

POOLE ALTHOUSE

Barristers & Solicitors



D. Paul Althouse, Q.C.*
Jamie Merrigan
Cillian D. Sheahan

Joseph S. Hutchings, Q.C.
Dean A. Porter
Janet M. Christian

George L. Murphy
J. Annette Bennett

Western Trust Building
49-51 Park Street
P.O. Box 812
Corner Brook, NL
Canada
A2H 6H7
Telephone: (709) 634-3136
Facsimile: (709) 634-8247/9815

Edward P. Poole, Q.C., Retired

*A Master of the Supreme Court

Direct Line: 637-6425
e-mail: jhutchings@pa-law.ca

October 5, 2006

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

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

**Re: Application of Newfoundland and Labrador
Hydro for Approval of Recovery of Costs of
No. 6 Fuel not exceeding 1% Sulphur**

Dear Ms. Blundon:

These are the submissions of the Industrial Customers in respect of the above noted Application as requested in your letter of September 29, 2006.

In the earlier Application which resulted in the issuance of Order No. P.U. 16 (2006), the Industrial Customers expressed concern as to the manner in which Newfoundland and Labrador Hydro manages its relationship with the Department of Environment and Conservation as that Department's role relates to enforcement of environmental legislation. Active discussion and a vigorous defence of the right to minimize the costs incidental to environmental protection issues are a normal part of commercial enterprise in this country and do not reflect negatively on the sensitivity of the enterprise to environmental issues.

While Hydro must clearly be in compliance with applicable environmental standards, it is also required to provide electricity to consumers at the lowest cost consistent with reliable service. Neither of these statutory responsibilities trumps the other and each must be given its proper weight. In its responsibility to administer the *Public Utilities Act*, under which the least cost obligation is imposed upon Hydro, the Public Utilities Board needs to be vigilant in support of that obligation, as it was in the issuance of Order No. P.U. 16 (2006), and Hydro needs to be cognizant of this obligation at all times.

It is now clear that on and after September 14, 2006, Hydro is no longer permitted to burn fuel which contains more than 1% sulphur by weight. This represents an increase in one specific expense of Hydro and, being mandated by legislation, must be taken to be a reasonable expense. Accordingly, Hydro is entitled to recover that expense in its rates.

It is, obviously, not the practice for Hydro to apply to the Board on every occasion when any of its expenses increase. Its rates produce a certain rate of return and when all the interactions of expense increases, expense decreases, interest costs, sales, production efficiencies and a whole host of other items combine to reduce Hydro's rate of return to unacceptably low level, it seeks an increase in rates. Given the significance of the cost of No. 6 fuel in Hydro's overall expenses, it is perhaps not unreasonable to treat this expense separately, especially in light of the existence of the Rate Stabilization Plan which is largely directed toward fuel costs.

The principle which must, however, be respected is that rate making is prospective and not retroactive. It is not necessary for this purpose to consider whether the Board has jurisdiction to impose rates retroactively. Even if such jurisdiction exists, it would only be exercised in the most extraordinary of circumstances in respect of huge dollar increases which were sudden and wholly unexpected. As this issue has been live for a considerable period of time and already formed the subject matter of a hearing before the Board, there could be no suggestion that any retroactivity needs to be considered here.

Accordingly, whatever change the Board may choose to make in Hydro's rates under this Application can take effect only upon the date of the order made pursuant to the Application.

The parties are aware that Hydro has been buying lower sulphur fuel since January, 2006 and would have consumed some of that fuel as of this date. To the date hereof, Hydro has no authority to recover through the RSP the additional costs associated with the purchase or consumption of 1% sulphur fuel and the Board should confirm that no such recovery has taken place. While the Industrial Customers accept that the additional cost of consumption of 1% sulphur fuel is appropriately recovered by Hydro as and when an order is issued, the Board should ensure that no such recovery occurs prior to the date of its order pursuant to this Application. Should it happen that any such charge has been made to the RSP, the Board will need to direct Hydro to reverse that charge and apply the appropriate credit.

We look forward to the Board's disposition in this Application.

Yours very truly,

POOLE ALTHOUSE



Joseph S. Hutchings

JSH/sh

Cc Mr. Geoff Young
Mr. Tom Johnson
Mr. Gerard Hayes
Mr. Paul Coxworthy