

July 29, 2016

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

Attention: Ms. Cheryl Blundon
Director Corporate Services & Board Secretary

Dear Ms. Blundon:

Re: Newfoundland and Labrador Hydro - Application for the Approval of a Plan for the Rate Stabilization Plan ("RSP") Surplus to Customers - Request for Further Information

In the Board's letter of July 25, 2016, the Board requested additional information on Hydro's application for approval of a plan to refund to customers a portion of the balance in the Rate Stabilization Plan. Hydro's responses to the Board's questions are below.

- Q1.** Has Hydro received correspondence or clarification from Canada Revenue Agency ("CRA") on the treatment of HST on customer refunds? If so, please provide a copy along with an explanation of the impact of the ruling on Hydro's RSP Refund Plan.
- A1.** Hydro's correspondence from the Canada Revenue Agency (CRA) regarding the treatment of HST on customer refunds is attached as Attachment 1. As noted in Attachment 1:

...subsection 232(2) of the Excise Tax Act provides that where a particular person has charged to, or collected from, another person tax under Division II calculated on the consideration or a part thereof for a supply and, for any reason, the consideration or part is subsequently reduced, the particular person may adjust, refund, or credit, the amount of tax as calculated on the value of the consideration that was reduced.

Based on the CRA letter, Hydro can provide a HST/GST refund to customers and receive an offsetting GST/HST credit if the RSP Refund to be provided to customers is based on the customers' usage for the period in which the RSP Surplus accumulated (January 1, 2007 to August 31, 2013). The GST/HST credit is required to be determined based on the rate of GST/HST that was in effect for the refund period.

- Q2. Please confirm, and provide an explanation, that Hydro's proposal that the refund be paid to Hydro Island Interconnected Rural customers whose rates are based on rates charged by Newfoundland Power, with the exception of Hydro Rural Rate 1.3, complies with the decision of the Court of Appeal and the direction from government.
- A2. In Hydro's view, it would be incorrect and improper to provide a refund of the RSP to Rural Rate 1.3. Moreover, it would be inconsistent with the Order in Council and with the Court of Appeal's decision on the matter.

Rural Rate 1.3 is a preferential rate with long historical roots. It came about decades ago through an Order in Council and has been extended throughout that time to the present. This rate is not based upon current or forecast costs and, more to the point, is not based upon the Island Interconnected Grid rate structure and so is not affected by changes in fuel costs collected or refunded through the RSP.

The Order in Council requires Hydro to refund RSP amounts. The concept of a refund requires that an over payment was made. In the case of the RSP Refund Plan, a balance has been identified within the RSP as having been higher than was appropriate and which resulted from some precipitous reductions in load that occurred in the Island Industrial rate Class. Rates paid in accordance to Rural Rate 1.3 are not connected with or affected by the RSP.

The Court of Appeal's decision on this matter in *The Consumer Advocate v. The Board of Commissioners of Public Utilities*, 2015 NLCA 24, is clear. The primary issue before the court was whether, in accordance with the Order in Council (OC2013-089 as amended by OC2013-207) rate payers on the Labrador Interconnected System could avail of the RSP refund. The Court determined that they could not. Rural Rate 1.3 (the preferential rate charged to the Burgeo School and Library under an Order in Council to the Board) was not an issue brought before the Court but the principles found in the Court's decision apply equally to that rate class as they do to the Labrador Interconnected Customers. While the source of the electrical supply for Rural Rate 1.3 is from the Island Interconnected Grid, the composition of the costs is not. This is because the rate is not derived from Island interconnected Grid costs structures in any manner, and more particularly, is not affected by the RSP.

The Court provides the rationale for its decision in its discussion of the matter found in paragraphs 41 and 45:

[41] In its decision, the PUB concluded that all ratepayers could receive a rebate, i.e. a partial repayment of the amount they had paid for power. But, reading the Order in Council it is clear that the rebate is a modality, a means to give effect to the purpose of the plan, which was to provide a refund from the RSP. The PUB failed to address the following issue: while a ratepayer can receive a rebate of an amount paid for power, can they receive a refund from the RSP when they have never paid into it? It was unreasonable for the PUB to interpret "ratepayers" without having regard to the issue of whether the range of such persons was limited by the purpose set out in the Order in Council of providing a refund from the RSP.

