

January 12, 2024

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

Attention: Jo-Anne Galarneau  
Executive Director and Board Secretary

**Re: Newfoundland and Labrador Hydro – 2021 Capital Budget Supplemental Application Approval of the Construction of Hydro's Long-term Supply Plan for Southern Labrador – Request for Further Information – Reply**

On January 3, 2024, the Board of Commissioners of Public Utilities ("Board") requested additional information to address questions related to Newfoundland and Labrador Hydro's ("Hydro") proposed conditional approval in relation to Hydro's application regarding the construction of Hydro's long-term supply plan for southern Labrador.<sup>1</sup> Enclosed please find Hydro's responses to the questions posed by the Board.

**i. Is Hydro requesting conditional approval of the full project and all proposed expenditures?**

Hydro is requesting approval of the full project and all its proposed expenditures based on the evidence Hydro has provided under the condition that Hydro will not proceed with the construction stage of the project prior to meeting requirements related to the duty to consult and to environmental approval.

Hydro has made this proposal to balance the necessity of the further steps needed to meet the duty to consult, and to obtain environmental approval, while providing the certainty necessary to allow Hydro to proceed with the construction stages of the project once the duty to consult and environmental approval requirements have been met. Having received approval of the project, once the conditions have been met no further process would be necessary other than providing confirmation of the condition fulfillment to the Board. The steps necessary to meet the duty to consult and to obtain environmental approval are not expected to materially impact any of the evidence and justification for the project that is now before the Board and, therefore, is not necessary to have in advance of a Board decision on those merits. Hydro notes that if there were any substantive changes to the project scope or costs as a result of the duty to consult or environmental assessment process that would materially change the project from what had been approved by the Board, the Board would be advised. This would be no different than any project

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<sup>1</sup> "Long-Term Supply for Southern Labrador," Newfoundland and Labrador Hydro, rev. May 31, 2023 (originally filed July 16, 2021).

where circumstances would dictate scope or cost changes after Board approval. Hydro has, in the past, brought such changes to the attention of the Board where necessary.<sup>2</sup>

Hydro has proposed that the Board provide approval of the project under the condition that Hydro not proceed with the construction to allow Hydro the time to meet the duty to consult, to obtain environmental approval, and to provide confirmation to the Board that it has done so. If only partial approval were provided and further process was necessary after the initial, non-construction work, there would be substantial risk to the schedule currently in place to complete the project, further delaying service to the region and likely increasing the project costs due to the delay.

Hydro's evidence has shown that the proposed project is the least-cost solution to provide safe and reliable service to the residents in the region in an environmentally responsible manner. However, Hydro acknowledges the position set out by the NunatuKavut Community Council ("NCC") that the Board may have an obligation to consider whether the duty to consult has been adequately achieved.

Hydro believes that the proposal to approve the project under the condition that construction cannot proceed prior to confirmation of fulfillment of the duty to consult and receipt of environmental approval would ensure that no actions are taken in the region that would impact any of the NCC's asserted rights, while allowing for pre-construction steps and progress to advance. Approval with conditions will reduce the risk of delay resulting from ongoing or additional regulatory process, and allow for the steps necessary to meet the current project schedule once the conditions are met.

**ii. Is there work and expenditures which Hydro will not begin until the Board determines that the conditions are satisfied? If so, please provide details.**

Yes. Hydro proposes that construction on the interconnection, currently anticipated to begin in the second quarter of 2025,<sup>3</sup> and the subsequent commissioning of equipment would not proceed until such time confirmation is provided that the conditions have been satisfied.

Hydro notes that the estimated costs are noted in Hydro's application, and are estimates based on the current schedule.

