue [paras 45-61], the Court canvassed several court decisions, including Bell Canada (1989) and the Supreme Court of Canada's recent Bell Aliant decision²³. It is noteworthy that the City of Calgary recognized that the Bell Canada (1989) decision posed an obstacle to a successful attack on the Board's decision, and therefore sought to distinguish that decision as involving "interim rates" rather than "final rates"²⁴.

The Bell Aliant decision as noted by Hunt, J.A. [para 53] concerned deferral accounts. Hunt, J.A. stated:

[53] "In Bell Aliant, the Supreme Court also upheld a CRTC decision to order the disposition of funds that had accumulated in a deferral

²³Bell Canada v. CRTC (2009) SCC 40 (SCC)

²⁴See para 54 of ATCO Gas

1 account. The Court rejected the argument that this constituted
2 retrospective rate-setting because the rates had already been finalized.
3 Abella J. pointed out that it was known at the outset that the CRTC
4 would make subsequent orders about how to use the balance in the
5 deferral accounts. At para. 63 she added (citations omitted and
6 emphasis added):

7 In my view, the credits ordered out of the deferral
8 accounts in the case before us are neither retroactive nor
9 retrospective. They do not vary the original rate as
10 approved, which included the deferral accounts, nor do
11 they seek to remedy a deficiency in the rate order
12 through later measures, since these credits or reductions
13 were contemplated as a possible disposition of the
14 deferral account balances from the beginning.
15 These funds can properly be characterized as
16 encumbered revenues, because the rates always
17 remained subject to the deferral accounts mechanism
18 established in the Price Caps Decision. The use of
19 deferral accounts therefore precludes a finding of
20 retroactivity or retrospectivity. Furthermore, using
21 deferral accounts to account for the difference between
22 forecast and actual costs and revenues has traditionally
23 been held not to constitute retroactive rate-setting...

24 The majority in ATCO did not need to resolve the issue whether the rates in question were
25 final or interim - the Court's conclusion was that "whether the rates should be
26 characterized as final or interim, the use of the DGA in this case did not involve prohibited
27 ratemaking". The basis for this conclusion was as follows:

28 "57. Both *Bell Canada 1989* and *Bell Aliant* (which concerned deferral accounts
29 rather than interim rates) illustrates the same preoccupation: were the
30 affected parties aware that the rates were subject to change? If so, the
31 concerns about predictability and unfairness that underlie the prohibitions
32 against retroactive and retrospective ratemaking become less significant.

1 58. *Were these parties aware that gas rates were potentially subject to change*
2 *through the use of the DGA? If so, whether the rates are characterized as*
3 *interim or final, the principles in Bell Aliant govern.*

4 59. *The history of DGAs demonstrates that affected parties knew they would be*
5 *used from time to time to alter gas rates based on later, actual gas costs.*
6 *Indeed, the Board so found as a fact in the Limitations Decision at p. 4. It*
7 *adopted the reasoning from that decision in the Reconsideration Decision.*
8 *The Board's fact findings are not appealable: Alberta Energy and Utilities*
9 *Board Act, s. 26(1).*

10 60. *Reconciliation of the DGA/GCRR would sometimes benefit consumers and*
11 *sometimes not. Gas rates sometimes changed because of the lack of*
12 *predictability (volatility) in gas prices and sometimes from other factors such*
13 *as measuring errors. Whatever the cause, the objective was to ensure that the*
14 *consumer paid the actual cost of the gas. This legitimate object was accepted*
15 *by all parties. It strengthened the utility regulatory system by ensuring that*
16 *the utility received a fair rate of return on its rate base.*

17 61. *Therefore, whether the rates should be characterized as final or interim, the*
18 *use of the DGA in this case did not involve prohibited ratemaking."*

19 What is important to appreciate in the context of the present preliminary hearing into the
20 Board's jurisdiction is that the Court in ATCO Gas did not find a want of jurisdiction or
21 authority on the part of the Board in approving the company's application to correct
22 balances in the DGA in respect of actual gas costs incurred several years earlier even
23 though as stated by Hunt, J.A., "it is manifest that the costs approved in the decisions
24 under appeal did not fall within the original purpose of the DGA, namely, adjusting for gas
25 price volatility"²⁵. Indeed, as the Alberta Board acknowledged, the DGA "was never set
26 up with the intention of permitting all prior accounting errors, particularly those that

²⁵ATCO Gas, para [67]

1 would have been subject to ATCO's management and control"²⁶. Furthermore, the Court
2 stated "Nor did they [the charges in question] resemble other past uses of DGAs where
3 errors were attributable to measuring equipment problems and where there had been no
4 suggestion of utility fault"²⁷.

