

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

AN ORDER OF THE BOARD

NO. P. U. 6(2010)

IN THE MATTER OF the *Electrical Power Control Act*, SNL 1994, Chapter E-5.1 (the “EPCA”), 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;

AND IN THE MATTER OF a claim of proprietary or confidential information.

BEFORE:

**Darlene Whalen, P.Eng.
Vice-Chairperson**

**Dwanda Newman, LL.B.
Commissioner**

**James Oxford
Commissioner**

1 **WHEREAS** Nalcor Energy (“Nalcor”) filed an application with the Board of Commissioners of
 2 Public Utilities (the “Board”) on November 10, 2009 for an order of the Board establishing the terms
 3 of a Water Management Agreement between Nalcor and Churchill Falls (Labrador) Corporation
 4 Limited (“CF(L)Co”) with respect to the Churchill River (the “Application”); and
 5

6 **WHEREAS** notice of the Application was published in newspapers throughout the province and
 7 was given directly to certain persons beginning on November 21, 2009; and
 8

9 **WHEREAS** in reply to correspondence from the Board in relation to the confidentiality of
 10 documents CF(L)Co states in its November 25, 2009 correspondence that it considers the
 11 Guaranteed Winter Availability Contract filed with the Application to be confidential in nature and
 12 further that the Shareholders’ Agreement filed with the Application has previously been released to
 13 the public; and
 14

15 **WHEREAS** on December 7, 2009 the Board received a letter from Hydro-Québec requesting that
 16 the Board restrict public access to the Guaranteed Winter Availability Contract between Hydro-
 17 Québec and CF(L)Co and the Shareholders’ Agreement between Newfoundland and Labrador
 18 Hydro, Hydro-Québec and CF(L)Co and arguing that these documents are confidential in nature and
 19 contain information of a commercial nature; and
 20

21 **WHEREAS** on January 22, 2010, following the filing of Intervenor Submissions and associated
 22 comments and replies, the Board issued Order No. P. U. 2(2010) granting intervenor status to the
 23 Conseil des Innus de Ekuanitshit; Twin Falls Power Corporation Limited; and the Innu of Uashat mak
 24 Mani-Utenam, the Innu Takuaikan Uashat mak Mani-Utenam Band Council and certain traditional
 25 families of the Uashat mak Mani-Utenam Innu; and
 26

27 **WHEREAS** on January 28, 2010 the Conseil des Innus de Ekuanitshit filed a submission in relation to
 28 Hydro-Québec’s request for a determination that the Guaranteed Winter Availability Contract and the
 29 Shareholders’ Agreement are confidential, noting that Hydro-Québec has not provided any evidence in
 30 relation to the test established by the Supreme Court of Canada in *Sierra Club of Canada v. Canada*
 31 (*Minister of Finance*), [2002] 2 S.C.R. 522 and further stating that the Conseil des Innus de
 32 Ekuanitshit takes no position on whether the Board has jurisdiction to grant Hydro-Québec’s
 33 confidentiality request; and
 34

35 **WHEREAS** on January 29, 2010 Nalcor filed a letter stating that it has no objection to the Board
 36 considering the Guaranteed Winter Availability Contract and the Shareholders’ Agreement as
 37 confidential and not making them publicly available; and
 38

39 **WHEREAS** on January 29, 2010 CF(L)Co filed a submission in relation to the confidentiality request
 40 stating that it has no objection to the documents forming part of the record and no objection to the
 41 documents being treated as confidential and restricted as to public access; and

42 **WHEREAS** in relation to the Guaranteed Winter Availability Contract, Hydro-Québec argues in its

1 December 7, 2009 letter that this contract is currently in effect and contains confidential information,
2 that it was agreed to with a reasonable expectation of non-disclosure and that the contents of the
3 contract are unknown and generally inaccessible to persons other than the parties; and
4

5 **WHEREAS** in relation to the Shareholders' Agreement, Hydro-Québec argues in its December 7,
6 2009 letter that this agreement is a private contract that sets out the ongoing relationship between
7 Hydro-Québec and Newfoundland and Labrador Hydro, that it contains commercial information that is
8 considered by Hydro-Québec to be confidential in nature, that it was executed by Hydro-Québec with
9 the expectation of non-disclosure and that the contents of the contract are not part of the public
10 domain; and
11

12 **WHEREAS** Hydro-Québec further argues in its letter that the specifics of the Shareholders'
13 Agreement are not necessary for the Board to fulfill its mandate to establish a Water Management
14 Agreement and further requests that, if the Board determines that the operative provisions of the
15 Shareholders' Agreement are necessary to be considered, disclosed or reviewed then any such
16 disclosure, consideration or review of the Shareholders' Agreement be made in camera and subject to
17 a non-disclosure order, publication ban or confidentiality order; and
18

19 **WHEREAS** since there was no objection filed to the request to maintain the Guaranteed Winter
20 Availability Contract and the Shareholders' Agreement confidential and the Board is satisfied that
21 these documents may be relevant to an issue or issues in the Application, the Guaranteed Winter
22 Availability Contract and the Shareholders' Agreement will be placed on the record and will be
23 maintained confidential with the terms and conditions of the release of the documents to be
24 determined by the Board.
25

26 **IT IS THEREFORE ORDERED THAT:**
27

- 28 1. The Guaranteed Winter Availability Contract and the Shareholders' Agreement will be
29 placed on the record but will be considered to be confidential.
30
- 31 2. The terms and conditions of the release of documents considered confidential will be
32 determined by the Board on a receipt of a request for disclosure.

DATED at St. John's, Newfoundland and Labrador this 4th day of February 2010.

Darlene Whalen, P.Eng.
Vice-Chairperson

Dwanda Newman, LL.B.
Commissioner

James Oxford
Commissioner

Cheryl Blundon
Board Secretary