**iii. Is there work and expenditures which would not be subject to the conditions? If so, please provide details.**

Yes. Hydro proposes that the activities outlined below and described in Table 3 of Schedule 3 to the application as planning, design, and procurement would commence immediately following the receipt of approval of the project by the Board. These would include:

- Detailed engineering and design;

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<sup>2</sup> For example, on June 6, 2022, Hydro applied for approval of supplemental capital expenditures for projects at the Holyrood Thermal Generating Station, including refurbishment of Tank 2. Subsequent to receiving the Board's approval, Hydro determined that Tank 1 could be refurbished and reinstated for substantially less than Tank 2 and requested that the Board's Order be modified or changed to approve the refurbishment of Tank 1 instead of Tank 2. Please refer to "Request for Change or Modification to Board Order No. P.U. 24(2022) – Approval of Various Supplemental Capital Projects at the Holyrood Thermal Generation Station," Newfoundland and Labrador Hydro, September 26, 2022, att. 1.

<sup>3</sup> "Long-Term Supply for Southern Labrador," Newfoundland and Labrador Hydro, rev. May 31, 2023 (originally filed July 16, 2021). sch. 3, p. 3, Table 3.

- Issue, award, and execution of the environmental assessment consultant;
- Issue and award of the genset tender (required for overall genset data for environmental assessment/duty to consult - emissions, fuel consumption and physical footprint);
- Issue, award, and initial execution of the design consultant contract;
- Internal scope to support the environmental assessment process, duty to consult, design, procurement, and contract management; and
- Issue and award switchgear and transformer tenders (required due to long-lead times to meet required schedule).

The estimated cost commitment associated with the above work totals approximately \$10 million, including costs relating to cancellation fees for some tenders if the project did not continue to construction.<sup>4</sup> Those costs related to cancellation would not be incurred if the conditions are met and the project continues to construction.

Unless Hydro is able to proceed with these steps within the timeframes set out in Table 3 of Schedule 3, Hydro will be unable to meet the fulsome schedule and provide safe and reliable service in an environmentally responsible manner, as planned.

**iv. Please describe the specific conditions that must be met for final approval.**

As Hydro noted above, Hydro requests that the Board approve the project at this time based on the information and submissions that have been filed to date. Hydro proposes that the approval would include the condition that, while the project was approved, Hydro is not to proceed with construction pending fulfillment of the conditions. Specifically, Hydro must confirm to the Board that it has met the duty to consult requirement and environmental approval of the project has been obtained.

**v. Should a deadline be established for Hydro to demonstrate that the conditions have been met? If so, what is the proposed deadline?**

Hydro's proposal regarding the conditions to be instituted by the Board would require that they have been met before construction begin. Hydro acknowledges that there is the possibility that the environmental assessment and the duty to consult process could evolve and impact the estimated schedule on the record, although Hydro is taking all steps necessary to mitigate against any additional delays in the schedule. Hydro does not believe that a deadline of a specific date is necessary.

**vi. In the absence of an agreement between the parties, how will Hydro demonstrate that the duty to consult has been met? How would potential timelines associated with demonstrating that the duty to consult has been met impact the progress of the project?**

In any circumstance where the duty to consult arises, it is incumbent on the party with that duty to take all reasonable steps to have meaningful consultation with the applicable Indigenous group, and to take any reasonable steps necessary to mitigate any adverse impacts of the project on the rights or asserted rights of that group. In circumstances where the project proponent believes that all

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<sup>4</sup> As contracts have not yet been awarded, Hydro has not finalized what the penalty or cancellation clauses for these contracts would be. This is a general estimate only based on a number of variables. The above estimate also includes costs related to front-end engineering design, which has already been completed.

reasonable steps have been taken to determine and mitigate any adverse impacts, but where the Indigenous group does not agree, the details of the consultation, discussions, and steps of mitigation are provided to the appropriate adjudicator for review and consideration to determine if the legal standard of duty to consult has been met. If this was the case for this project, the timeline associated with arriving at a determination that the duty to consult has been met could be substantial and would have implications for the current schedule estimated for the project.

Hydro is committed to ensuring meaningful consultation with the NCC with respect to the project and, as NCC noted in their submission, has committed to taking their asserted rights into account and to make reasonable efforts to accommodate or mitigate any potential impacts. The NCC further noted that Hydro has made considerable efforts to ensure NCC's concerns are addressed, and to ensure that the necessary consultation has and will take place. Hydro believes that it will be able to confirm to the Board, with the support of the NCC, that the duty to consult has been met prior to proceeding with construction of the project.

