NEWFOUNDLAND AND LABRADOR
BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

AN ORDER OF THE BOARD

NO. P.U. 9(2014)

IN THE MATTER OF the Electrical Power Control Act, 1994, SNL 1994, Chapter E-5.1 (the "EPCA") and the Public Utilities Act, RSNL 1990, Chapter P-47 (the "Act"), as amended, and regulations thereunder; and

IN THE MATTER OF an application by Newfoundland and Labrador Hydro ("Hydro") for approval of amendments to the Rate Stabilization Plan rules and a refund to Newfoundland Power Inc. ("Newfoundland Power") customers and certain Hydro Rural customers.

Background

On April 4, 2013 the Lieutenant Governor in Council, pursuant to section 5.1 of the EPCA and section 39 of the Hydro Corporation Act, 2007, issued OC2013-089, OC2013-090 and OC2013-091 in relation to Hydro's general rate application, the phase-in of rates for Island Industrial customers and a refund to ratepayers. OC2013-089 directs the Board of Commissioners of Public Utilities (the "Board") that, among other things, the balance in the January 1, 2007 to June 30, 2013 accumulated Load Variation component of the Rate Stabilization Plan (the "Rate Stabilization Plan Surplus") is to be used to credit the Island Industrial customers' Rate Stabilization Plan with $56.5 million effective June 30, 2013. The remaining balance in the Rate Stabilization Plan Surplus is to be transferred to the credit of Newfoundland Power's Rate Stabilization Plan. On July 16, 2013 OC2013-089 and OC2013-090 were amended by OC2013-207 and OC2013-208 respectively such that the effective date for the Island Industrial customers' balance transfer was August 31, 2013 and the amount to be transferred was reduced to $49 million.

OC2013-089 as amended also directs the Board that Hydro's general rate application process include a Rate Stabilization Plan surplus refund plan to ratepayers. Specifically with respect to the refund to ratepayers the direction states:

6) Newfoundland and Labrador Hydro's General Rate Application process shall include a Rate Stabilization Plan surplus refund plan to ratepayers. The refund plan shall comprise direct payments or rebates to ratepayers and shall not be in the form of an electricity rate adjustment. This refund plan will exclude Island Industrial customers who will receive...
Rate Stabilization Plan surplus funds through the three year phase-in of new rates. The Board of Commissioners of Public Utilities shall make the final determination on the details of the refund to remaining ratepayers;

7) Newfoundland Power’s portion of the Rate Stabilization Plan Surplus shall be distributed as a direct payment or rebate to its ratepayers and shall not be in the form of an electricity rate adjustment; and...

OC2013-091 directs Hydro that:

2) during its General Rate Application process, it shall file a Rate Stabilization Plan surplus refund to ratepayers. The refund shall be a direct payment or rebate to ratepayers and shall not be in the form of an electricity rate adjustment. This refund plan will exclude Island industrial customers who will receive Rate Stabilization Plan surplus funds through the three year phase-in of new rates; and...

On July 30, 2013, in compliance with OC2013-091, Hydro filed an application requesting approval of, among other things, changes to the Island Industrial customer rates and to the Rate Stabilization Plan rules. Hydro also filed a general rate application on July 30, 2013. On August 30, 2013 the Board issued Order No. P.U. 26(2013) approving, effective August 31, 2013, the credit of $49 million to the Island Industrial customers’ Rate Stabilization Plan and the transfer of the remaining balance in the Rate Stabilization Plan Surplus to the credit of the Newfoundland Power Rate Stabilization Plan. The Board did not approve Hydro’s other proposals in relation to rate changes for the Island Industrial customers, leaving these proposals to be addressed in a subsequent Order of the Board.

On September 30, 2013 the Board issued Order No. P.U. 29(2013) addressing the remaining proposals in Hydro’s July 30, 2013 application. The Board finalized rates up to August 31, 2013 for Hydro’s Island Industrial customers and Hydro’s rate to Newfoundland Power. The Board did not approve the proposed changes to the Rate Stabilization Plan rules to phase-in Island Industrial customer rates and rates for these customers were continued on an interim basis. The Board also accepted Hydro’s proposal to segregate within the Rate Stabilization Plan the August 31, 2013 plan balances related to the load variation for both the Island Industrial customers and Newfoundland Power. Hydro was directed to file revised interim Rate Stabilization Plan rules effective September 1, 2013 reflecting the findings of the Board. This application was filed on October 18, 2013 and approved in Order No. P.U. 32(2013).

