

IN THE MATTER OF An Investigation And Hearing
Into Supply Issues And Power Outages On The
Island Interconnected System.

SUBMISSION IN RESPONSE TO HYDRO'S MOTION TO STRIKE CERTAIN REQUESTS FOR INFORMATION

**Board of Commissioners of Public Utilities
Prince Charles Building
120 Torbay Road, P.O. Box 21040
St. John's, NL
A1A 562**

**ATTENTION: Ms. Cheryl Blundon
Director of Corporate Services & Board Secretary**

August 26, 2014

Preamble: Jurisdiction

In its request for intervener status in this proceeding, Grand Riverkeeper Labrador Inc. ("GRKL") wrote:

We are concerned about many aspects of the construction of the Project, as well as the impacts after construction is complete, impacts that would include but are not limited to, risks, which we believe Nalcor has not thus far acknowledged, that include legal and contractual risks, and risks to the physical integrity of the dams and the North Spur natural dam.

These risks could entail the unavailability for the Island of some or all the planned energy and capacity from Muskrat Falls, over the short, medium or long term. GRKL believes that these risks are material in evaluating the adequacy and reliability of the Island Interconnected system after the interconnection with the Muskrat Falls generating

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facility, and it intends, through its participation in this hearing, to present evidence with respect to these risks.¹

The Board then summarized this request as follows:

Grand Riverkeeper Labrador, Inc. stated that the risks associated with the Muskrat Falls project have not been properly assessed and it is hoped that the Board will ensure that all the risks are laid-bare. They advised that they plan to present evidence concerning the contractual uncertainties related to the water management agreement and implications for the operation of the Muskrat Falls plant and as to the physical risks related to the North Spur natural dam.

On page 4 of the same order, it issued the following observations with respect to this application:

The Board believes that some of the issues which Grand Riverkeeper Labrador, Inc, described in its correspondence may not be relevant to the matters to be addressed in this investigation and hearing. Grand Riverkeeper Labrador Inc. is not a customer on the Island Interconnected system and is not directly affected by the matters before the Board in this investigation and hearing. The Board has determined that it would address adequacy and reliability of the Island Interconnected system following the interconnection with Muskrat Falls. The Board agrees with Newfoundland Power, Hydro and the Consumer Advocate that the issues in the matter should not be extended to the construction, legal, contractual and physical risks of the Muskrat Falls development, as raised by Grand Riverkeeper Labrador, Inc.

The Board notes that Grand Riverkeeper Labrador, Inc.'s reply submission states its intent is to ensure that the Board's review of the adequacy and reliability of the system after commissioning of the Muskrat Falls generating facility and the Labrador Island Link takes into account the various risks associated with the unavailability of some or all of the planned energy and capacity from Muskrat Falls. The Board is satisfied that this stated interest may fall within the issues to be addressed in this investigation and hearing and that Grand Riverkeeper Labrador, Inc. should be granted intervenor status on this basis.

In the last sentence of the first of the two quoted paragraphs (at lines 6 to 9 of page 4 of P.U. 15 (2014), the Board indicates that the issues in the hearing “should not be extended to the construction, legal, contractual and physical risks of the Muskrat Falls development, as raised by Grand Riverkeeper Labrador, Inc.”

The Board then states, in the following paragraph, that GRKL’s intent “to ensure that the Board's review of the adequacy and reliability of the system after commissioning of the Muskrat Falls generating facility and the Labrador Island Link takes into account the various risks associated with the unavailability of some or all of the planned energy and capacity from Muskrat Falls” may indeed “fall within the issues to be addressed in this investigation”. The risks *specifically* identified by GRKL include “legal and contractual risks, and risks to the physical integrity of the dams and the North Spur natural dam ... that

¹ Quoted in P.U. 15(2014), page 2.

could entail the unavailability for the Island of some or all the planned energy and capacity from Muskrat Falls.”

Read together, these paragraphs clearly indicate that the risks identified by GRKL fall within one of the issues already identified in the present proceeding – to wit, the issue of “the adequacy and reliability of the Island Interconnected system following the interconnection with Muskrat Falls”. The Board declines to “extend” the issues in this matter to include these risks, because they are already included in the issues identified in Schedule A in P.U. 3 (2014).