5 Conclusions on the Jurisdictional Questions

6 In the case of the Rate Stabilization Plan, it was initially established effective January 1, 1986
7 with the objective of providing rate stability to customers and providing a mechanism to
8 eliminate volatility in Hydro's revenue requirement due to events beyond its control. It
9 was specifically designed to smooth rate impacts for certain variations between actual
10 results in test year COS estimates for, amongst other things, **customer load**.

11 It is not disputed that the Island Industrial Customer load has decreased significantly since
12 rates were last set for Industrial Customers in 2007.

13 It is further not disputed that the IC load reduction has resulted in a significant balance
14 accumulating in the Rate Stabilization Plan.

15 Hydro's successive applications to the Board have repeatedly stated that the projected rate
16 changes for the ICs as a result of the operation of the RSP may cause significant rate
17 volatility due to the change in the RSP rate and a significant IC class load change.

²⁶ATCO Gas, para [69]

²⁷ATCO Gas, para [71]

1 This Board has stated in No. P.U. 34 (2007) that granting approval, on an interim basis, of
2 a Schedule of Rates for Industrial Customers that maintains existing rates is appropriate
3 and reasonable in the circumstances. No appeal has been taken of that Interim Order of
4 the Board questioning the Board's jurisdiction or authority to have so ordered. Likewise,
5 no appeals have been taken in respect of the Board's subsequent orders.

6 In the Consumer Advocate's submission, this Board has the authority and jurisdiction as
7 a necessary incident of its rate-making authority to issue an order which does any of the
8 following:

- 9 (i) determines how the RSP operated, including the rate charged to Industrial
10 Customers, effective from and after January 1, 2008;
- 11 (ii) determines the balance(s) in the RSP and how these balances are allocated to
12 customers or customer classes.

13 In relation to the particular questions in Hydro's correspondence of June 2, 2010, the
14 following is provided:

- 15 • **Does legislation or common law give the Board any specific relevant authority or**
16 **alternatively, restrict the Board's authority**

17 Neither the Public Utilities Act nor the EPCA contains express statutory provisions
18 governing this matter. However, the Board's authority over deferral accounts and the Rate
19 Stabilization Plan, in particular, flows from its power to set just and reasonable rates and
20 a fair return on rate base. The reasoning of the ATCO Gas, Re case is illustrative of this
21 proposition.

1 The caselaw canvassed in this submission suggests that the use of deferral accounts
2 precludes a finding of retroactivity or retrospectivity. Indeed, the Court of Appeal of
3 Alberta was unanimous in finding that the Board had the jurisdiction to make an order
4 permitting recovery of expenses incurred years before regardless whether the rates in effect
5 in these prior periods were interim or final.

6 On the other hand, if this matter is approached on an “interim order” basis, the
7 jurisprudence would suggest that there is a restriction on the Board’s authority. That
8 restriction is that the Board’s authority to review and replace the Industrial Customers’
9 rates in the interim order would not extend to a time prior to the date the rates became
10 interim. Having said that, there is still the fact that amounts accrued in the RSP in 2007
11 while rates were final and that due to Order No. P.U. 34 (2007) no RSP adjustments were
12 made as would otherwise have been the case on January 1, 2008. As a result, there remains
13 the question of the disposition of amounts accrued during 2007. Therefore an “effect” of
14 the Interim Order is that amounts accrued in 2007 have not been dealt with as a
15 consequence of the rates having been Interim.

16 In the Bell Canada (1989) case, the Court (p. 1752) stated that it was inherent in the nature
17 of interim orders that “their effect” as well as any discrepancy between the interim order
18 and the final order may be reviewed and remedied by the final order. It would appear that
19 the Board therefore has the jurisdiction to deal with the disposition of the amounts accrued
20 during 2007. Certainly, the Board will want to consider all relevant circumstances in
21 exercising its jurisdiction. While on the one hand it can be said that during 2007 rates were
22 final, on the other hand rates were made interim on January 1, 2008 precisely because the
23 RSP Plan Balance which was to be collected in the RSP component of the rate raised
24 volatility concerns. At this stage, however, it is not necessary to go further than the

1 question of jurisdiction.

- 2 • **What would generally accepted sound public utility practice as set out in s. 4 of**
3 **the EPCA require?**

4 The Consumer Advocate understands that this question is not intended to invite argument
5 on what the Board “should do” at the end of the day, but rather, whether the principles of
6 regulation affect jurisdiction. At this stage, that approach to this question is necessary
7 because the question of what generally accepted sound public utility practice would
8 require is, at least in part, a matter of evidence.

