

**NEWFOUNDLAND AND LABRADOR
BOARD OF COMMISSIONERS OF PUBLIC UTILITIES**

AN ORDER OF THE BOARD

NO. P.U. 2(2017)

1 **IN THE MATTER OF** the *Electrical Power*
2 *Control Act, 1994*, SNL 1994, Chapter E-5.1
3 (the “*EPCA*”) and the *Public Utilities Act*, RSNL
4 1990, Chapter P-47 (the “*Act*”), as amended,
5 and regulations thereunder; and
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7 **IN THE MATTER OF** an investigation and hearing
8 into supply issues and power outages on the Island
9 Interconnected system; and
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11 **IN THE MATTER OF** a motion by Newfoundland
12 and Labrador Hydro to strike out three reports filed
13 by Grand Riverkeeper Labrador, Inc.
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16 **Motion**
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18 On November 10, 2016 Hydro filed a letter requesting that the Board strike out three reports filed
19 by Grand Riverkeeper Labrador, Inc. (“GRK”) in Phase Two of the Board’s investigation and
20 hearing into supply issues and power outages on the Island Interconnected system. The three
21 reports are:
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- 23 i) A report dated November 26, 2015 by Dr. S. Bernander entitled “Lower Churchill
24 River Riverbank Stability Report” (the “First Bernander Report”)
25
26 ii) A report dated October 13, 2016 by Dr. S. Bernander entitled “Safety and Reliability
27 of the Muskrat Falls Dam, in Light of the Engineering Report of 21 December 2015 by
28 Nalcor/SNC-Lavalin” (the “Second Bernander Report”)
29
30 iii) A report dated October 17, 2016 by Philip Raphals entitled “Muskrat Falls’
31 Contribution to the Reliability of the Island Interconnected System” (the “Raphals
32 Report”)
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34 Hydro argued that the content of these reports relates to matters that the Board has ruled is outside
35 of the scope of the proceeding. Hydro suggested that, if the reports remain on the record, it will
36 need to consider filing evidence in response, cross-examining the authors of the reports and filing
37 reply evidence, all of which would place additional pressure on an already complex proceeding.

1 In relation to the First Bernander Report Hydro argued that the subject matter would complicate
2 the ongoing review, would not be relevant or helpful to the Board and would likely delay the
3 proceeding. Hydro noted that its position in relation to this report is set out in its correspondence
4 dated December 2, 2015. In this letter Hydro argued that this report is exactly the type of
5 information which the Board has already ruled is not the subject matter of the review. Hydro stated
6 that the information presented in this report is clearly beyond the parameters and scope of the
7 issues for this proceeding and its admission would complicate the proceeding, would not be
8 relevant to the Board and would likely delay the proceeding. In its November 10, 2016 letter Hydro
9 stated that the First Bernander Report is entirely an engineering or construction discussion which
10 falls squarely within the subject matter of the requests for information which the Board ruled were
11 outside of the scope of this proceeding. Hydro noted that it may be forced to file expert evidence
12 in response. Hydro argued that it would be unfair to allow the First Bernander Report to remain
13 on the record in light of the expectations in relation to scope established by virtue of the previous
14 orders of the Board in this proceeding. Hydro also raised issues in relation to the process and timing
15 surrounding the filing of this report.

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17 Hydro submitted that the Second Bernander Report deals with specific technical analysis of the
18 stability review undertaken by Nalcor/SNC-Lavalin and goes directly to the design and
19 construction of the Muskrat Falls project and is therefore outside of the scope of this review. Hydro
20 explained that the risk of failure of the North Spur was addressed in its answer to GRK-NLH-044
21 and technical analysis as to the extent of possible risk of failure is neither necessary nor helpful to
22 the issues in the inquiry.