In its Notice of Motion, dated July 7, 2014, NLH makes reference to the first of these two paragraphs:

20. Hydro submits that, contrary to the spirit of Order No. P.U. 15(2014), a majority of the Requests for Information filed by the Grand Riverkeeper Labrador Inc. ("Grand Riverkeeper") pertain to the costing, construction, legal, contractual and physical risks of the Muskrat Falls development.

However, it makes no reference to the Board’s conclusions in the very next paragraph (i.e. lines 9-17).

GRKL suggests, with respect, that the rule of interpretation concerning specific and general provisions can also be applied to this matter.

Even if one were to read the first paragraph (lines 1 to 9) as a general exclusion of the referenced subject matter, the second paragraph (lines 11 to 17) spells out specific inclusions thereto. In law, however, the specific overrules the general (also known as implied exception, taking precedence or “trumping”).² GRKL therefore submits that, even if the first paragraph is read as an exclusion, Newfoundland and Labrador Hydro is incorrect in its characterisation of the questions raised by GRKL as being in excess of the jurisdiction conferred by the Board’s decision.

NLH refers only to the broad exclusions in its characterisation of GRKL’s requests for information, ignoring the specific inclusions that follow. The rule of interpretation states, however, that broad exclusions do not apply when contradicted by specific inclusions.

Noting that GRKL’s intent is “to ensure that the Board’s review of the adequacy and reliability of the system after commissioning of the Muskrat Falls generating facility and the Labrador Island Link takes into account the various risks associated with the unavailability of some or all of the planned energy and

² *City of Verdun v. Doré* [1977] 2 S.C.R. 862; Sullivan R., *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (London, Butterworth’s, 2002) at page 273: “*generalia specialibus non derogant*” (“the Rule”). Sullivan writes: “When two provisions are in conflict and one of them deals specifically with the matter in question while the other is of more general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one. The specific prevails over the general.” While the Rule originally was intended to interpret provisions found in two (2) statutory enactments, one general and one specific, it has since been expanded as a linguistic cannon of construction to apply to any interpretation of specific and general provisions, including within a statute, within a contract or within the decision of a Court, Tribunal or quasi-judicial body. The principle is summarised in *Halsbury’s Laws of England*, 4th ed, vol 44(1), para 1300. See also *Lalonde v Sun Life* [1992] 3 S.C.R. 261, and *R. v Greenwood*, Justice Griffiths (Ontario Court of Appeal) [1992] 7 O.R. (3d) 1.

capacity from Muskrat Falls,” the Board concluded that “this stated interest may fall within the issues to be addressed in this investigation and hearing.” Having granted intervenor status to GRKL based on this intent, it would be inconsistent for the Board to then strike RFIs directly related to these issues — or, at a later date, to strike evidence addressing these same issues.

To summarize, GRKL’s understanding of P.U. 15 (2014) is as follows:

- In the first paragraph of page 4, it declines to generically expand the issues in the present proceeding to include the construction, legal, contractual and physical risks of the Muskrat Falls development;
- In the second paragraph of page 4, however, it specifically indicates that GRKL’s intent “to ensure that the Board’s review of the adequacy and reliability of the system after commissioning of the Muskrat Falls generating facility and the Labrador Island Link takes into account the various risks associated with the unavailability of some or all of the planned energy and capacity from Muskrat Falls” does indeed fall within the Issues already included in the present hearing.

Based on this understanding of P.U. 15 (2014), GRKL respectfully submits that, with the exception of three (3) RFIs concerning costs, the remaining contested RFIs fall squarely within the inclusions in the Board’s decision.

In the following sections, we will demonstrate the conformity of the contested RFIs with the Board’s Order, withdrawing or amending certain of them when appropriate.

Redundancy

GRKL wishes to withdraw the following RFIs, which are redundant to other RFIs (identified in parentheses). We apologize for these clerical errors.

- GRK-NLH-40 (GRK-NLH-7)
- GRK-NLH-51 (GRK-NLH-32)
- GRK-NLH-52 (GRK-NLH-39)

Furthermore, there is no information requested under GRK-NLH-9, which is thus also withdrawn. The Preamble presented under GRK-NLH-9 in fact applies to GRK-NLH-10.