[45] In light of what has been set out above concerning “refund”, there is only one possible answer to the question, “can those who never paid into the RSP receive a refund from it”: the answer is that they cannot. Only those who paid into the RSP can receive a refund from it.

Paragraph 51 of the Court’s decision reads:

[51] This Court interprets the Order in Council such that the refund in the form of a rebate is to be made to Newfoundland Power’s customers and to Hydro’s island grid customers. For other issues, the matter is referred back to the PUB for consideration.

Hydro recognizes that paragraph 51 of the Court’s decision speaks of island grid customers without mention of the Burgeo School and Library preferential rate (Hydro Rural Rate 1.3); however the principle that is set forth clearly in the Court’s decision (as quoted above) removes any doubt that the failure to exclude Rural Rate 1.3 was an oversight by the Court (and by those appeared before it). Making an RSP refund payment to this rate class would violate the principle set forth in the Court’s decision.

- Q3. Please provide a complete list of the communities on the Island Interconnected system serviced by Hydro and confirm in which communities customers are eligible for refunds.
- A3. A complete list of the communities on the Island Interconnected System serviced by Hydro and confirmation that these customers are eligible for refunds is attached as Attachment 2.

Should you have any questions, please contact the undersigned.

Yours truly,

NEWFOUNDLAND AND LABRADOR HYDRO


Tracey L. Pennell
Senior Counsel, Regulatory

TLP/cp

cc: Gerard Hayes – Newfoundland Power

Thomas Johnson, Q.C. – Consumer Advocate



Excise and GST/HST Rulings Directorate
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Ottawa ON K1A 0L5

Newfoundland and Labrador Hydro
Hydro Place, 500 Columbus Drive
PO Box 12400
St. John's NL A1B 4K7

JUL 25 2014

Case Number: 159624
Business Number: 121394928

Attention: Mr. Fred Murphy
Tax Specialist

Dear Mr. Murphy:

Subject: GST/HST INTERPRETATION
Application of GST/HST to a Refund of Rate Stabilization Plan Surplus

Thank you for your letters of January 28, 2014, and March 18, 2014, concerning the application of the Goods and Services Tax (GST)/Harmonized Sales Tax (HST) to the refund of surplus funds held in Newfoundland and Labrador Hydro's Rate Stabilization Plan (RSP).

The HST applies in the participating provinces at the following rates: 13% in Ontario, New Brunswick and Newfoundland and Labrador, 14% in Prince Edward Island and 15% in Nova Scotia. The GST applies in the rest of Canada at the rate of 5%.

All legislative references are to the *Excise Tax Act* (ETA) unless otherwise specified.

We understand through the aforementioned letters, telephone conversations, and supplemental documentation that:

1. Newfoundland Labrador Hydro (Hydro) is registered for GST/HST purposes and holds Business Number 121394928.
2. Hydro supplies electricity to customers in Newfoundland and Labrador.
3. The RSP is an electricity rate smoothing methodology introduced in 1986 to manage an otherwise volatile electricity market. The electricity market's volatility is directly correlated to the cost of fuel used at the Holyrood Generating Station and the overall electricity consumption in the province.

