

Office of the Consumer Advocate

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September 24, 2021

Board of Commissions of Public Utilities
120 Torbay Road, P.O. Box 2140
St. John's, NL A1A 5B2

**Attention: G. Cheryl Blundon, Director of
Corporate Services / Board Secretary**

Dear Ms. Blundon:

**Re: Newfoundland Power's 2022 Capital Budget Application
- Request for Reconsideration - Sept. 22/2021 Decision re Public Oral Hearing**

This letter is the Consumer Advocate's request for the Board to reconsider its decision to deny the Consumer Advocate's request for a public oral hearing of the 2022 Capital Budget Application ("CBA") of Newfoundland Power ("NP").

The Board's September 22, 2021 decision said:

Capital budget applications have, in recent years, been addressed through fully public and transparent written hearing processes.

As an oral hearing for a capital budget application last occurred in 2004, "in recent years" means during the past sixteen (16) years.

The Board decision said:

The Board has found that written questions and responses are the best way to test the evidence filed in a capital budget application.

As the Board has not held a public oral hearing for a capital budget application in 16 years, the Board has no way of determining whether written questions and responses alone "are the best way" - or even a better way - "to test the evidence filed." Publicly available information indicates that only one current Board member has, sitting as a Board member, actually heard cross-examination during an oral hearing of a capital budget application, and that hearing occurred 19 years ago.

The Board decision gives rise to a rhetorical question:

Will the Board refuse public oral hearings for General Rate Applications because they include “fully public and transparent written hearing processes” and the Board believes that “written questions and responses are the best way to test the evidence”?

The Board decision said:

The evidence normally consists of detailed technical information and reports prepared by engineering, accounting, financial and IT professionals within the utility or who were engaged by the utility. Often there are individuals in addition to the person presenting the evidence who had a role in the preparation of the evidence. The credibility of the person presenting evidence is rarely an issue for the Board in a capital budget application.

The “credibility of the person presenting evidence” in a capital budget application can hardly become an issue unless and until it is tested by means of cross-examination. Inanimate words and numbers printed on paper or a screen – such as those in NP’s 2022 CBA – cannot be cross-examined. Which is why Canadian courts view cross-examination during an oral hearing as the best means of testing or challenging the credibility of evidence. A witness’s pre-hearing written statement (such as technical reports filed as part of NP’s 2022 CBA) or affidavit cannot itself be cross-examined. That is why Canadian courts require witnesses to testify by means of oral communication, which is then subject to cross-examination. In those instances where a witness’s written statement (i.e. affidavit / solemn declaration) can be filed, the deponent knows that he or she must be prepared to submit to being cross-examined in court on the content of his or her affidavit. Unless and until the Board changes its approach, NP personnel can – based on what has now been 16 years of no oral hearings – assume they will not be required to publicly and under oath defend their report(s). Such circumstances are akin to NP being self-regulating.

The Board decision also said:

The Board notes that the Consumer Advocate did not identify specific issues with respect to the proposed expenditures which should be addressed in an oral hearing.

This assertion inexplicably ignores the Consumer Advocate’s expressed desire to further scrutinize the effects of the COVID-19 pandemic and John Todd’s report, both being matters the Board decision referenced.

The Consumer Advocate submitted that the Board needs to carefully scrutinize the Application because the expenditures Newfoundland Power proposed are compounded by:

- *the multifaceted negative economic impact of the COVID-19 pandemic;*
- *Newfoundland Power’s failure “to respond to what is presently the uncontradicted expert opinion evidence of John Todd that the Application fails to meet the prudence standard the Board has expressly endorsed.”*

The Consumer Advocate did, therefore, in fact identify specific issues with respect to the proposed expenditures which should be addressed in a public oral hearing. In referring to and relying on Mr. Todd’s assertion that NP’s 2022 CBA fails to meet the Board’s own prudence standard, the Consumer Advocate challenged each proposed project for which the proffered documentary evidence does not satisfy the prudence standard. In the Conclusions section of his report (pp. 32 – 36), Mr. Todd stated (footnotes omitted):

In section 2 of this report, Elenchus concluded that:

in order for the PUB’s review of NP’s 2022 CBA to be consistent with both generally accepted prudency review standards and the Board’s own stated prudency review standards, the following questions need to be addressed fully.