The amount of the Rate Stabilization Plan Surplus as of August 31, 2013 was $161.6 million. The allocation of the $49 million to the Island Industrial customers’ Rate Stabilization Plan on August 31, 2013 resulted in a credit of $10.9 million in the Island Industrial customers’ Rate Stabilization Plan. The remaining Rate Stabilization Plan Surplus balance of $112.6 million is segregated into a separate plan referred to as the Newfoundland Power Rate Stabilization Plan Surplus (“NP RSP Surplus”).

The Application

On October 31, 2013, pursuant to OC2013-091, Hydro filed an application for approval of a Rate Stabilization Plan surplus refund plan (the “Application”). A minor amendment to this
Application was filed on November 7, 2013. In the Application Hydro requests an Order of the Board approving:

a) That the NP RSP Surplus refund be paid to Newfoundland Power, and to those rural customers whose rates are based on the rates charged by Newfoundland Power.

b) That the NP RSP Surplus be refunded to Newfoundland Power customers on their April 2014 electricity bills and be based on their total energy consumption on bills issued during the period January 2013 to December 2013.

c) That Hydro’s Rural customers, whose rates are based on Newfoundland Power rates, receive a similar refund on their April 2014 electricity bills based on their total energy consumption on bills issued during the period January 2013 to December 2013.

d) That the refund to Rural customers be funded from the NP RSP Surplus.

e) That any net refund to Newfoundland Power’s customers and Hydro’s customers be in the form of a credit to each customer’s account.

The Application was copied to Newfoundland Power, the Consumer Advocate, and Island Industrial customers (Corner Brook Pulp and Paper, North Atlantic Refining Limited and Teck Resources Limited, Praxair Canada Inc., and Vale Newfoundland and Labrador Limited).

On November 5, 2013 the Board forwarded the Application to the Intervenors in Hydro’s general rate application. Newfoundland Power and the Consumer Advocate notified the Board that they wished to participate in the Application. The Industrial Customer group of Corner Brook Pulp and Paper Limited, North Atlantic Refining Limited and Teck Resources Limited advised that they would not be participating in the Application. The Innu Nation and the Towns of Labrador City, Wabush, Happy Valley-Goose Bay and North West River also advised that they would not be participating. The Board did not receive any correspondence from the other general rate application Intervenors.

On November 14, 2013 the Board wrote the parties to the Application requesting submissions on the issue of whether the Application should be addressed in Hydro’s general rate application or should proceed as a separate matter. On November 27, 2013 the Board determined that the Application involves a discreet issue which does not require the resolution of other issues flowing from Hydro’s general rate application. The Board found that addressing this matter before the completion of the general rate application would allow for the early distribution of the refund. The Board did note, however, that if it appears that, as the matter progresses, the consideration of issues should be brought together with other matters in the general rate application, the schedule and process would be appropriately adjusted.

On December 4, 2013 the Board set a schedule for the review of the Application. On January 28, 2014 the Board revised this schedule to allow for the filing of additional requests for information ("RFIs") and evidence. A total of 95 RFIs were issued to Hydro and one RFI was issued to Newfoundland Power. On February 24, 2014 Newfoundland Power filed evidence in relation to the Application proposals.
On February 27, 2014 the Board wrote the parties advising that it would give early consideration to Hydro’s proposal to give a refund to certain Rural customers. In its letter the Board noted that there is an outstanding ruling expected from the Canada Revenue Agency (“CRA”) in relation to the HST treatment of the proposed refund which must be resolved before the matter can be concluded. The Board advised that, to provide clarity and focus to the remaining issues, it would address Hydro’s proposals in relation to the refund to its Rural customers in advance of the other issues in the Application. The Board requested that the parties’ submissions address Hydro’s proposals that:

i) the NP RSP Surplus refund be apportioned to Newfoundland Power and to Hydro’s Rural customers whose rates are based on the rates charged by Newfoundland Power;

ii) Hydro’s Rural customers whose rates are based on the rates charged by Newfoundland Power, receive a similar refund to Newfoundland Power’s customers; and

iii) the refund to Hydro’s Rural customers be funded from a portion of the NP RSP Surplus.