**vii. Environmental acceptance is not normally a condition for Board approval. Why should it be a condition in this case?**

As noted above, Hydro is proposing that the project be approved with the condition that construction not proceed until Hydro has confirmed that the duty to consult has been met and environmental approval received. Without environmental approval, Hydro would not be able to proceed with construction even with an unconditional Order from the Board. It is for this reason that environmental approval is not normally stipulated as a condition for Board approval. In this circumstance, because some of the same work and analysis necessary to obtain environmental approval will also contribute to meeting the duty to consult, and as the environmental assessment process will likely include consultation, analysis, and mitigation of concerns related to the NCC's asserted rights, Hydro included the environmental approval as a condition of proceeding with construction. However, it isn't a necessary condition for consideration by the Board in the way the fulfillment of the duty to consult is.

**viii. Does the legislation provide the Board with the authority to issue a conditional approval and is such an approval consistent with regulatory practice?**

Yes, the Board has this authority. Sections 16 and 17 of the *Public Utilities Act* ("Act")<sup>5</sup> allows the Board to make all examinations and inquiries to keep itself informed as to the compliance with the law by a public utility, and has the duty to enforce all other laws relating to public utilities in addition to the Act.

As stated in section 118 of the Act,<sup>6</sup> the Act is to be interpreted and construed liberally in order to accomplish its purposes, and the Board has, in addition to the powers specified in the Act, all additional, implied and incidental powers which may be appropriate or necessary to carry out all the powers specified in this Act.

Justice Green, in the 1998 Stated Case ("Stated Case"), included the following among a number of general principles to be used in the interpretation and application of the legislation:

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<sup>5</sup> *Public Utilities Act*, RSNL 1990, c P-47, ss 16, 17.

<sup>6</sup> *Public Utilities Act*, RSNL 1990, c P-47, s 118.

1. The Act should be given a broad and liberal interpretation to achieve its purposes as well as the implementation of the power policy of the province;
2. The Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy; and
3. The failure to identify a specific statutory power in the Board to undertake a particular impugned action does not mean that the jurisdiction of the Board is thereby circumscribed; so long as the contemplated action can be said to be "appropriate or necessary" to carry out an identified statutory power and can be broadly said to advance the purposes and policies of the legislation, the Board will generally be regarded as having such an implied or incidental power.<sup>7</sup>

In a number of instances in the *Act*,<sup>8</sup> the Board is noted as having the discretion to issue an Order containing reasonable terms and conditions. Hydro notes that the inclusion of that stipulation in some sections does not limit the ability of the Board to include terms and conditions in Orders issued on other matters, and in light of section 118 and the comments of Justice Green in the Stated Case, the Board has the jurisdiction to include specific conditions in its decisions. This is consistent with regulatory practice. For example, the Board's Capital Budget Application Guidelines state the following regarding multi-year projects:

The proposed expenditures for each year of a multi-year project will be considered together in the initial year of the application. Where a utility confirms in its capital budget application in subsequent years that the scope, nature and magnitude of the project continues to be consistent with the original approval, further approval of the project is not required. If there is a material change in a subsequent year the expenditures will be subject to further review.<sup>9</sup>

The approval of a multi-year project, provided in the initial year of the application, is conditional on the confirmation in subsequent years that the scope, nature, and magnitude is consistent. That confirmation is necessary to proceed with the subsequent years of the approved project. Similarly, in the case of this project, the approval of the Board of the project and expenditures is conditional on the confirmation, prior to the start of construction, that the duty to consult has been met and environmental approval obtained. That confirmation is necessary to proceed with the subsequent steps of the project.

**ix. What is the impact of a conditional approval and how will the costs be treated in terms of inclusion in rate base and recovery from customers until the determination is made as to whether the conditions are satisfied?**

As with any capital project, until the asset is in service the costs remain in work in progress and would not be included in rate base for recovery from customers. Once the construction is complete and the assets are in service, the costs will be included in rate base for recovery from customers consistent with the recovery of costs for any capital project.

