

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

AN ORDER OF THE BOARD

NO. P. U. 2(2010)

IN THE MATTER OF the *Electrical Power Control Act*, RSNL 1994, Chapter E-5.1 (the “EPCA”) and the *Public Utilities Act* RSNL 1990, Chapter P-47 (the “Act”), and regulations thereunder;

AND IN THE MATTER OF an application by Nalcor Energy for an order to establish the terms of a water management agreement between Nalcor Energy and Churchill Falls (Labrador) Corporation Limited for the Churchill River, Labrador.

BEFORE:

Andy Wells
Chair and Chief Executive Officer

Darlene Whalen, P.Eng.
Vice-Chairperson

Dwanda Newman, LL.B.
Commissioner

1 Nalcor Energy (“Nalcor”) filed an application with the Board of Commissioners of Public Utilities
2 (the “Board”) on November 10, 2009 for an order of the Board establishing the terms of a water
3 management agreement between Nalcor and Churchill Falls (Labrador) Corporation Limited
4 (“CF(L)Co”) with respect to the Churchill River (the “Application”). Notice of the Application was
5 published in newspapers throughout the province and was given directly to certain parties beginning
6 on November 21, 2009. On December 11, 2009, pursuant to s. 6 of the *Water Management*
7 *Regulations* under the *EPCA*, Nalcor filed a written submission setting out a proposed water
8 management agreement. On December 10, 2009 CF(L)Co filed a written submission proposing the
9 same water management agreement.

10
11 On December 15, 2009 the Board received a letter from Hydro Québec advising that it would not
12 intervene in the Nalcor Application. On December 15, 2009 the Board received an intervenor
13 submission from the Conseil des Innus de Ekuanitshit claiming the use of the air, lands, water, plant
14 and animal life of the territory affected by the proposed water management agreement. On
15 December 17, 2009 the Board received an intervenor submission from Twin Falls Power
16 Corporation Limited (“TwinCo”) stating that it could be an affected supplier and proposing limited
17 participation in the matter for the purpose of obtaining all documents and information filed in the
18 proceeding. On December 22, 2009 the Board received an intervenor submission from the Innu of
19 Uashat mak Mani-Utenam, the Innu Takuaikan Uashat mak Mani-Utenam Band Council and certain
20 traditional families of the Uashat mak Mani-Utenam Innu (the “Innu of Uashat mak Mani-Utenam,
21 et. al.”) stating that they possess, occupy and use the territory and natural resources which are
22 affected by the proposed water management agreement. On December 22, 2009 Nalcor requested
23 that it be heard with respect to any requests for intervenor status prior to the determination of the
24 Board.

25
26 On January 6, 2010 the Board received submissions from Nalcor with respect to the three requests
27 for intervenor status. Nalcor submits that the Board should deny intervenor status to TwinCo.
28 Nalcor argues that because TwinCo’s rights for the supply of power will have expired before the
29 proposed water management agreement becomes operational TwinCo has no specific or recognized
30 interest in this matter. In the alternative Nalcor asks that the Board limit TwinCo’s right to

1 intervene.

2 Nalcor also states that the Board should deny intervenor status to the Conseil des Innus de
3 Ekuanitshit and the Innu of Uashat mak Mani-Utenam, et. al. Nalcor argues that the Conseil des
4 Innus de Ekuanitshit and the Innu of Uashat mak Mani-Utenam, et. al. do not have an interest in the
5 matter and further that the environmental review is the appropriate forum for consultation with
6 respect to the development of the Lower Churchill. Nalcor states:

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8 *“The proposed water management agreement does not affect the specification or characteristics for the*
9 *Lower Churchill Project that will be established through the environmental assessment process. The*
10 *Aboriginal Intervenor Applicants have not demonstrated an interest in the matter before the Board that*
11 *would justify the granting of Intervenor status. Aboriginal consultation with respect to the development*
12 *of the Project is being addressed through the environmental assessment process.”*
13

14 On January 6, 2010 the Board received the submissions of CF(L)Co which also takes the position
15 that all three requests for intervenor status should be denied. CF(L)Co argues that TwinCo’s desire
16 to obtain documents and information can be met without intervenor status, that TwinCo does not
17 have a sufficient interest in this matter, and that TwinCo can make no useful contribution to the
18 matter.