23
24 In relation to the Raphals Report Hydro submitted that Hydro's responses to GRK-NLH-021,
25 (Revision 1, Jan 14-15) and GRK-NLH-044 address the issues to the extent useful and specifically
26 provide the options available to Hydro. Hydro argued that the Raphals Report is not expert
27 evidence and is heavily premised on presumed legal implications of one step of ongoing litigation.
28 Hydro noted that the water management agreement was not the issue before the Quebec Superior
29 Court. Hydro stated:

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31 As stated in Hydro's response to GRK-NLH-021, Rev. 1, the decision of the Quebec
32 Superior Court (and by extension, the Court of Appeal) has no impact on reliability, merely
33 the potential use of resources available to Hydro at any given time to meet system
34 requirements. An exploration of this issue would require a consideration of whether this
35 on-going litigation bears relevance to the issue at hand in this matter.¹

36
37 Hydro submitted that if the Raphals Report is found to be relevant it would require a review of a
38 range of entirely hypothetical scenarios which would be premature and it would further complicate
39 this proceeding to entertain the purported potential implications of matters that are not yet resolved
40 before the courts.

41 **Submissions**

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44 On November 30, 2016 GRK filed a reply to Hydro's request that the Board strike out the two
45 Bernander reports and the Raphals Report. GRK submitted that the Board should dismiss Hydro's
46 request and alternatively the Board should reserve final judgement on the relevance and

¹ Hydro's letter dated November 10, 2016, page 4

1 admissibility of the reports for the hearing since the usefulness of the expert evidence can only be
2 ascertained after it has been presented. GRK reiterated the content of its January 25, 2016 letter in
3 relation to the First Bernander Report and asked that it be considered as a part of its reply to
4 Hydro's request. GRK submitted that the Bernander reports constitute important elements in
5 defining the risks affecting the reliable supply of power and energy from the Muskrat Falls
6 generating station and provide a valid reply to Hydro's assertion that the probability of failure of
7 the North Spur is negligible.

8
9 GRK explained that in filing the reports it seeks to inform the Board as to the actual firm capacity
10 that will be provided by the Muskrat Falls project and the risk of failure so that the exercise of the
11 Board's jurisdiction concerning Island Interconnected system reliability will be fully informed.
12 GRK argued that, while the Board's refusal to compel Hydro to respond to information requests
13 in relation to the Muskrat Falls project may have been justified under the Muskrat Falls Exemption
14 Order, there is no parallel argument to be made for excluding the reports. GRK dismissed Hydro's
15 suggestion that the reports will complicate the review and suggested that the Board should consider
16 all relevant and helpful evidence. GRK stated:

17
18 In order to analyze the adequacy and reliability of the Island system after commission of
19 the Muskrat Fall generating facility, the Board obviously needs to be fully informed as to
20 the amounts of power and energy that will be available from this facility (the subject of
21 Mr. Raphals' report) as well as the degree to which it can rely on this supply remaining
22 available (the subject of Dr. Bernander's reports). As such, GRK respectfully submit that
23 these reports are evidently relevant and helpful to the inquiry.²

24
25 GRK argued that expert evidence contesting Hydro's assessment of the risks related to an
26 important source of supply is prima facie relevant.

27
28 In relation to the Raphals Report, GRK submitted that Hydro has raised legal arguments in relation
29 to the substance of Mr. Raphals' findings which arguments have no place in a motion to exclude
30 evidence. GRK argued that the Raphals Report is indisputably relevant to the reliability inquiry
31 and specifically stated:

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33 The Raphals report focuses on the amount of the firm capacity available to the IIS from the
34 Muskrat Falls project. It brings attention to the fact that Hydro presumes, for planning
35 purposes, that the full installed capacity of the project will be available at all times to meet
36 Island demand.³

37
38 GRK noted that the Board has acknowledged the relevance of the issue addressed in the Raphals
39 Report. GRK argued that the fact that the Board has deemed that the answers to the RFIs were
40 sufficient does not preclude GRK from addressing the matter in evidence.