The Board advised that it would establish the process for the remainder of the issues in the Application when Hydro confirms that it has received the ruling of the CRA.

Written submissions were filed by the Consumer Advocate and Newfoundland Power on March 7, 2014. Hydro filed a reply submission on March 11, 2014. This Decision and Order addresses the Board’s findings on Hydro’s proposals in relation to the refund to its Rural customers. The remaining issues in the Application, including the calculation methodology and recovery of administrative costs, will be addressed in a subsequent Order of the Board.

Evidence and Submissions

Hydro

Hydro proposes that the NP RSP Surplus be refunded to Newfoundland Power customers and Hydro Rural customers whose rates are based on Newfoundland Power rates. Rates for Hydro’s Rural customers, with the exception of customers on the Labrador Interconnected system and Government customers on the Isolated systems, are based on the rates approved by the Board for Newfoundland Power customers, in accordance with Hydro’s Policies for Automatic Rate Changes set out in its Rules and Regulations. Hydro states that, had the fuel cost savings reflected in the NP RSP Surplus been passed on to Newfoundland Power customers in accordance with the Rate Stabilization Plan rules, Newfoundland Power customers’ rates would have been lower as a result of the annual July 1 Rate Stabilization Plan adjustment rate. Hydro states that, based on the Policies for Automatic Rate Changes, reduced rates for Newfoundland Power customers would have also resulted in lower rates for certain Rural customers.

Hydro considered two alternatives for treating the proposed refund to its Rural customers whose rates are based on Newfoundland Power’s customer rates:
i) Upon refund of the NP RSP Surplus to Newfoundland Power customers a similar percentage refund would be given to Hydro Rural customers whose rates are based on Newfoundland Power rates. The amount required to offer this refund would then be collected from Newfoundland Power customers through the operation of section 1.3 of the Rate Stabilization Plan.

ii) Similar to the first scenario, the same percentage refund would be given to both Newfoundland Power customers and Hydro Rural customers whose rates are based on Newfoundland Power rates, with both funded from the NP RSP Surplus. To effect this approach Hydro proposes to set aside an amount from the NP RSP Surplus to cover the proposed refund to its Rural customers.

Hydro proposes the second alternative in the Application whereby the refund to its Rural customers whose rates are based on Newfoundland Power rates is funded from the NP RSP Surplus and not through the subsequent operation of the Rate Stabilization Plan. The amount of the refund to be credited to customers’ accounts is estimated by Hydro to be approximately two cents per kWh for the billed energy over the January 1, 2013 to December 21, 2013 period.

In its submission at page 2 Hydro argues that the issue of whether the Rate Stabilization Plan refund should apply to both Newfoundland Power’s customers and certain Hydro Rural customers depends on the correct interpretation of OC2013-089. Hydro explains:

The Order in Council can be said to contain two distinct steps that are to be applied to make refund payments to customers. Paragraph 2 of the Order (the first step) divides the RSP surplus amount so as to determine the amounts of entitlement amongst two components of the RSP (Industrial and Newfoundland Power).

Once the RSP surplus is divided, paragraphs 6 and 7 of the Order (the second step) focuses on the rebates to customers other than the Industrial Customers; that is these paragraphs address the method of disposition of the amount credited to the “Newfoundland Power Rate Stabilization Plan” amongst “the remaining ratepayers”.

Hydro suggests that, if the Order in Council was intended to restrict the disposition of the funds to Newfoundland Power customers only, this would effect a substantive change from the normal disposition of positive balances in the Rate Stabilization Plan and as such would require very clear language. Hydro further states at page 4 of its submission:

In particular, if it were the intention that the Order in Council was to direct the Board to make a refund plan that gave amounts to Industrial Customers and Newfoundland Power customers only, that intention could have been easily expressed by substituting “Newfoundland Power’s customers” for “ratepayers” and “remaining ratepayers” where they appear in paragraph 6 of the Order in Council.

Hydro sets out its interpretation of paragraph 6 of OC2013-089 at page 5 of its submission:

Only two groups of customers are referred to there as entitled to receive portions of the RSP surplus: Island industrial customers and remaining ratepayers. Hydro submits that these words in the Order in Council are not imprecise, incorrect nor ambiguous; on the contrary, they were carefully chosen and their meaning and effect are clear. Where the
Order in Council addresses the manner by which the Board is to make refunds with respect
to the customers affected by the RSP surplus funds disposition, that authority and
discretion is given to the Board with respect to the “remaining ratepayers”.