4. Electricity rates are established by the Board of Commissioners of Public Utilities (the Board) using estimates of, amongst others, fuel consumption, fuel prices, and consumer demand. Actual electricity charges to customers are then compared to the cost of service estimates to generate an RSP surplus, or deficit.
5. Since its inception in 1986, the RSP rules have prescribed the use of future electricity consumption to refund or collect from customers, balances which have accumulated in the RSP account.
6. Since 2007, there has been a significant reduction in the industrial customer consumption, primarily due to a reduction in use within the pulp and paper industry in the province. As a result of this and other RSP variances, a significant positive balance has accumulated in the RSP account. As of August 31, 2013, the positive balance in the account owed to customers (the RSP surplus) had grown to \$112.6 million and consisted of accumulated surpluses and interest accrued on the balances in the account.
7. Through Orders-In-Council OC2013-89 and OC2013-207, and Board Orders PU26(2013) and PU32(2013), Hydro has been directed to refund the RSP surplus.
8. Order-in-Council, OC2013-089 dated April 4, 2013, states that Hydro's General Rate Application process will include a RSP surplus refund plan to non-industrial ratepayers. Further, the plan shall result in direct payments or rebates to those ratepayers and shall not be in the form of an electricity rate adjustment.
9. Hydro has proposed allocating the RSP surplus to its current electricity customers (Newfoundland Power and rural customers) proportionately, according to the retail electricity consumption by account holders over the period of January 2013 through December 2013, compared to total electricity consumption by all account holders.
10. Alternatively, Hydro would contemplate allocating the RSP surplus out to all past and current customers proportionately, based on their individual consumption through the period in which the RSP surplus accumulated. The amount of refund would be a reduction in the original consideration paid or payable and would either be applied as a credit against future billings or paid directly to the account holder.
11. Hydro's customers would receive their refund in the form of a one-time account credit on a future billing statement. Where a refund credit entitlement exceeds the consideration payable for the supply of electricity in that billing statement, a credit balance will be carried through successive billings until the credit amount is exhausted.
12. Hydro proposes to identify by billing line item, the amount of consideration payable for electricity consumption in that billing period, the amount credited for the RSP surplus, and the total amount of HST payable. Hydro suggests that the amount of HST to be billed would be calculated by applying the HST rate to the net amount payable, which is the

difference between the aforementioned consideration payable for the electricity consumption and the amount of the credit.

INTERPRETATION REQUESTED

You would like to know whether either of the two proposals put forward are consistent with the legislative framework established by section 232 and whether the interest accumulated in the RSP account must be segregated and excluded from the reduction in consideration. Further, providing at least one of the proposals would be considered a reduction in consideration, you have asked whether the Canada Revenue Agency (CRA) would provide an administrative concession regarding the information requirements of credit notices as prescribed in the *Credit Note and Debit Note Information (GST/HST) Regulations*. Specifically, you have requested that Hydro be able to maintain an Excel document that would contain the required information as opposed to providing the information directly on the credit notice.

INTERPRETATION GIVEN

Subsection 232(2) provides that where a particular person has charged to, or collected from, another person tax under Division II calculated on the consideration or a part thereof for a supply and, for any reason, the consideration or part is subsequently reduced, the particular person may adjust, refund, or credit, the amount of tax as calculated on the value of consideration that was reduced. The supplier has up to four years after the end of the reporting period in which the consideration was reduced to adjust the amount of tax charged or to refund or credit the tax collected to the recipient.

In issuing a credit note to a person the *Credit Note and Debit Note Information (GST/HST) Regulations* identifies the information that must be contained within the credit note. The information requirements are further discussed in GST/HST Memorandum 12.2 – *Refund, Adjustment, or Credit of the GST/HST under Section 232 of the Excise Tax Act*. The legislative provisions and information supplements make it clear that all credit notes issued must contain;

1. a statement or other indication that the document is a credit note;
2. the name of the supplier or an intermediary in respect of the supply, or the name under which the supplier or the intermediary does business, and the registration number of the supplier or the intermediary;
3. the name of the recipient or name of the recipient's business or the name of the recipient's duly authorized agent or representative;
4. the date on which the note is issued.

Further, where the note is issued for a total amount that includes the amount by which the consideration and the tax calculated thereon have been reduced in respect of multiple taxable supplies, the note should contain the total amount of the adjustment, credit, or refund of tax. Without the latter, the issuer of the note must include a statement to the effect that the adjustment

includes an amount as tax, the total of the rates at which tax was paid or payable in respect of each of the taxable supplies that is not a zero-rated supply and for which there is a reduction in tax, and either the total reduction of consideration and tax in respect of each such supply or the total reduction of consideration and tax in respect of all such supplies to which the same total tax rate applies.

The legislative framework is specific. Section 232 only applies in circumstances where a reduction in consideration is provided to a person who has paid, or has been charged, the GST/HST on an original taxable supply and for any reason the amount of consideration has subsequently been reduced.

It is our position that the requirements of subsection 232(2) would not be met if Hydro chooses to apportion the RSP surplus to current account holders by providing a single credit based on their 2013 electricity consumption. This methodology does not relate the amount of rebate, proposed to be paid, back to original supplies on which GST/HST was originally charged. Furthermore, this methodology does not match the rebate back to persons who originally paid, or were charged, the GST/HST. As such, this methodology would not permit a credit or refund of the GST/HST, nor would Hydro be permitted to deduct these amounts in determining its net tax.