41
42 The Consumer Advocate filed a submission dated December 5, 2016 arguing that it would be
43 premature at this juncture to strike the reports which have the purpose of identifying potential risks
44 to the adequate and reliable supply of power for the Island Interconnected system resulting from
45 the Muskrat Falls project. The Consumer Advocate stated:

² GRK's letter dated November 30, 2016, page 5

³ Ibid., page 7

1 The objective of the Board's investigation and hearing is to ensure that should there be a
2 failure to supply power from Muskrat Falls to the Island Interconnected System that Hydro
3 have viable, alternative sources to ensure the interests of consumers have been adequately
4 protected.
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6 Newfoundland Power and the Industrial Customer Group did not file comments in relation to
7 Hydro's request to strike the three GRK reports.
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9 **Board Findings**

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11 The Board finds that the information and opinion set out in the Bernander reports would not be
12 useful for the Board in its determinations relating to the adequacy and reliability of the Island
13 Interconnected system. The First Bernander Report is a technical discussion of the North Spur
14 stability addressing issues including the soil properties of the Churchill River Valley, the
15 applicability of standard soil investigations, the tendency to liquefaction, stability analysis issues,
16 and Nalcor's approach in relation to the North Spur. This report does not address adequacy or
17 reliability of the Island Interconnected system. The report states:

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19 The intent of this Report is to explain the extraordinary features of the Churchill River
20 Valley, and to comment on North Spur stability regarding the proposed future
21 impoundment.⁴
22

23 The Second Bernander Report is a criticism of the Nalcor/SNC-Lavalin Report of December 21,
24 2015 and addresses specific technical aspects of the stability analysis in the report. The issues
25 addressed include progressive failure analysis, soil sensitivity, and soil properties. This report goes
26 directly to the engineering, design and construction of the Muskrat Falls project but does not
27 address adequacy or capacity on the Island Interconnected system.
28

29 It is not necessary or appropriate in this investigation for the Board to reach conclusions on the
30 engineering and construction issues associated with Nalcor's approach in relation to the North
31 Spur. Rather the Board must assess Hydro's management of the reliability and adequacy of the
32 Island Interconnected system in advance of and upon interconnection with the Muskrat Falls
33 generation facility. The Board finds that the information contained in the Bernander reports is not
34 relevant to this issue and would not be useful to the Board in its determinations. The Board
35 concludes that the information contained in the Bernander reports is outside of the scope of the
36 review and would not add to the Board's understanding of the issues and may serve to unduly
37 complicate the review. The Bernander reports will be struck from the record of this review. It is
38 therefore not necessary to address the issue raised by Hydro in relation to the process and timing
39 of the First Bernander Report.
40

41 The Raphals Report examines the contribution of the Muskrat Falls generating station to the
42 reliability of the Island Interconnected system in light of the water management agreement and the
43 August 8, 2016 declaratory judgement of the Quebec Superior Court. The Board has previously
44 ruled in relation to the production of information related to these issues. In Order No. P.U.
45 41(2014) the Board found that some of the information requested by GRK⁵ in relation to the water
46 management agreement and the Quebec litigation may be relevant to the extent that the information

⁴ First Bernander Report, page 1

⁵ GRK-NLH-021

1 relates to the implications on the power available on the Island Interconnected system if the results
2 of the Quebec litigation are unfavorable. Hydro subsequently filed revised information in relation
3 to the implications of an unfavorable ruling stating:

4
5 If Nalcor's interpretation of the renewal of the Churchill Falls Contract is not upheld, then
6 depending on the finding of the court and the response by Hydro Quebec to such finding,
7 the manner in which water will flow down the Churchill River from the Churchill Falls
8 plant and thus the timing of when energy is produced at Muskrat Falls could be impacted.
9 It could therefore impact the degree to which Hydro can influence the timing of delivery
10 of energy to the Island Interconnected System to maximize the efficient use of the water
11 resources it has control over. This would not impact system reliability but could impact
12 how Hydro utilizes the resources available to it at any given time to meet system
13 requirements. Hydro would evaluate the circumstances arising at the relevant time and run
14 its system accordingly.⁶
15