Hydro argues that the Order in Council makes clear which customers the Board is authorized to
consider for refunds - all customers that are involved in and affected by the Rate Stabilization
Plan Surplus, being Newfoundland Power customers and Hydro Rural customers whose rates are
based on Newfoundland Power rates.

Newfoundland Power

In its evidence, at page 3, Newfoundland Power states that the Orders in Council do not contain a
direction to pay any portion of the NP RSP Surplus to Hydro Rural customers and that OC2013-089 directs that Newfoundland Power’s portion of the Rate Stabilization Plan Surplus be
distributed as a direct payment or rebate to its customers.

Newfoundland Power further states that the rates of Hydro Rural customers do not recover the
costs of serving those customers. Newfoundland Power notes that, in accordance with provincial
government policy, the deficit between the cost of serving Hydro Rural customers and the rates
paid by those customers is subsidized in large part by the rates paid by the customers of
Newfoundland Power. According to Newfoundland Power’s evidence (page 4) the forecast of
the amount of this deficit which will be included in Newfoundland Power’s 2014 customer rates
is approximately $54 million, which represents approximately 8% of the rates paid by customers
of Newfoundland Power. Newfoundland Power states that, in these circumstances, Hydro’s
Rural customers should not receive a portion of the NP RSP Surplus.

In its final submission Newfoundland Power argues that the proposed refund to Hydro’s Rural
customers is inconsistent with (i) the directions given in OC2013-089; and, (ii) the language
contained in Hydro’s Policies for Automatic Rate Changes. Newfoundland Power submits that
OC2013-089 contains no explicit direction to pay any portion of the NP RSP Surplus to Hydro’s
Rural customers and, in fact, there is no mention of Hydro’s Rural customers in any of the
Orders in Council related to the Application. Newfoundland Power states at page 2 of its
submission:

OC2013-089 directed the Board to divide the Rate Stabilization Plan Surplus into 2
portions. The first portion ($49 million) was to be credited to the Rate Stabilization Plan of
the Island Industrial customers. The “remaining balance” was to be credited to
Newfoundland Power’s Rate Stabilization Plan. The Order directs that the portion credited
to the Island Industrial customers is to be used to phase-in industrial rates over a defined
phase-in period. Newfoundland Power’s portion is to be distributed as “a direct payment
or rebate to its ratepayers.... (emphasis added)

Newfoundland Power also reiterates its position that, during the period when the Rate
Stabilization Plan Surplus accumulated, Newfoundland Power’s customers were effectively
paying more than the full cost of their service, while Hydro’s Rural customers whose rates are
based on Newfoundland Power rates paid less than the full cost of their service and were in large
part subsidized by Newfoundland Power customers. Hydro’s position is not, according to Newfoundland Power, consistent with a reasonable, contextual interpretation of OC2013-089.

Newfoundland Power argues that Hydro’s proposition that a rebate should be considered a rate adjustment for the purposes of the Policies for Automatic Rate Changes but not a rate adjustment for the purposes of the Government direction is not supported by regulatory precedent and is not reasonable. At page 3 of its submission Newfoundland Power states:

Hydro suggests that Government intended that the Policies for Automatic Rate Changes be triggered by changes in “effective rates”. According to Hydro, this is reflected in the fact that certain rate adjustments for Hydro’s customers on Isolated Systems are based on “the average rate of change granted Newfoundland Power from time to time”. It is not clear how this supports Hydro’s interpretation, since the purpose of the averaging mechanism is simply to facilitate rate adjustments where there are no equivalent Newfoundland Power rates.

On the question of the funding of the proposed refund Newfoundland Power submits that, should the Board determine that certain Hydro Rural customers are entitled to a refund, it is appropriate that the refund be calculated in the same manner for customers of both Newfoundland Power and Hydro and that the refund to Hydro’s Rural customers be funded from the NP RSP Surplus.