Costs

In paragraph 21 of its Motion, Hydro argues that GRK-NLH-5, GRK-NLH-6, GRK-NLH-7 and parts of GRK-NLH-3 should be struck because they pertain to costs. GRKL agrees with this assertion.

GRKL hereby withdraws GRK-NLH-5 and GRK-NLH-6.

With respect to GRK-NLH-3, GRKL withdraws the last four words, relating to costs, as follows:

GRK-NLH-3: Please describe NLH's rights to energy and capacity under the MFPPA, ~~and the associated costs.~~

With respect to GRK-NLH-7, GRKL also agrees to withdraw the request for cost information. However, the first column of the table presents energy data ("Energy at Soldier's Pond, in GWh") which are relevant for this proceeding. That said, this information has already been provided in response to GRK-NLH-41.

Consequently, GRKL hereby withdraws GRK-NLH-7.

Water Management Agreement and HQ litigation

In paragraph 22 and 23 of its Motion, Hydro challenges the relevance of GRK-NLH-8 through GRK-NLH-29, arguing that they address questions related to the Water Management Agreement and Hydro-Québec litigation. More specifically, it affirms that GRK-NLH-8 through GRK-NLH-15 and GRK-NLH-27 should be struck because they pertain to the Water Management Agreement between Nalcor Energy and CF(L)Co. Hydro writes:

22. ... The issues raised by these Requests for Information comprise forecast data in the absence of the Water Management Agreement. Hydro submits that this issue has been addressed by this Board and that further inquiry into this issue in the present matter will cause prejudice to the parties, will delay the proceeding, and is not conducive to efficient regulatory processes.

As no indication is provided as to how responding to these information requests might "cause prejudice to the parties," this affirmation should be disregarded. GRKL further maintains that NLH is barred from providing such indications in reply, as they ought to have been presented in the Motion proper.

NLH also affirms (at para. 23) that GRK-NLH-16 through GRK-NLH-29 (with the exception of GRK-NLH-27) should be struck because they "pertain to the enforceability of the Water Management Agreement" and "raise speculative questions as to the circumstances that might arise were the WMA found to be beyond this Board's jurisdiction."

It is important to clarify that GRKL has never asserted that the WMA is or might be beyond this Board's jurisdiction, nor does it intend to do so. GRKL is, however, concerned by the possibility that other matters which are clearly outside of this Board's jurisdiction — for example, the interpretation of the contract between CF(L)Co and Hydro-Québec ("the HQ Contract"), currently before the Superior Court of Quebec — could lead to a situation where the WMA established by this Board could be challenged or could become unenforceable.

More specifically, GRKL is concerned that the operation of the WMA is based on an interpretation of the HQ Contract that Hydro-Québec rejects. Should the Courts decide in HQ's favour, it is hard to see how the WMA would not be affected. Recall that, in approving the WMA, the Board stated:

The Board is satisfied that the terms of the proposed Agreement ensure that existing power contracts and renewals of these contracts are not adversely affected. (P.U. 8 (2010), p. 15)

The Board made that finding based on Nalcor's presentation of the terms of the HQ Contract after renewal (Nalcor Pre-Filed Evidence, p. 6) — precisely the interpretation that HQ is now challenging before the Quebec Superior Court.

It is impossible to know and would be improper to speculate as to what further steps HQ would take, should it prevail. But it would also be foolhardy to assume that the continued operation of the WMA would be unaffected.

In its evidence to the PUB in the WMA hearing, quoted in the preamble to GRK-NLH-9, Nalcor made it clear that the WMA was essential to the proper operation of the Lower Churchill power plants.

In the absence of a water management agreement, Nalcor would be required to utilize the water as it became available. Given the limited storage capacity in the Gull Island reservoir (approximately three to four days of maximum flow from the upper Churchill facilities), Nalcor would have to turbine the water and produce energy at the time that it was available; it would be required to "chase the flows" from the upper Churchill. Spills would be likely during the period of the spring runoff, resulting in wasted energy. (underlining added)

Since, without the WMA, Muskrat Falls would not be able to provide all of the energy and capacity to the Island electrical system that is currently planned, this situation constitutes "a risk associated with the unavailability of some or all of the planned energy and capacity from Muskrat Falls" — precisely the issue on the basis of which the Board granted Intervenor status to GRKL.

