



NEWFOUNDLAND AND LABRADOR
BOARD OF COMMISSIONERS OF PUBLIC UTILITIES
120 Torbay Road, P.O. Box 21040, St. John's, Newfoundland and Labrador, Canada, A1A 5B2

2021-09-22

Newfoundland Power Inc.

Dominic Foley
Corporate Counsel
Newfoundland Power Inc.
55 Kenmount Road, P.O. Box 8910
St. John's, NL A1B 3P6
E-mail: dfoley@newfoundlandpower.com

Newfoundland and Labrador Hydro

Shirley Walsh
Senior Legal Counsel, Regulatory
P.O. Box 12400
Hydro Place, Columbus Drive
St. John's, NL A1B 4K7
E-mail: shirleywalsh@nlh.nl.ca

Consumer Advocate

Dennis Browne, Q.C.
Browne Fitzgerald Morgan & Avis
Terrace on the Square, Level 2
P.O. Box 23135
St. John's, NL A1B 4J9
E-mail: dbrowne@bfma-law.com

Dear Madam/Sirs:

Re: Newfoundland Power Inc. - 2022 Capital Budget Application - To Parties - Response to Consumer Advocate's Request for Oral Hearing

On May 18, 2021 Newfoundland Power submitted its 2022 Capital Budget Application (the "Application") to the Board.

On May 27, 2021 the Consumer Advocate requested the Board conduct an oral hearing with respect to the Application and objected to the Board proceeding by way of the Capital Budget Application Guidelines in its consideration of it. On June 2, 2021 the Board informed the Consumer Advocate that his request for an oral hearing was premature and that it would be considered once the evidentiary record for the Application was complete.

On June 17, 2021 the Consumer Advocate filed comments in relation to the process for the Application. On June 25, 2021 the Board responded to the Consumer Advocate stating:

While the hearing of a capital budget application is normally a written proceeding, the Board may hold an oral hearing where it determines that it is required to properly assess whether the proposed project expenditures should be approved. The Board does not make this determination based solely on the magnitude of the proposed annual capital budget. The Board will consider all the information filed, including the application, the issues and projects to be addressed, responses to requests for information, intervenor evidence, and the justification provided in the request for an oral hearing. Since holding an oral hearing can be very costly and these costs are passed on to customers, this determination must consider whether an oral hearing would be in customers' best interests.

On September 16, 2021 the Consumer Advocate filed a formal request for the Board to conduct an oral hearing in relation to the Application stating:

- Newfoundland Power filed voluminous qualitative material that “does not quantify the risks or benefits to consumers of various projects; which is a particular shortcoming in relation to a generation project (i.e. replacement of the Sandy Brook Penstock) intended to operate for the next 80 years.”
- “Decades-long projects merit the more detailed scrutiny that only public oral hearings can provide” which is important since the expiry of the Churchill Falls contract in 20 years from now and potential capacity additions by NL Hydro to the island system could strand Newfoundland Power’s generation projects.
- Expert personnel acting on behalf of Newfoundland Power have hours to prepare carefully written responses to requests for information, which can “obfuscate or even conceal weaknesses” in its Application.
- The prospect of testifying provides a strong incentive for a regulated utility’s internal management decisions to be cost-effective and in the customer’s best interest because the witness’ “professional judgment is subject to public review in a process with little upside and considerable potential for downside.”
- Oral cross-examination affords little opportunity for a witness to “prevaricate, confuse or deflect a question that is uncomfortable or problematic”.
- Uncertainty as to the exact meaning of an oral question or response can promptly be addressed, and the germane point clarified and explained in follow-up questioning.
- An oral hearing would allow the Consumer Advocate to cross-examine Newfoundland Power’s witnesses “concerning their purported expertise and how it was or was not utilized in preparing the Application.”

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

- uncertainty about the Muskrat Falls project and unfinalized rate mitigation;
- the multifaceted negative economic impact of the COVID-19 pandemic;
- a September 2020 announcement by Newfoundland Power’s parent company, Fortis Inc., of its plan to increase both the rate base of its regulated subsidiaries and its dividends by an average of 6% per year over the ensuing five years; and
- 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 summarized his position with a quote from earlier correspondence to the Board:

The [Board] says that having no public hearing is the norm. The Consumer Advocate does not understand why that is so. Canadian appellate courts have said: “We rely on the adversarial process to get at the truth. That process assumes that the truth best emerges after a full and vigorous competition amongst the various opposing parties”. That vigorous competition process routinely involves evidence being “tested in the crucible of cross-examination” in a public forum. Public oral hearings, particularly adversarial ones, further freedom of expression, foster public interest, and instigate public engagement and debate. Subjecting a utility’s proposed budget to the crucible of cross examination in a public

forum would: better identify the strengths and weaknesses of the proponent's and intervenors' cases; and be more likely to achieve the optimum outcome for ratepayers.