Consumer Advocate

The Consumer Advocate supports Hydro’s proposals as set out in the Application. He submits that any assessment of Hydro’s proposal must take cognizance of the fact that the refund amount accumulated over several years in the Rate Stabilization Plan owing to the load variation component. The Consumer Advocate notes that, under current rules of the Rate Stabilization Plan, this amount would normally form part of the balance used to calculate the Rate Stabilization Plan adjustment to be applied to energy consumption (for Newfoundland Power customers) for the period July 1, 2014 to June 30, 2015. In accordance with Hydro’s Policies for Automatic Rate Changes, lower rates for Newfoundland Power customers would result in lower rates for Hydro Rural customers whose rates are based on Newfoundland Power rates.

The Consumer Advocate submits that the question of which customers should benefit from the refund should not depend on whether the refund plan takes the form of direct payments or is in the form of an electricity rate adjustment. He notes that Government in enacting OC2013-089 would be aware of the fact that Hydro’s Island Interconnected customers pay the same rates as Newfoundland Power’s customers and that rate changes for Newfoundland Power customers also impact certain of Hydro’s Rural customers. In his submission at pages 2-3 the Consumer Advocate references the language of OC2013-089 and notes that the reference in paragraph 6 “is made to “ratepayers” – not to a particular group or class of ratepayers.” He goes on to note that the only group excluded are the Island Industrial customers and that paragraph 6 provides for the Board to make the final determination on the details of the refund to remaining ratepayers. He submits:

The term “remaining ratepayers” evidences the fact that there is no intent to limit the refund to a particular group or class of ratepayers. The term “remaining ratepayers”
clearly encompasses more customers than just customers of Newfoundland Power. Having excluded only the Island Industrial customers for consideration for the refund, it would simply not make sense to use the term "remaining ratepayers" if the intent was to exclusively benefit Newfoundland Power customers.

The Consumer Advocate agrees with Hydro that the right to receive the refund extends to the ratepayers who normally receive Rate Stabilization Plan related rate changes and submits that the Order in Council did not exclude from the refund those customers whose rates are subsidized. He submits that OC2013-089 does not leave it open to the Board to deny a refund to those customers who normally receive Rate Stabilization Plan related rate changes.

Discussion and Board Findings

Under section 5.1 of the EPCA the Lieutenant Governor in Council can direct the Board with respect to the policies and procedures to be implemented in certain aspects of its regulation of public utilities, and specifically with respect to certain matters related to Hydro. The Lieutenant Governor in Council has, under section 5.1 of the EPCA, directed the Board in OC2013-089, as amended, as to the ultimate disposition of the Rate Stabilization Plan Surplus. This direction firstly distributes the Rate Stabilization Plan Surplus between the Island Industrial customers’ Rate Stabilization Plan and Newfoundland Power’s Rate Stabilization Plan. This first step of dividing the Rate Stabilization Plan Surplus amounts between the two components of the Rate Stabilization Plan was dealt with in Order No. P.U. 26(2013) in which the Board ordered:

1. Hydro shall on August 31, 2013:
   i) credit $49 million to the Island Industrial Customers’ Rate Stabilization Plan; and
   ii) transfer the remaining balance in the January 1, 2007 to August 31, 2013 accumulated Load Variation component of the Rate Stabilization Plan to the credit of the Newfoundland Power Inc. Rate Stabilization Plan.

The matter before the Board now is the disposition of the amount transferred to Newfoundland Power’s Rate Stabilization Plan, which has been segregated as the NP RSP Surplus. The amount at issue to be refunded to ratepayers as of August 31, 2013 was $112.6 million.

There is fundamental disagreement between Hydro and the Consumer Advocate on the one hand and Newfoundland Power on the other as to the interpretation of OC2013-089 in relation to which customers should receive a refund. The question of which customers are entitled to the payment/rebate is important as the amount to be distributed from the NP RSP Surplus is substantial and the amount to be refunded to each customer will be affected by the decision as to which customers are included in the refund plan.

In making a determination on this issue the Board must look to the language of the Order in Council which directs the Board. Paragraph 6 of OC2013-089, which directs the form of the refund and to whom it is to be paid, states:

6) Newfoundland and Labrador Hydro’s General Rate Application process shall include a Rate Stabilization Plan surplus refund plan to ratepayers. The refund plan shall comprise direct payments or rebates to ratepayers and shall not be in the form of an electricity rate adjustment. This refund plan will exclude Island industrial customers who will receive Rate
Paragraph 7 of OC2013-089 further states:

7) Newfoundland Power’s portion of the Rate Stabilization Plan Surplus shall be distributed as a direct payment or rebate to its ratepayers and shall not be in the form of an electricity rate adjustment; and...