9 Given these parameters, it is clear that s. 4 of the EPCA mandates that the Board in carrying
10 out its duties under the P.U. Act and the EPCA “shall implement the power policy declared
11 in s. 3, and in doing so shall apply tests which are consistent with generally accepted sound
12 utility practice.”

13 There has been judicial recognition in this province that the Board has a broad discretion,
14 and hence a large jurisdiction, in its choice of methodologies and approaches to be adopted
15 to achieve the proposes of the legislation and to implement provincial power policy.
16 Madam Justice Cameron stated in a 2004 decision:

17 *“The purpose of the Electrical Power Contract Act, 1994 must also be considered.*
18 *The Public Utilities Act and the Electrical Power Control Act, 1994 provide a*
19 *scheme for the regulation of electrical utilities which requires the Board to address*
20 *policy issues and to balance interests. They operate in tandem. This factor suggests*

1 *a more deferential standard to the Board's decisions.*"²⁸

- 2 • **Are there any concerns in relation to vested rights, i.e. does the language of the**
3 **RSP create a right/obligation in each of the customers or customer classes? If so,**
4 **at what point does this right/obligation accrue? Does this mean that credits/debits**
5 **allocated to each customer in accordance with the plan are the responsibility of**
6 **or to the benefit of customers in the class at the time of the accumulation or does**
7 **the Board have the jurisdiction to order alternative disbursements of the**
8 **balances?**

9 The Consumer Advocate submits that the RSP is a deferral account mechanism which is
10 an example of a regulatory tool that is available to a regulator as part of its rate-setting
11 powers. A customer or customer class would have no proprietary or titular right or
12 ownership interest in any assets or liabilities that may accrue in the RSP. Certainly, if the
13 customer or customer class were to have such a right or interest in any of the assets or
14 liabilities, the Board's regulation and approval of rates, tolls and charges as well as its
15 ongoing general supervision of public utilities in the province would be impermissibly
16 fettered. Moreover, it would mean as a practical matter that the Board would not be able
17 to alter the RSP or order a disposition of assets or liabilities within the plan, otherwise than
18 in accordance with the consent of plan participants. Such a result would be absurd.

19 The Consumer Advocate submits that the Board clearly has the jurisdiction to order
20 alternative disbursements of the plan balances. Whilst not intending in this submission to

²⁸Labrador (City) v. Newfoundland and Labrador Hydro Inc. (2004), 241 Nfld. & PEIR
81 (NL. C.A.), Tab 6 of the CA's Book of Authorities.

1 state how this jurisdiction ought to be exercised, it would appear that the Board in
2 exercising the jurisdiction should consider the exercise of its jurisdiction in the context of
3 the objectives and policies of the legislation and in a manner that amounts to a reasonable
4 balance between the competing interests involved²⁹.

- 5 • **Does the issuance of Order Nos. P.U. 34 (2007), P.U. 37 (2008) and P.U. 6 (2009), the**
6 **filing of Hydro's Application on June 30, 2009, or any other order of the Board**
7 **impact the jurisdiction of the Board?**

8 In the first place, the interim orders of the Board impact the jurisdiction of the Board as
9 regards how far back the Board may review these interim orders and their effects. The
10 jurisprudence in relation to interim orders indicates that the Board may replace the rates
11 in the interim order with different rates with effect from any time back to the date of the
12 interim order. One should be mindful as well that there is jurisdiction in the Board to do
13 something other than replace the rates in the interim order with different rates. That was
14 precisely the situation in Bell Canada (1989)³⁰. The point still remains that the date of the
15 interim order determines how far back the review can take place. Gonthier, J. stated,

16 *"As a result, it cannot be said that the rate review process begins at the date of the*
17 *final hearing; instead the rate review begins when the appellant sets interim rates*

²⁹Stated Case, per Green, J.A. at para [144]

³⁰Bell Canada (1989) at page 1749 where the SCC stated:
"As indicated above, the appellant has examined the period during which interim rates were in force i.e. from January 1, 1985 to October 14, 1986, for the purpose of ascertaining whether these interim rates were in fact just and reasonable, the one-time credit order now contest before this Court was made in order to remedy this situation. Thus, the effect of Decision 86-17 was not retroactive in nature, since it does not seek to establish rates to replace or be substituted to those which were charged during that period."