On September 20, 2021 Newfoundland Power submitted that the Application has been subjected to a "thorough and transparent process" under the Guidelines. It also noted that the Board's request for information process under the Guidelines:

...functions as an efficient and effective substitute for oral cross-examination of the Application's proposals, which is further enhanced when the intervenor has the opportunity to submit additional requests requesting clarification on earlier responses. The process for reviewing the Application has also allowed for the filing of intervenor evidence by the Consumer Advocate, with an opportunity for written submissions to follow.

Newfoundland Power stated in relation to the issues raised by the Consumer Advocate:

The information on the record with respect to the Sandy Brook Plant Penstock Replacement project illustrates the thorough interrogation of the Application that has occurred through the Board's established process. The Company observes that other issues raised by the Consumer Advocate, such as the impact of the COVID-19 pandemic on the 2022 capital budget, public statements by Fortis Inc. concerning its consolidated forecasts, and the prudence standard, have also been addressed through the [Request for Information] process.

Newfoundland Power submitted that the Consumer Advocate's request for an oral hearing is not justified and stated:

The Consumer Advocate has not identified specific issues regarding projects proposed in the Application, and has, in effect, requested a public hearing for the sole purpose of cross-examining the Company's management on the proposed capital projects. Newfoundland Power submits that the Consumer Advocate has been afforded a full opportunity through the written review process to understand the nature and scope of Newfoundland Power's proposals and to test the evidence provided by the Company.

Newfoundland and Labrador Hydro advised that it had no comment on the Consumer Advocate's request for an oral hearing.

Capital budget applications have, in recent years, been addressed through fully public and transparent written hearing processes. Through this process the Board, the Consumer Advocate and other interested parties use the documentary evidence, utility presentations, technical conferences and written requests for information (RFIs) to understand and test the proposals set out in a capital budget application. After this full exchange of information the parties submit written submissions for the Board's consideration. The Board believes that this written hearing process provides a fair and reasonable opportunity for participation in capital budget applications for the Consumer Advocate and other interested persons and provides effective and efficient oversight of utility capital expenditures. The use of written processes is a common feature of Canadian public utility regulation.

The Board does not agree with the Consumer Advocate's suggestion that oral testimony and cross-examination should be ordered to ensure that Newfoundland Power's witnesses:


- do not “obfuscate or even conceal weaknesses” in the Application;
- present cost-effective decisions made in the customer’s best interest;
- do not “prevaricate, confuse or deflect a question that is uncomfortable or problematic”;
- clarify and explain exact meaning of their responses to questions; and
- are subjected to an assessment of their “purported expertise and how it was or was not utilized in preparing the Application.”

The written process allows for questions to be posed in relation to any aspect of the evidence and for the responding party to provide a complete answer which addresses all aspects relating to the questions posed and considers the input of relevant staff and experts. To the extent that there are additional questions that arise from a response these can be addressed through additional written information requests. The Board has found that written questions and responses are the best way to test the evidence filed in a capital budget application. 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 Board does not accept the Consumer Advocate’s position that there should be oral cross-examination of Newfoundland Power witnesses.

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. The Consumer Advocate submitted that the information provided in the Application and the RFIs falls short of what is needed to properly assess the merits of the proposed expenditures and the material does not quantify the risks or benefits to customers of various projects. The Consumer Advocate stated that decades-long projects merit the more detailed scrutiny that only public oral hearings can provide and that the need for careful scrutiny is compounded in the particular circumstances. The Board agrees that careful scrutiny of Newfoundland Power’s 2022 Capital Budget Application is required and believes that this best accomplished through the written process. The Board also believes that the written process has afforded the Consumer Advocate a full opportunity to understand the nature and scope of the proposals and to test the evidence filed. The Board is satisfied that the issues to be decided in this Application can be addressed based on the written record and that an oral hearing is not necessary in the circumstances. The Board will not grant the Consumer Advocate’s request for an oral hearing in Newfoundland Power’s 2022 Capital Budget Application.

If you have any questions, please do not hesitate to contact the Board’s Legal Counsel, Ms. Jacquie Glynn, by e-mail, jglynn@pub.nl.ca or telephone (709) 726-6781.

Sincerely,



Cheryl Blundon
Board Secretary

CB/cj

ecc **Newfoundland Power Inc.**
Liam O'Brien, E-mail: lobrien@curtisdawe.com
NP Regulatory, E-mail: regulatory@newfoundlandpower.com
Newfoundland and Labrador Hydro
NLH Regulatory, E-mail: NLHRegulatory@nlh.nl.ca

Consumer Advocate
Bernard M. Coffey, Q.C., E-mail: berncoffey@gmail.com
Stephen Fitzgerald, E-mail: sfitzgerald@bfma-law.com
Sarah Fitzgerald, E-mail: sarahfitzgerald@bfma-law.com
Bernice Bailey, E-mail: bbailey@bfma-law.com