

P. U. 16 (2003)

IN THE MATTER OF THE *PUBLIC UTILITIES ACT*, (THE “*ACT*”);

AND

IN THE MATTER OF AN APPLICATION BY NEWFOUNDLAND AND LABRADOR HYDRO (“*HYDRO*”) FOR APPROVAL OF: (1) ITS 2004 CAPITAL BUDGET PURSUANT TO SECTION 41(1) OF THE *ACT*; (2) ITS 2004 CAPITAL PURCHASES, AND CONSTRUCTION PROJECTS IN EXCESS OF \$50,000 PURSUANT TO SECTION 41(3)(a) OF THE *ACT*; AND (3) ITS ESTIMATED CONTRIBUTIONS IN AID OF CONSTRUCTION FOR 2004 PURSUANT TO SECTION 41(5) OF THE *ACT*.

DECISION AND ORDER

BACKGROUND

Hydro filed an Application with The Board of Commissioners of Public Utilities (the “*Board*”) on March 28, 2003 requesting that the Board make an Order:

- (i) Approving Hydro’s 2004 Capital Budget, pursuant to Section 41(1) of the *Act*;
- (ii) Approving 2004 capital purchases and construction projects in excess of \$50,000.00, pursuant to Section 41(3) of the *Act*; and
- (iii) Approving the proposed estimated contributions in aid of construction for 2004 pursuant to Section 41(5) of the *Act*.

On April 16, 2003 the Board published Notice of the Application and Hearing which was scheduled to be held on June 10, 2003. On May 2, 2003 Intervenor Submissions were filed on behalf of Newfoundland Power Inc., (“*Newfoundland Power*”) as well as Abitibi Consolidated Inc. (Grand Falls), Abitibi Consolidated Inc.

(Stephenville), Corner Brook Pulp & Paper Limited and on May 15, 2003 North Atlantic Refining Limited (the “*Industrial Customers*”).

On May 15, 2003 the Board received a motion from the Industrial Customers to postpone and consolidate the hearing with a hearing anticipated to be scheduled in relation to Hydro’s general rate application later in 2003. The Industrial Customers requested an oral hearing of this motion.

HEARING OF THE MOTION

Industrial Customers Position

The Industrial Customers question the Board’s authority to dispose of this matter without an oral hearing and say that if the Board does have the jurisdiction it must be exercised judicially. They argue that because there are disputed matters of fact the Board can only consider the application after an oral hearing. They cite **RE United Brotherhood of Carpenters and Joiners of America, Local 579 and Cape Pine Electrical Construction Limited** (1983), 46 Nfld. & P.E.I.R. 274 to say that natural justice requires a hearing.

Hydro’s Position

Hydro says that the Board has the authority to set its own procedure including proceeding without a hearing in the appropriate circumstances. Hydro cited MacCaulay, Practice and Procedure Before Administrative Tribunals, where the author concludes that an oral hearing is not always required. Hydro says that the circumstances do not call for a hearing in this case as any disputed facts can be and should more properly be addressed at the capital budget hearing itself.

Reasoning of the Board

The Board has the ability to set its own process by virtue of Section 20 of the *Act*, which says:

“20. The board may make, revoke and alter rules and regulations for the effective execution of its duties and of the intention and objects of this Act, and the regulations of the practice and procedure with regard to the matters over which it has jurisdiction and the rules an regulations, when approved by the Lieutenant-Governor in Council, shall have the force of the law”

The Board has the authority to determine when it is appropriate to hold a public hearing as set out in Regulation 6(2) which says:

“6. (2) In matters where the board determines that a public hearing will be held regarding an application, the board shall publish or broadcast notice of the public hearing for a reasonable period before the public hearing as the board considers necessary.”

The right of the Board to proceed on the basis of written documentation is set out in Regulation 22, which says:

“22. When the Board does not proceed by way of a public hearing, the board may, (a) dispose of the matter on the basis of written documentation before it:.....”

The Industrial Customers cite Newfoundland case law, which they say requires an oral hearing in all cases except where the tribunal agrees with the applicant. The Board does not find these cases helpful as they are in relation to the *Labor Relations Act* which the Court concluded provides for the right to a hearing. In contrast the *Public Utilities Act* and associated regulations specifically allows for the Board to determine whether a public hearing will be held and when there is no public hearing the Board can proceed based on written documentation.

The Board finds in light of the legislative provisions it is not obliged to hold an oral hearing. That being the case the Board will evaluate the circumstances to determine if it is required in this particular case.

The motion is a procedural one that relates to the timing and consolidation of a matter. The Order that issues from this motion will not be one that settles rights but is rather interlocutory in nature. Further, the Board does not accept that there are factual aspects to this determination. The Industrial Customers allege that there are several issues of fact that were raised by the parties that need to be determined to resolve this motion. They say that the following issues of fact require an oral hearing:

Facts Raised by the Industrial Customers:

- 1) The capital budget may be dependent on spending in the preceding year;
- 2) Hydro may not have a properly prepared capital budget;

Facts Raised by Hydro:

- 3) Approval of the capital budget late in the year may impact upon a utility's ability to manage its business properly;
- 4) Consolidation of the capital budget and the general rate application may not be the most effective process;
- 5) The time frame allowed provides adequate time for the intervenors to prepare their case; and
- 6) A delay until the fall is not appropriate and is not required to ensure that all party's interests are adequately protected through the hearing process.

The Board has considered each item of fact which it is alleged must be proved and concludes that items 1, 2, 3 go to whether the budget should be approved as filed and are not items which must be decided in this application. The Board finds that these items can and should be dealt with as a part of the capital budget hearing. As to items 4, 5, and

6 the Board is satisfied that these are not matters of fact which require the presentation of evidence but rather are matters of argument which can be and was done by way of written submissions.