16 The Board considered this response in Order No. P.U. 5(2015) and found that the explanation as
17 to the impact of an unfavorable ruling in the Quebec litigation and the alternatives available to
18 Hydro was adequate for the purposes of the review and answered the issue which the Board found
19 in Order No. P.U. 41(2014) should be addressed. Subsequently GRK filed another request for
20 information seeking a further explanation in relation to these issues.⁷ In addressing Hydro's
21 challenge to this request the Board stated:

22
23 The Board remains satisfied that the issue of the impact of an unfavorable ruling in the
24 Quebec litigation on the water flows of the Churchill River has been sufficiently addressed
25 and does not require further elaboration.⁸
26

27 Given the nature and breadth of the issues which may arise in the context of this review the Board
28 believes that there is a risk that this review will be unduly complicated by issues which are not
29 relevant or necessary to address. In the Board's order identifying GRK as an intervenor the Board
30 stated:

31
32 To ensure an efficient and effective proceeding all parties must respect the parameters and
33 scope of the issues which have been established and must restrict the evidence and
34 submissions filed to matters which may be of assistance to the Board in determining the
35 issues. The investigation and hearing cannot be allowed to be complicated by issues and
36 evidence which are not relevant and helpful to the Board in its determination.⁹
37

38 The Board has reviewed the Raphals Report and finds that it primarily relates to issues which have
39 been found to be outside of the scope of this review, specifically the legal, contractual and physical
40 risks of the Muskrat Falls development. In particular, the report addresses the physical
41 characteristics and inflows of the Muskrat Falls generating station, the role of the water
42 management agreement and the Quebec Superior Court decision. The report concludes based on
43 an analysis of these issues that the capacity balances presented by Hydro systematically overstate
44 available firm capacity but does not provide analysis which addresses impacts on the reliability of
45 the Island Interconnected system. The Board notes that the evidence filed by Hydro confirms that

⁶ GRK-NLH-021(Revision 1, January 14, 2015)

⁷ GRK-NLH-093

⁸ Order No. P.U. 12 (2016), page 6

⁹ Order No. P.U. 15(2014), page 4

1 an unfavorable ruling in the Quebec litigation may have an impact on the manner in which water
2 will flow from the Churchill Falls plant and the timing of energy produced at Muskrat Falls.
3 Further Hydro's evidence provides that while an unfavorable judgement may impact how Hydro
4 utilizes the available resources it would not impact Island Interconnected system reliability. The
5 Board concludes that the information contained in the Raphals Report is substantially outside of
6 the scope of the review and would not add to the Board's understanding of the issues or assist the
7 Board in its review and may serve to unduly complicate the review. The Raphals Report will be
8 struck from the record of this review.

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11 **IT IS THEREFORE ORDERED THAT:**

- 12
13 1. Hydro's motion to strike the two Bernander reports dated November 26, 2015 and October 13,
14 2016, and the Raphals report dated October 17, 2016, is granted.
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16 2. Hydro shall pay the expenses of the Board associated with the matter.

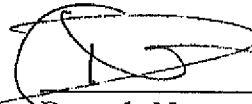
DATED at St. John's, Newfoundland and Labrador this 20th day of January, 2017.



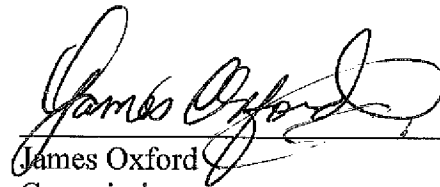
Andy Wells
Chair & Chief Executive Officer



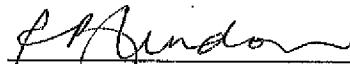
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