- 1. Has a reasonable range of alternative solutions been identified?*
- 2. Has all relevant information been identified?*
- 3. Is the planned investment the least cost option?*
- 4. Does the utility’s approach to the economic evaluation of alternatives reflect the inherent bias for an investor-owned utility to prefer alternatives that require high levels of capital investment?*

Based on the evidence on the record to date (NP’s 2022 CBA and the responses to RFIs) Elenchus has the following comments with respect to the four questions identified in section 2, above, that need to be answered before a credible case can be made that the PUB’s stated prudency review standards have been met.

1. Has a reasonable range of alternative solutions been identified?

The evidence to date indicates to Elenchus that NP is excluding consideration in its 2022 CBA of alternatives that merit at least preliminary inclusion in “a reasonable range of alternative solutions”. It follows that this test has not been met.

Elenchus has not attempted to identify excluded alternatives that could be considered within the reasonable range of alternatives for each project included in the 2022 CBA. NP is in a far better position to do that once it adopts a more open view of reasonable alternatives.

2. *Has all relevant information been identified?*

Elenchus has not examined the alternatives that NP included in its economic evaluations of all capital projects included in the 2022 CBA for the purpose of identifying information deficiencies. However, as noted above, it appears to Elenchus that NP has not approached the economic analysis of the projects by identifying and evaluating “a reasonable range of alternative solutions”. Unless NP can demonstrate through further disclosure and discovery that (i) it has considered a reasonable range of alternatives and (ii) those alternatives are not preferable to the proposed projects taking into account both costs and uncertainty with respect to the long-term value of the proposed projects, it follows that all relevant information has not been identified and included as is necessary to identify the least cost option and therefore prudent alternative...

3. *Is the planned investment the least cost option?*

As indicated by the preceding comments, it is impossible to know whether the planned investments are the least cost options in the absence of evidence that a reasonable range of alternatives have been identified and assessed based of all relevant information...

4. *Does the utility’s approach to the economic evaluation of alternatives reflect the inherent bias for an investor-owned utility to prefer alternatives that require high levels of capital investment?*

The apparent preference of NP for traditional capital-intensive alternatives over NWAs may be indicative of this behaviour. A more complete comparison of alternatives would help determine whether lower cost alternatives with low capital costs have been avoided, reflecting the bias referred to as the A-J Effect.

The lack of effort that has been made to explore NWAs is suggestive that NP may have a bias that is resulting in higher total costs than would result from the adoption of more flexible alternatives that would involve lower commitments to long-lived, high capital cost alternatives ...

The Consumer Advocate’s formal request eschewed NP’s approach of using a generic boilerplate rationale for 28 of 40 projects. (i.e. “This project is justified on the obligation to provide reliable service to customers at least cost and cannot be deferred.”) The Consumer Advocate instead identified the pervasive insufficiency of prudency evidence in the record, which insufficiency can only be effectively challenged in a public oral hearing. During an oral hearing, Mr. Todd would in person explain and elaborate on his report, and in respect of each prudency deficient project the Consumer Advocate would cross-examine NP personnel about factors NP ignored or omitted. To

paraphrase Mr. Todd, the Consumer Advocate would cross-examine NP personnel about: (i) what, if any, “excluded alternatives could be considered within the reasonable range of alternatives...”; (ii) whether NP identified and considered all relevant information; (iii) whether a planned investment is the least cost option; and (iv) whether NP’s economic evaluation of alternatives reflects an inherent bias to prefer alternatives that require high levels of capital investment.