19
20 CF(L)Co argues that the Conseil des Innus de Ekuanitshit and the Innu of Uashat mak Mani-
21 Utenam, et. al. do not have a sufficient interest in the matter and cannot make a useful contribution
22 to the determination of the Board. CF(L)Co states that the Conseil des Innus de Ekuanitshit and the
23 Innu of Uashat mak Mani-Utenam, et. al. have not established that the proposed water management
24 agreement adversely affects aboriginal rights and title. CF(L)Co argues that the Conseil des Innus
25 de Ekuanitshit is an intervenor in the environmental review of the Lower Churchill Development
26 Project and that any duty to consult is limited to this review. CF(L)Co argues that the Innu of
27 Uashat mak Mani-Utenam, et. al. is pursuing claims to aboriginal title and treaty rights in the
28 Federal Court of Canada and through the environmental review associated with the Lower Churchill
29 development where Nalcor has been directed to consult with the Innu of Uashat mak Mani-Utenam,
30 et. al.

31
32 On January 14, 2010 the Board received a reply from the Innu of Uashat mak Mani-Utenam, et. al.
33 which sets out further information and argument in support of the duty of the crown to consult in

1 relation to the water management agreement with additional particulars of the use of the territory and
2 the impacts on the Innu of Uashat mak Mani-Utenam, et. al. The reply further addresses their
3 submission that the establishment of the water management agreement will infringe on the Aboriginal
4 rights and title of the Innu of Uashat mak Mani-Utenam, et. al. and that the environmental review
5 process does not satisfy the duty to consult.

6
7 On January 14, 2010 the Board received a reply from the Conseil des Innus de Ekuanitshit which also
8 provided further information and argument in relation to the claimed interest in the territory which is
9 the subject of the water management agreement, the duty of the crown to consult, the circumstances of
10 consultation to date, and the potential for adverse impact.

11
12 The Board has reviewed the substantial materials provided in support of the submissions. The Board
13 finds that the complex factual and legal issues raised by the Conseil des Innus de Ekuanitshit and the
14 Innu of Uashat mak Mani-Utenam, et. al. require a level of evidence and argument which cannot be
15 fairly assessed at this preliminary stage of the matter. The Board concludes based on the
16 submissions and additional information provided that the Conseil des Innus de Ekuanitshit and the
17 Innu of Uashat mak Mani-Utenam, et. al. have a sufficient interest to intervene and that they may
18 contribute to the Board's determination in relation to certain issues as this matter proceeds.

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20 In relation to TwinCo's request the Board finds that TwinCo has a sufficient interest to be given
21 intervenor status based on its sublease with CF(L)Co, its obligation to supply power and its
22 ownership of transmission assets which transmit power and energy from Churchill Falls. While the
23 Board agrees that TwinCo could obtain publicly available information without intervenor status, the
24 Board accepts that TwinCo has sufficient interest to justify intervenor status and further that TwinCo
25 may contribute to the Board's determination.

26
27 The Board is satisfied that TwinCo and the Conseil des Innus de Ekuanitshit and the Innu of Uashat
28 mak Mani-Utenam, et. al. have demonstrated sufficient interest to justify intervenor status in the
29 proceeding. The Board will not impose specific limits on any party or intervenor at this stage but,
30 consistent with its mandate to effectively and efficiently manage its processes, will observe practices
31 and procedures which ensure that all interests are heard and given due weight and consideration as

1 appropriate in the circumstances.

2 **IT IS THEREFORE ORDERED THAT:**

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- 4 1. The Registered Intervenors in this proceeding are as set out in the attached Schedule “A” to
5 this Order.

DATED at St. John’s, Newfoundland and Labrador this 22nd day of January 2010.

Andy Wells
Chair & Chief Executive Officer

Darlene Whalen, P.Eng.
Vice-Chairperson

Dwanda Newman, LL.B.
Commissioner

Cheryl Blundon
Board Secretary

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Schedule “A”

Registered Intervenors

1. **Twin Falls Power Corporation Limited**
represented by

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President
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2. **Innu of Uashat mak Mani-Utenam, the Innu Takuaikan Uashat mak Mani-Utenam
Band Counsel and certain traditional families of the Uashat mak Mani-Utenam
Innu Nation**
represented by

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3. **Conseil des Innus de Ekuanitshit**
represented by

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