1 pending a decision on the merits.³¹ (emphasis added)

2 The Consumer Advocate would also wish to address any impact on the Board's jurisdiction
3 that is occasioned by the fact that the Order in P.U. 34 2007 approved on an interim basis
4 "the Island Customer rates as attached in Schedule A", whereas subsequently in Order P.U.
5 37 (2008) "[T]he continuation of rates, rules and regulations. . ." were approved on an
6 interim basis. The Consumer Advocate sees no practical difference between the two
7 interim orders. The Industrial Customers' "rates" are inextricably linked to the RSP rules.
8 The Industrial Customer rates as attached in Schedule A to Interim Order P.U. 34 (2007)
9 are expressly stated to be "Subject to RSP Adjustment":

10 "RSP Adjustment refers to all applicable adjustments arising from the operation of
11 Hydro's Rate Stabilization Plan, which levelizes variations in hydraulic production,
12 fuel cost, load and rural rates." (emphasis added)

13 Certainly, the EPCA provides an expansive definition of "rates" so that "rates" include not
14 only prices, charges and tolls but also "conditions applying to prices for power", thus
15 "rates" would encompass the provisions of the RSP.

16 In any event, it is clear from Hydro's 20 December Application that the basis for Hydro's
17 Application was that projected rate changes and volatility as a result of the normal
18 operation of the RSP made interim rates reasonable and prudent. In these circumstances,
19 it would be unreasonable to construe the words "Island Customer rates as attached in
20 Schedule A" as not including the RSP rules. Board Orders are themselves "regulations"
21 by virtue of Section 2(1)(b) of the Interpretation Act and as such are to "be considered

³¹Bell Canada (1989), page 1761

1 remedial and shall receive the liberal construction and interpretation that best ensures the
2 attainment of the objects of the Act, regulation or provision according to its true
3 meaning."³²

4 **RESPECTFULLY SUBMITTED** this 9th day of June, 2010.



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³²Interpretation Act RSNL 1990 Chapter I-19, s. 16, Tab 7 of the CA's Book of Authorities.

Schedule "A"

June 2, 2010

Board of Commissioners of Public Utilities
Prince Charles Building
120 Torbay Road, P.O. Box 21040
St. John's, NL
A1A 5B2

ATTENTION: Ms. Cheryl Blundon
Director of Corporate Services & Board Secretary

Dear Ms. Blundon:

Re: An Application by Newfoundland and Labrador Hydro (Hydro) concerning the Rate Stabilization Plan (RSP) components of the rates to be charged to Industrial Customers

This is further to the meeting of counsel for the various parties in this matter held at the Board's offices on May 20, 2010. At that meeting it was agreed that for the purposes of better defining and deciding issues as to the Board's jurisdiction over certain elements of this Application, preliminary issues would be stated to be determined by the Board. The parties have been consulted by the Board's counsel and through that process the preliminary issues have been identified. Hydro therefore asks that the Board decide the following issues:

Does the Board have the jurisdiction to issue an order which changes how the Rate Stabilization Plan (RSP) operated before the date of the order and, if so, does this jurisdiction extend to any aspect of the operation of the RSP, including the rate charged to customers, the determination of the balance(s) in the RSP, and how these balances are allocated to customers or customer classes? In particular:

- Does legislation or common law give the Board any specific relevant authority or alternatively, restrict the Board's authority?
- What would generally accepted sound public utility practice as set out in s. 4 of the EPCA require?
- Are there any concerns in relation to vested rights, i.e. does the language of the RSP create a right/obligation in each of the customers or customer classes? If so, at what point does this right/obligation accrue? Does this mean that credits/debits allocated to each customer in accordance with the plan are the responsibility of or to the benefit of customers in the class at the time of the accumulation or does the Board have the jurisdiction to order alternative disbursements of the balances?

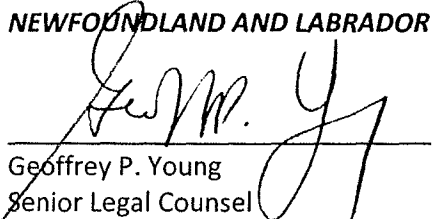
- Does the issuance of Order Nos. P.U. 34(2007), P.U. 37 (2008), P.U. 6 (2009), the filing of Hydro's application on June 30, 2009, or any other order of the Board impact the jurisdiction of the Board?

We understand that the Board will receive written briefs on this matter from the parties on June 9, 2010 and that a hearing will be held at the Board on this matter on June 14, 2010.

We thank the Board for its attention to this matter.

Yours truly,

NEWFOUNDLAND AND LABRADOR HYDRO



Geoffrey P. Young
Senior Legal Counsel

GPY/jc

cc: Gerard Hayes – Newfoundland Power
Paul Coxworthy – Stewart McKelvey Stirling Scales
Joseph S. Hutchings, Q.C. – Poole Althouse
Thomas Johnson – Consumer Advocate
Colm St. Roch Seviour – Abitibi Consolidated
Dan Simmons – Ottenheimer Baker