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<sup>7</sup> *Section 101 of the Public Utilities Act (Newfoundland) (Re)*, 1998 CanLII 18064 (NL CA), <<https://canlii.ca/t/27pwh>>.

<sup>8</sup> An example being *Public Utilities Act*, RSNL 1990, c P-47, s 84(3).

<sup>9</sup> "Capital Budget Application Guidelines (Provisional)," Board of Commissioners of Public Utilities, December 20, 2021, p. 5 of 18, para. 6.

**x. How will the costs be treated in terms of inclusion in rate base and recovery from customers if the conditions are not satisfied?**

If the conditions are not satisfied, and the project does not proceed into the construction phase, Hydro would transfer the costs incurred up to that date from work in progress into a newly defined and approved deferral account for future recovery from customers. Those costs would be in relation to the work described in Hydro's response to question iii above; an application for approval of the definition and terms of the deferral account would be made at a later date once it was determined the conditions were not satisfied.

**xi. What is the expected timeline and process for a determination as to whether the conditions have been met? Will Hydro provide updated information at that time with respect to the project and whether there have been any changes in circumstances?**

As noted above, Hydro anticipates environmental assessment approval by the second quarter of 2025. Hydro is working and will continue to work with the NCC to ensure that the duty to consult has been met by that time, if not earlier. Hydro will advise the Board of the status as any substantial and material steps are made in the process. When the conditions are met, Hydro will advise the Board. Hydro believes that with the approval of the project in place based on the evidence provided to date, Hydro's confirmation to the Board that the conditions have been met will allow the project to continue to construction without further regulatory process and associated schedule delay.

As noted above, as is the case with any project, if there are any substantive or material changes in the scope and cost of the project Hydro will advise the Board.

**xii. Hydro stated in its reply, "To start the environmental assessment process, Hydro requires an approved project to submit for assessment." Does Hydro require Board approval prior to submitting the project for environmental assessment? If so, does conditional approval of the Board impact the start of the environmental assessment process?**

Yes. In order to submit the project for environmental assessment, Hydro will need to begin detailed engineering, and issue, award, and execute the environmental assessment consultant contract. Further, Hydro will need to issue and award the genset tender as the technical details of the genset to be installed are required to be submitted as part of the environmental assessment and duty to consult processes (i.e., information such as emissions, fuel consumption and physical footprint) and these details come from the manufacturer. Additionally, Hydro will need to issue, award, and begin execution of the design consultant contract to obtain and share the information necessary to contribute to consultation with the NCC and provide any necessary information within the environmental assessment process.

**xiii. Hydro stated in its reply, "To obtain some of the information necessary both for effective consultation with the NCC and to progress the environmental assessment process, Hydro will have to incur capital expenditures for third-party experts. Expenditures for certain capital assets will also be required as information needed for both the consultation process and environmental assessment process is specific to the asset purchased." Please detail the specific work and expenditures which are required with an explanation as to why it is necessary.**

Please see Hydro's response to question xii.

**xiv. Hydro stated in its reply, “Conditional approval would address the NCC’s concerns by precluding Hydro from proceeding with construction prior to confirmation that the duty to consult has been fulfilled and environmental approval granted, and would also provide Hydro with the required assurance to continue with the next critical steps in a time-sensitive schedule.” Please provide the proposed language of the condition which would preclude Hydro from proceeding with construction.**

Hydro suggests that the Board’s Order could state:

1. Hydro’s application for capital expenditures related to Hydro’s long-term supply plan for southern Labrador, as set out in Schedule A to this Order, is approved.
2. Hydro may proceed with the expenditures necessary for the planning, design, and procurement related to Hydro’s long-term supply plan for southern Labrador, as of the date of this Order.
3. Hydro may proceed with the expenditures necessary for the construction, commissioning, and closeout related to Hydro’s long-term supply plan for southern Labrador, upon confirmation to the Board that environmental approval has been obtained, and that the legal duty to consult with the NCC has been fulfilled.

Should you have any questions or comments about any of the enclosed, please contact the undersigned.

Yours truly,

**NEWFOUNDLAND AND LABRADOR HYDRO**



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