The requirements of subsection 232(2) would be met if Hydro apportions, based on actual consumption and billings, the RSP surplus to persons who, at any time, held an electricity account during the period of January 1, 2007, to August 31, 2013, and if Hydro provides the prescribed information on its credit notices. In providing a reduction in consideration against previous taxable supplies and providing a proper credit note, Hydro would be in a position to provide a refund or credit of GST/HST previously charged to or paid by its customers and to adjust its own net tax. Under subsection 232(3), Hydro could deduct the amount in determining its net tax in the same reporting period in which it has issued the credit notes to its customers. This will allow Hydro to recover the GST/HST credited or refunded to its customers as the RSP surplus would only be used to establish the amounts of the reductions in consideration and not the corresponding GST/HST adjustments. Further, there would not be a requirement for Hydro to segregate the RSP surplus between amounts of surplus and interest that has accumulated on the surplus to determine the amounts of the reductions in consideration. Legislatively, Hydro would be able to calculate a GST/HST refund or credit on any amount by which previous consideration for a taxable supply has been reduced, regardless of the reason for the reduction.

Although we have recognized that subsection 232(2) would apply to the second scenario offered by Hydro, we would be unable to provide an administrative concession with respect to the credit note information requirements. All aspects of the information requirements identified in the *Credit Note and Debit Note Information (GST/HST) Regulations* must be met on the credit note, or on an addendum to the credit note which the customer receives. However, that is not to say each prior transaction is required to be listed separately on the credit note with a corresponding reduction in GST/HST also being reflected. The calculation of the total amount credited or refunded to a customer can be retained by Hydro in an Excel spreadsheet. Hydro could meet the credit note information requirements identified in the *Credit Note and Debit Note Information*

(GST/HST) Regulations by providing the following information on its billings statements, some of which is already included in the statements:

- 1) A statement indicating a credit note adjustment;
- 2) the name of Hydro;
- 3) the name of the recipient, or the name of the recipient's agent or representative;
- 4) the date on which the credit note is issued;
- 5) the aggregate amount of the refund or credit of the GST/HST for which the credit note is issued.

Note: In calculating the adjustment for the GST/HST, the rate of the GST/HST in effect at the time the original supply was made is to be used.

An example of the amounts to be included on a billing statement would be as follows:

Previous Account Balance		\$500.00
Payment received		\$500.00
Current Billing Month: August 2014:		
Electricity use	\$600.00	
GST/HST @ 13%	<u>78.00</u>	
Subtotal		\$678.00
Credit Note:		
RSP Billing reduction:	(500.00) ¹	
HST credit adjustment ²	<u>(65.00)</u>	
Total Credit		<u>(\$565.00)</u>
Current Charges/Credits		<u>\$113.00</u>
Account Balance		<u>\$113.00</u>

¹ The actual calculations of the reduction and the amount of tax could be maintained in an Excel spreadsheet.

² This is a recent customer and only HST at 13% was charged on previous supplies of electricity.

In accordance with the qualifications and guidelines set out in GST/HST Memorandum 1.4, *Excise and GST/HST Rulings and Interpretations Service*, the interpretation given in this letter, including any additional information, is not a ruling and does not bind the CRA with respect to a particular situation. Future changes to the ETA, regulations, or the CRA's interpretative policy could affect the interpretation or the additional information provided herein.

If you require clarification with respect to any of the issues discussed in this letter, please call me directly at 905-721-5222. Should you have additional questions on the interpretation and application of GST/HST, please contact a GST/HST Rulings officer at 1-800-959-8287.