The Board also notes paragraph 2 of OC2013-091 which sets out the direction of Government to Hydro states:

2) during its General Rate Application process, it shall file a Rate Stabilization Plan surplus refund plan to ratepayers. The refund shall be a direct payment or rebate to ratepayers and shall not be in the form of an electricity rate adjustment. This refund plan will exclude Island industrial customers who will receive Rate Stabilization Plan surplus funds through the three year phase-in of new rates; and... (emphasis added)

The only distinction made in paragraph 6 of OC2013-089 with respect to the refund plan is between the Island Industrial customers and remaining ratepayers. Paragraph 6 does not contain any reference to Newfoundland Power or its customers, Hydro’s Rural customers, or any other specific Hydro customers. Similarly, paragraph 2 of OC2013-091 directs Hydro to file a refund plan whereby there is direct payment or rebate to ratepayers excluding Island Industrial customers. The Government direction does not restrict or narrow the customers to receive the refund except to say that it is to go to remaining ratepayers after the exclusion of the Island Industrial customers. It does not direct the Board further or set out any criteria as to specific classes of customers eligible or entitled to the refund. The Board does not accept Hydro’s suggestion that OC2013-089 makes it clear that the Board is authorized to consider ordering refunds to all customers that are involved in and affected by the Rate Stabilization Plan Surplus.

Hydro’s position that the term ratepayers is meant to include Newfoundland Power’s customers and certain Hydro Rural customers appears to be based on the established rate policy. Hydro’s policy for automatic rate changes is based on long standing government direction and provides that rates for its Rural customers (other than Labrador Interconnected and Government customers on Isolated systems) are based on the rates established by the Board for Newfoundland Power’s customers. Section 16 of Hydro’s approved Rules and Regulations of Service provides that rates for these customers are automatically adjusted based on changes to Newfoundland Power’s rates:

Policies for Automatic Rate Changes
(a) Island Interconnected System:
(i) As Newfoundland Power changes its rates, Hydro will automatically adjust all rates such that these customers pay the same rates as Newfoundland Power customers.
(b) L’Anse au Loup System:
(i) As Newfoundland Power changes its rates, Hydro will automatically adjust all rates such that these customers pay the same rates as Newfoundland Power customers.
(c) Isolated Systems:
(i) Isolated Rural Domestic customers, excluding Government departments, pay the same rates as Newfoundland Power for the basic customer charge and First Block consumption (outlined in Rate 1.2D). Rates charged for consumption above this block will be automatically adjusted by the average rate of change granted Newfoundland Power from time to time.

(ii) Rates for Isolated Rural General Service customers, excluding Government departments, will increase or decrease by the average rate of change granted Newfoundland Power from time to time.

(iii) As Newfoundland Power changes its rates, Hydro will automatically adjust Rural Isolated street and area lighting rates, excluding those for Government departments, such that these rates are the same as charged Newfoundland Power customers.

The Board notes that Government has specifically directed in OC2013-089 that the refund is not to be in the form of an electricity rate adjustment. As there is to be no change in rates as a result of the refund to ratepayers, Newfoundland Power’s rates will not change and the Policies for Automatic Rate Changes is not operative in this case. Therefore the Board does not accept Hydro’s position that certain Rural customers are entitled to the refund because the rules set out that the rates for these customers are based on Newfoundland Power’s customer rates.

Newfoundland Power argues that paragraph 7 of OC2013-089 directs that its portion of the Rate Stabilization Plan is to be distributed as a direct payment or rebate to its ratepayers and relies on this paragraph to support its position that the entire amount of the NP RSP Surplus is to be refunded to Newfoundland Power customers only. In the absence of paragraph 6 of OC 2013-089 this position would be persuasive. However paragraph 6 states that only the Island Industrial customers are excluded and “remaining ratepayers” are entitled to the refund. Given the specific language of paragraph 6 the Board takes paragraph 7 as direction on how Newfoundland Power is to distribute the refund to its customers once it receives its portion of the Rate Stabilization Plan Surplus, and that it must be in the form of a direct payment or rebate and not as an electricity rate adjustment. The Board does not accept the argument of Newfoundland Power that it should order a refund only to Newfoundland Power customers.