The Board provided the parties the opportunity to make submissions, submit replies and rebuttals. Each party has made thorough comments which have assisted the Board in reaching its decision. The Board does not accept that an oral hearing is necessary in the circumstances and will therefore issue a decision on the motion of the Industrial Customers on the basis of the written documentation.

CONSOLIDATION/DELAY

Industrial Customers Position

The Industrial Customers argue that the capital budget application is untimely, as the utility does not need approval until it begins capital spending in the year. They say that the capital budget is *“highly dependent on the results of capital spending in the previous year”* and, since Hydro has spent only a small portion of its 2003 Capital Budget, the 2004 Capital Budget should not be approved at this time. They further suggest because Hydro did not follow its usual eight-month process the budget was not properly prepared.

The Industrial Customers also argue that they did not have sufficient notice of the hearing to adequately prepare for the hearing. They would like to engage expert evidence and say that this type of evidence is difficult and time consuming to secure and that they would need a period of six to eight weeks from the time of notice of the hearing.

In addition to the reasons for the delay, the Industrial Customers are asking that the capital budget application hearing be consolidated with Hydro’s general rate application. They say that it is more convenient and economical to provide evidence on the capital budget procedure in the context of the general rate application.

The Industrial Customers further argue that the capital budget has a significant impact on the rates which will be addressed in Hydro’s general rate application and, if the Board considers the matters separately, it will fetter its ability to properly deal with the rate increases. They say *“the operating costs considered in the general rate application are affected by the nature of the capital plant that is in place, which is determined by which capital budget items have been approved.”* They note that the rate base upon which the rate of return is based is the accumulated assets which were approved by the Board. Further they say that rate design issues in the general rate application involve the nature of the generation sources and that the cost of service issues address the distribution of assets approved through the capital budget process. Because of these relationships the Industrial Customers argue that the matters should be heard together.

Hydro's Position

Hydro says that the timely approval of its annual capital budget assists in proper planning of pre-construction work required for successful completion of capital projects. Hydro does not agree that the 2004 Capital Budget is not properly prepared or that it is highly dependent on the results of capital spending in 2003. In any event, Hydro says that both of these issues can be brought forward in the capital budget hearing where the budget may be challenged.

Hydro also points out that the legislation does not require a certain timeframe to be followed for the approval of the capital budget as long as the application is sought before December 15, 2003. Hydro notes that the public notice on April 16, 2003 allowed eight weeks until the start of the hearing and further that the Industrial Customers received the application on April 10, 2003.

As to the issue of the consolidation of the 2004 Capital Budget hearing and the general rate application hearing Hydro's position is that the two applications are distinct. It says, while the capital budget raises capital issues leading to engineering and safety concerns, the general rate application focuses on evidence relating to operational issues.

Newfoundland Power's Position

Newfoundland Power agrees with Hydro that the capital budget application and the general rate application are distinct. Newfoundland Power argues that the Board is obliged by the *Act* to approve a capital budget for a utility in advance of the year in which the expenditures will be made. Newfoundland Power suggests that, given the timing of Hydro's general rate application, it is likely that there will not be an Order of the Board by December 31, 2003 and therefore, if the matters are joined, Hydro may not have approval of its budget by year-end. In its submission Newfoundland Power says:

“Approval of a capital budget during the year of expenditure places a utility in an untenable position with respect to the orderly, efficient and cost effective implementation of its capital expenditures for that year. Such a course of action is effectively contrary to the policy objectives of ss.3(b)(i) through (iii) of the Electrical Power Control Act, 1994.”

Conclusions of the Board

Consolidation

The Board does not accept that joining the two applications will be more convenient or economical. In the Board's experience it has not found it helpful to have the capital budget considered within a general rate application proceeding. The issues which are before the Board in a general rate application are numerous and complex. The addition of the approval of a capital budget to this process serves to add more complexity and may actually detract from the proper consideration of the capital budget itself. The

Board agrees with Hydro that the matters are distinct and, when considering efficient and effective process, the only conclusion is that they should be dealt with separately.

The Board accepts that in the usual course a utility's capital budget should be approved prior to December 31 in the preceding year. This allows for the effective management of the capital program. The Board acknowledges that the general rate application matter may not be finalized by year-end and wishes to ensure that capital budget approval is not delayed as a result.

Therefore, the Board does not accept the submission of the Industrial Customers that the hearing of the 2004 Capital Budget should be consolidated with the general rate application. The matters will be heard separately.

Timing of the Hearing

The Board allowed for eight weeks between publication and the scheduled date of the hearing. The Industrial Customers were provided with a copy of the Application almost a week earlier. This timeframe is in accordance with the time traditionally allowed in these matters. The Board is satisfied that generally this is sufficient time for any interested party to prepare for the hearing.

However, the Board has considered the comments of the Industrial Customers that they have had difficulty in retaining expert evidence and accepts that preparation for these matters is becoming increasingly onerous. As such it will delay the start of the hearing until June 25, 2003. This will, in the Board's view, give all parties an opportunity to fully prepare.

IT IS THEREFORE ORDERED THAT

1. The motion of the Industrial Customers for an oral hearing is hereby dismissed.
2. The motion of the Industrial Customers for the consolidation of the capital budget application and the general rate application is hereby dismissed.
3. The public hearing of the capital budget application will begin at 9:00 A.M., on June 25, 2003, unless otherwise directed by the Board.

Dated at St. John's, Newfoundland and Labrador this 30th day of May 2003.

Robert Noseworthy,
Chairperson & Chief Executive Officer.

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

G. Cheryl Blundon,
Board Secretary.