GRKL respectfully submits that these information requests fall directly within the specific inclusions set out in the second paragraph of page 4 of P.U. 15 (2014), and hence should be allowed.

RFIs concerning the Water Management Agreement

GRK-NLH-10 through GRK-NLH-15 request information that is necessary to evaluate the amounts of energy and capacity that would be available to the Island power system from Muskrat Falls, in the event that the WMA were, for any reason, to become without effect or unenforceable. This information is thus necessary in order to quantify the "risks associated with the unavailability of some or all of the planned energy and capacity from Muskrat Falls," in relation to the Water Management Agreement.

GRKL respectfully submits that these information requests fall directly within the specific inclusions set out in the second paragraph of page 4 of P.U. 15 (2014), and hence should be allowed.

RFIs concerning HQ litigation

GRK-NLH-16 through GRK-NLH-29 requests information as concerns the status of Hydro-Québec's legal challenge to Nalcor's interpretation of the renewal clauses of the Churchill Falls Power Contract as well as specific information concerning the implications for the WMA should that challenge be successful. As noted above, the validity and enforceability of the WMA depend directly on Nalcor's interpretation of these clauses. Should the courts support Hydro-Québec's interpretation of those clauses over Nalcor's, the WMA could become invalid or unenforceable.

Given the risks associated with the unavailability of some or all of the planned energy and capacity from Muskrat Falls that could flow from this proceeding, GRKL respectfully submits that these information requests fall directly within the specific inclusions set out in the second paragraph of page 4 of P.U. 15 (2014), and hence should be allowed.

RFIs concerning the North Spur (Muskrat Falls)

In paragraph 25 of its Motion, NLH asks to be relieved of the responsibility to respond to GRK-NLH-42 through GRK-NLH-50, which raise issues concerning physical risks of the Muskrat Falls Project. Hydro argues that these are issues that the Board has ruled upon in Order No. P.U. 15(2014) as being not relevant to the current review of system reliability and therefore outside of the scope of the present Inquiry.

Like its arguments concerning the WMA and the HQ litigation, this argument fails for the reasons set out in the first section, above. Hydro misconstrues P.U 15 (2014) as excluding risks related to the physical integrity of the Muskrat Falls facility. While the Board did indeed decline to extend the issues in the present matter to explicitly include these risks, it affirmed that these questions do in fact fall within the Issues defined earlier. More specifically, it stated that taking into account the various risks associated with the unavailability of some or all of the planned energy and capacity from Muskrat Falls – which certainly include any identified risks to the physical integrity of the plant – falls within the issues to be addressed in this investigation and hearing.

Conclusion

GRKL respectfully submits that the North Spur issue, like the other issues addressed above, falls clearly within the "Investigation and Hearing Issues" identified in P.U. 3 (2014) for the Final Report, namely:

2. Evaluation of Island Interconnected system adequacy and reliability up to and after the interconnection with the Muskrat Falls generating facility

...

- Other system planning, capital and operational issues which may impact adequacy and reliability before and after interconnection

Each of the issues raised in the GRKL RFIs contested in Hydro's motion "may impact adequacy and reliability before and after interconnection", and therefore should be allowed by the Board. These issues are within the parameters and scope of the issues which have been established by the Board. More specifically, GRKL hereby affirms that the information requested will allow it to present evidence which is relevant and helpful to the Board in making its final determination.

GRKL also respectfully submits that no evidence has been presented in support of Hydro's allegation that "the requirement to provide responses to those Requests for Information will act to complicate the hearing." Even if it had, GRKL respectfully submits that such a floodgates argument should carry little if any weight. The Board is entirely capable of ensuring that the hearing remains focussed on the issues it has set out, even when those issues touch on technically complex matters.

In this regard, GRKL further affirms that it will ensure that the evidence that it subsequently presents to the Board is concise and focussed on the issues of concern to the Board.