In the Board’s view the expressed intent of OC2013-089 as set out in paragraph 6 is that ratepayers, other than the Industrial Customers, shall receive a refund in the form of a direct payment or rebate. The Board cannot take from the language any other intent, meaning or understanding of what Government may or may not have known at the time of drafting of the Order in Council. Government has directed a refund in the form of a direct payment or rebate to ratepayers except the Island Industrial customers.

The Board also does not agree with the argument of Hydro and the Consumer Advocate that the derivation of the Rate Stabilization Plan Surplus must be considered when deciding which customers are entitled to the refund. The amount in the Rate Stabilization Plan Surplus accumulated largely as the result of changes in load over the period January 1, 2007 to August 31, 2013. The Board has been directed by Order in Council and it must comply with the provisions of this direction. In ordinary circumstances a significant reduction in customer load, such as occurred on the Island Interconnected system beginning in 2007, would be addressed in a general rate application during which the components of the Rate Stabilization Plan and base rates would be reset to reflect the updated costs of service. In this case Hydro did not file a
general rate application until 2013. The Board notes that the manner in which the Order in Council directs the segregation of the Rate Stabilization Plan Surplus does not suggest that the refund is compensatory. The direction of Government allocates an amount of $49 million of the Rate Stabilization Plan Surplus to the Island Industrial customers. OC2013-089 states that this amount is “the estimated Rate Stabilization Plan amount required to phase-in industrial customer rates, based on Newfoundland and Labrador Hydro’s General Rate Application.” The amount allocated is not stated to be calculated in accordance with the Rate Stabilization Plan rules. Rather the $49 million is expressed to be an amount estimated to be required to offset future rate increases for Island Industrial customers. The remaining balance is the amount transferred to the Newfoundland Power Rate Stabilization Plan to be refunded to ratepayers, without any calculation of what was or should have been paid by each customer class based on the Rate Stabilization Plan rules.

In the circumstances the Board does not accept that the determination of which customers are entitled to the refund should be made based on how the Rate Stabilization Plan may have worked in the period 2007 to 2013. The Rate Stabilization Plan Surplus has been allocated by Government direction without reference to the impact the normal operation of the Rate Stabilization Plan would have had on rates for that period. The Government direction expressly requires that the form of the refund shall be a direct rebate or payment to ratepayers. The words of the Government direction are clear and unambiguous. Any interpretation of the direction that looks beyond the plain meaning to try to determine the intention of Government based on existing rate policies may lead to results which are inconsistent with the language of the Orders in Council.

The Board agrees with Hydro that it must have regard to the language of the Order in Council. Based on plain reading of the language of OC2013-089 the Board cannot accept Newfoundland Power’s position that only its customers are entitled to the refund. Similarly the Board cannot accept the position of Hydro and the Consumer Advocate that certain of Hydro’s customers are entitled to a refund and certain customers are not entitled to a refund. If it was the intent of Government that only certain customers were entitled to the surplus refund this could have been clearly stated. In the absence of language that expressly excludes certain customers the Board interprets the terms “ratepayers” and “remaining ratepayers” to mean all ratepayers, except those specifically excluded - the Island Industrial customers. Therefore the Board finds that the amount in the NP RSP Surplus should be refunded as a direct payment or rebate to Newfoundland Power customers and customers on each of Hydro’s systems - Rural Island Interconnected, Island Isolated, Labrador Isolated, L’Anse au Loup, and Labrador Interconnected.

Hydro has advised that it is awaiting a ruling from the CRA on the HST treatment of the refund, which may affect the total amount of the refund to each customer. The Board expects that Hydro, Newfoundland Power and the Consumer Advocate will work jointly to determine a reasonable and appropriate approach in relation to the refund consistent with the direction of Government and file a consensus proposal with the Board for its consideration.
IT IS THEREFORE ORDERED THAT:

1. The Newfoundland Power Rate Stabilization Plan Surplus shall be refunded to all ratepayers, with the exception of the Island Industrial customers, in the form of direct payment or rebate and in a manner to be approved by the Board.

2. Hydro shall pay the expenses of the Board incurred with this matter.

DATED at St. John's, Newfoundland and Labrador, this 9th day of April 2014.

Andy Wells
Chair & Chief Executive Officer

Darlene Whalen, P.Eng.
Vice-Chair

Dwanda Newman, LL.B.
Commissioner

James Oxford
Commissioner

Cheryl Blundon
Board Secretary