As noted, in his request for a public oral hearing the Consumer Advocate also expressed serious concern about “the multifaceted negative economic impact of the COVID-19 pandemic.” Again, the Consumer Advocate’s formal request eschewed a repetitive, boilerplate assertion approach. A public oral hearing would allow cross-examination of NP personnel about the specific implications for various projects of supply shortages, decreased labour productivity, and price increases associated with the COVID-19 pandemic. This is particularly important in light of the evidentiary record. Footnote 5 of the formal request reads:

A public oral hearing would enable the Consumer Advocate to conduct a detailed inquiry, in light of the COVID-19 pandemic, into the reliability of various project cost estimates in the NP 2022 CBA. This is particularly important in light of RFI CA-NP-100 and the response thereto, which read: "Question: Has Newfoundland Power done any analysis of the effect(s) of the COVID-19 pandemic on the cost estimate for each project proposed in the 2022 Capital Budget Application? If so, please provide a copy of all such analyses for each project. Answer: No, Newfoundland Power has not done an analysis of the effect(s) of the COVID-19 pandemic on the cost estimate for each project proposed in its 2022 Capital Budget Application." This is of great concern when one considers that in its 2020 Capital Expenditure Report dated February 26, 2021 NP reported: "Actual expenditure on the Replacements Due to In Service Failures project was \$415,000 or 13% above the budget estimate. The budget estimate was based on historical costs over the previous 5 years. The variance is principally due to increased labour costs associated with adhering to public health measures related to COVID-19 ... ", and also reported: "Actual expenditure for the Personal Computer Infrastructure project was \$155,000 above budget. The budget estimate of \$493,000 was based on the anticipated replacement of 60 desktop computers and 85 mobile computers in 2020 ... Due to the pandemic, there was a global supply shortage of mobile computers and related equipment in 2020, resulting in an overall price increase. Additionally, discounts normally associated with bulk purchase orders were not offered." In February 26, 2021 NP 2020 Capital Expenditure Report: Notes, see Appendix A, page 1 of 7, Substations, and Appendix A, page 5 of 7, Information Systems, located at:

<http://www.pub.nf.ca/indexreports/expenditure/From%20NP%20%202020%20Capital%20Expenditure%20Report%20-%202021-02-26.PDF>

In his expert report, Mr. Todd endorsed a view expressed by the Board nearly two decades ago:

In Elenchus' view, the key principles that are relevant to reviewing capital expenditure are contained in the second and sixth principles set out in Order No. P.U. 19 (2003).

2. Cost of Service

Under this principle a utility is permitted to set rates that allow the recovery of costs for regulated operations, including a fair return on its investment devoted to regulated operations - no more, no less. Costs should be:

- *prudent;*
- *used and useful in providing the service;*
- *assigned based on cause (causality);*
- *incurred and recovered (matching costs and benefits) during the same period;*
and
- *reflective of private/social costs and benefits occasioned by the service.*

6. End Result

In compliance with the legislation, the end result must be fair, just and reasonable from the perspective of both the consumer and utility.

In 2003, the Board said, "the end result must be fair, just and reasonable from the perspective of both the consumer and utility." That was said in circumstances where public oral hearings of capital budget applications were the norm (and when the Board did not always approve every proposed capital budget expenditure). Since 2004, no such hearing has occurred. For 16 years the Board has approved every dollar of more than \$1.3 billion in NP capital expenditure requests. In 2021, a public oral hearing is required to ensure that "the end result [is] fair, just and reasonable from the perspective of both the consumer and utility."

The Consumer Advocate has repeatedly expressed dissatisfaction with the 2007 Guidelines. They encompass a process the Board's own expert consultant found to be inadequate. In light of the Guidelines' flaws, the Board should order a public oral hearing to ensure public transparency and accountability in its review of NP's request to spend \$110 million of ratepayers' money.

Consequently, the Consumer Advocate respectfully asks that the Board reconsider its September 22, 2021 decision, and grant the request for a public oral hearing. A refusal by the Board to do so would also prevent the Consumer Advocate from calling our expert John Todd to testify concerning major shortcomings in NP's 2022 CBA. Such a refusal to allow John Todd's oral testimony would be inconsistent with fairness, due process and natural justice as required under Canadian judicial and administrative law.

Yours truly,


Dennis Browne, Q.C.
Consumer Advocate

Encl.
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