For the reasons set out above:

a) GRKL withdraws its RFIs GRK-NLH-5, -6, -7, 9, -40, -51 and -52;

b) GRKL amends its RFI GRK-NLH-3, to read:

GRK-NLH-3: Please describe NLH's rights to energy and capacity under the MFPPA, ~~and the associated costs.~~

c) GRKL respectfully requests that the Board:

- i) Dismiss the Motion to Strike presented by NLH;
- ii) Conclude that the remaining RFIs are relevant to the present matter and appropriate to the present proceeding,
- iii) Order NLH to respond promptly to these outstanding RFIs, and
- iv) ensure that, in setting its calendar for the subsequent steps in the present proceeding, that GRKL is granted sufficient time to file its evidence in these matters such that it is not prejudiced by the delay in response to these RFIs.

Supplemental RFIs in response to new information

GRKL respectfully requests permission to submit five (5) additional RFIs concerning the North Spur issue. These RFIs seek confirmation of new information revealed by *The Telegram* on August 24, 2014. In the

event that the Board decides to allow GRK-NLH-42 through GRK-NLH-50, it respectfully request that it order NLH to respond to GRK-NLH-53 through GRK-NLH-57 as well.

Reservation of Right to Reply

In the event that NLH's Response to be filed by September 10, 2014 presents new arguments or jurisprudence that could have been presented in its original Motion, GRKL respectfully requests the right to present a concise Reply thereto.

Respectfully yours,

(s)

Charles O'Brien

SUPPLEMENTAL RFIs

GRK-NLH-53.

Preamble:

An article entitled “Landslides near dam expected: Nalcor” published in *The Telegram* on August 23, 2014, includes the following passage:

This week, Bennett sat down with The Telegram to explain why Nalcor is confident that the North Spur is not a cause for concern.

The plan involves flattening the spur by taking material off the top and adding material at the bottom, so that its steep sides are less likely to calve off into landslides.

Nalcor will also pile rocks at the base of the spur — essentially building a breakwater — both upstream and downstream of the Muskrat Falls dam to prevent waves from eroding it.

On top of that, the construction work at Muskrat Falls involves building a concrete and bromite wall in the ground along the length of the North Spur, which will extend 45 metres below the water level.

That wall will prevent water from slowly migrating through the spur from the reservoir upstream.

In one of the emails to Bennett following the landslide, Nalcor’s lead geotechnical engineer, Regis Bouchard, said that the North Spur is a unique case and there’s nothing exactly comparable to it anywhere in the world.

However, Bouchard pointed out that each of the measures being taken is proven technology which has been used elsewhere.

Bennett said it’s disappointing that people are so focused on the North Spur.

“It’s unfortunate. A small number of very vocal people have fixated on this issue,” he said.

Bennett said the North Spur has been studied since the 1960s, when Muskrat Falls was first identified as a potential hydroelectric resource.

Since 1970, there have been wells in place on the North Spur pumping water out, to keep the clay dry and shore it up.

More recently, the Muskrat Falls engineer assigned to provide independent project oversight looked at the North Spur plans and concluded that they meet currently accepted geotechnical standards, and should stabilize the spur when Muskrat Falls is built. (underlining added)

Please provide a document or documents describing in detail the works to be undertaken to stabilize the North Spur, and in particular describing the “plan” referred to by Mr. Gilbert Bennett in the article cited in the preamble.

GRK-NLH-54.

Please provide a copy of the email cited from Nalcor’s lead geotechnical engineer, Regis Bouchard, to Mr. Bennett, in which he said that the North Spur is a unique case and there’s nothing exactly comparable to it anywhere in the world, and that each of the measures being taken is proven technology which has been used elsewhere.

GRK-NLH-55

Please provide a copy of the document in which “Muskrat Falls engineer assigned to provide independent project oversight looked at the North Spur plans and concluded that they meet currently accepted geotechnical standards, and should stabilize the spur when Muskrat Falls is built.”

GRK-NLH-56

Please confirm that Gilbert Newfoundland and Labrador Contracting is responsible for carrying out the North Spur stabilization plan. If this information is incorrect or incomplete, please indicate what company or companies will be responsible for this work, the scope of work, the value of the contract, and the time frame in which it is to be carried out.

GRK-NLH-57

Has the new North Spur stabilization plan been subjected to independent third party review? If so, please provide details of who carried out the review, when, and the results of their review. If not, are there any plans for such independent review? If not, why not?