Yours truly,



David Nichol
General Operations and Border Issues Division
Excise and GST/HST Rulings Directorate

List of Communities Serviced by Hydro on the Island Interconnected System

Community Name	Island Interconnected	Eligible for RSP Refund
ANCHOR POINT	Yes	Yes
BAIE VERTE	Yes	Yes
BARTLETTS HARBOUR	Yes	Yes
BEAUMONT	Yes	Yes
BELLBURNS	Yes	Yes
BELLEORAM	Yes	Yes
BIDE ARM	Yes	Yes
BIRCHY HEAD	Yes	Yes
BIRD COVE	Yes	Yes
BLACK DUCK COVE	Yes	Yes
BONNE BAY	Yes	Yes
BRENTS COVE	Yes	Yes
BRIGHTON	Yes	Yes
BUCHANS	Yes	Yes
BURGEO	Yes	Yes
BURLINGTON	Yes	Yes
CASTORS RIVER	Yes	Yes
CHANGE ISLANDS	Yes	Yes
COACHMANS COVE	Yes	Yes
CONCHE	Yes	Yes
CONNE RIVER	Yes	Yes
COOKS HARBOUR	Yes	Yes
COOMBS COVE	Yes	Yes
COW HEAD	Yes	Yes
CROQUE	Yes	Yes
DANIELS HARBOUR	Yes	Yes
DEEP BAY	Yes	Yes
DEER LAKE	Yes	Yes
EDDIES COVE	Yes	Yes
EDDIES COVE WEST	Yes	Yes
ENGLEE	Yes	Yes
ENGLISH HARBOUR WEST	Yes	Yes
FLEUR DE LYS	Yes	Yes
FLOWERS COVE	Yes	Yes
FOGO	Yes	Yes
GAULTOIS	Yes	Yes
GRAND BRUIT	Yes	Yes
GREEN ISLAND BROOK	Yes	Yes
GREEN ISLAND COVE	Yes	Yes
HAMPDEN	Yes	Yes

HARBOUR BRETON	Yes	Yes
HARBOUR ROUND	Yes	Yes
HARRYS HARBOUR	Yes	Yes
HAWKES BAY	Yes	Yes
HEAD BAY D'ESPOIR	Yes	Yes
HERMITAGE	Yes	Yes
ISLAND HARBOUR	Yes	Yes
JACKSONS ARM	Yes	Yes
JACKSONS COVE	Yes	Yes
JOE BATTS ARM	Yes	Yes
KINGS POINT	Yes	Yes
LA POILE	Yes	Yes
LA SCIE	Yes	Yes
LITTLE BAY NDB	Yes	Yes
LONG HARBOUR	Yes	Yes
MAIN BROOK	Yes	Yes
MIDDLE ARM	Yes	Yes
MILES COVE	Yes	Yes
MILLTOWN	Yes	Yes
MINGS BIGHT	Yes	Yes
MONKSTOWN	Yes	Yes
NIPPERS HARBOUR	Yes	Yes
NORRIS POINT	Yes	Yes
PACQUET	Yes	Yes
PARSONS POND	Yes	Yes
PETIT FORTE	Yes	Yes
PILLEYS ISLAND	Yes	Yes
PLUM POINT	Yes	Yes
POLLARDS POINT	Yes	Yes
POOLS COVE	Yes	Yes
PORT ANSON	Yes	Yes
PORT AUX CHOIX	Yes	Yes
PORT SAUNDERS	Yes	Yes
PORTLAND CREEK	Yes	Yes
RALEIGH	Yes	Yes
RATTLING BROOK	Yes	Yes
REEFS HARBOUR	Yes	Yes
RENCONTRE EAST	Yes	Yes
RIVER OF PONDS	Yes	Yes
ROBERTS ARM	Yes	Yes
ROCKY HARBOUR	Yes	Yes
RODDICKTON	Yes	Yes
ROUND HARBOUR	Yes	Yes

SALLYS COVE	Yes	Yes
SANDY COVE	Yes	Yes
SEAL COVE FB	Yes	Yes
SELDOM COME BY	Yes	Yes
SHOE COVE	Yes	Yes
SNOOKS ARM	Yes	Yes
SOPS ARM	Yes	Yes
SOUTH BROOK GB	Yes	Yes
SOUTH EAST BIGHT	Yes	Yes
SPRINGDALE	Yes	Yes
ST ALBANS	Yes	Yes
ST ANTHONY	Yes	Yes
ST JULIENS	Yes	Yes
ST LUNAIRE-GRIQUET	Yes	Yes
ST PAULS	Yes	Yes
STAG HARBOUR	Yes	Yes
TILTING	Yes	Yes
TRITON	Yes	Yes
TROUT RIVER	Yes	Yes
WESTPORT	Yes	Yes
WOODSTOCK	Yes	Yes