

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

AN ORDER OF THE BOARD

NO. P.U. 9(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
6

7 **IN THE MATTER OF** an investigation and hearing
8 into supply issues and power outages on the Island
9 Interconnected system; and
10

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; and
14

15 **IN THE MATTER OF** a request by Grand
16 Riverkeeper Labrador, Inc. that the Board rescind or
17 amend Order No. P.U. 2(2017).
18
19

20 **Request for Reconsideration**
21

22 On February 2, 2017 Grand Riverkeeper Labrador, Inc. (“GRK”) requested that the Board rescind
23 or amend Order No. P.U. 2(2017). This order struck three reports filed by GRK from the record of
24 this proceeding: two reports from Dr. S. Bernander, dated November 26, 2015 and October 13,
25 2016; (“Bernander reports”) and a report from Mr. Philip Raphals, dated October 17, 2016
26 (“Raphals report”). GRK argued that Order No. P.U. 2(2017) contains errors in fact and law.
27

28 In relation to the two Bernander reports, GRK submitted that the Board erred in finding that the
29 reports do not address adequacy or reliability of the Island Interconnected system, given that their
30 conclusions bear directly on these central issues. GRK stated:
31

32 While the Board’s statement that these reports do “not address adequacy or reliability of
33 the Island Interconnected system” is literally true, this does not mean that they are not
34 *relevant* to the examination of the adequacy or reliability of the Island Interconnected
35 system after interconnection.

1 GRK stated that the Bernander evidence that a catastrophic landslide on the North Spur of the
2 Muskrat Falls dam is a possible foreseeable event contradicts the evidence filed by Hydro that the
3 probability of risk of failure is negligible. GRK stated:

4
5 The precise consequences for IIS reliability of a failure of the North Spur and consequent
6 loss of the entire generating capacity of the MFGS is an issue on which some evidence has
7 already been provided, and on which GRK intends to provide additional evidence during
8 the Phase 2 hearings. The fact that Dr. Bernander's reports do not draw specific conclusions
9 in this regard is thus of no particular significance. Rather, the fact that they are *relevant* to
10 this important question means that they are *priori* relevant and hence admissible in this
11 public hearing process.
12

13 In relation to the Raphals report GRK submitted that the Board erred in law in relying on untested
14 evidence to exclude other evidence and that striking the evidence before it has been heard causes
15 prejudice to the Board's ability to make fact-based judgements concerning the adequacy and
16 reliability of the Island Interconnected system after interconnection. GRK argued that Raphals'
17 conclusion directly contradicts Hydro's evidence that an unfavorable judgement would not impact
18 reliability and explores in detail the reality behind Hydro's evidence.
19

20 GRK argued that it was deprived of the right to be heard. GRK also argued that the discrepancy in
21 the treatment of comparable evidence, including the Liberty report, and expert reports filed on
22 behalf of the Consumer Advocate and Newfoundland Power, is an error of fact in the Board's
23 appreciation that the reports do not address adequacy or reliability. GRK stated:

24
25 GRK respectfully submits that, while the *information* contained in the reports may fall
26 outside of the scope set out by the Board in its earlier orders, the *conclusions* of the reports,
27 based on that information, are profoundly relevant to the issues before the Board in this
28 proceeding. With respect, it is hard to see how these reports could not "add to the Board's
29 understanding of the issues or assist the Board in its review," unless the Board has already
30 drawn conclusions based on Hydro's superficial and untested evidence, which would itself
31 constitute an error of law.
32

33 **Submissions**

34
35 Hydro filed a submission on February 15, 2017 arguing that the GRK motion should be denied.
36 According to Hydro there are good policy reasons for having a high threshold for the
37 reconsideration of a decision, including the desire for expediency, finality and certainty. Hydro
38 submitted that the Board made the appropriate determination that the reports were not relevant to
39 the defined issues and that the reports do not assist the Board in addressing the consequences
40 regarding availability of a reliable and adequate supply of power on the Island Interconnected
41 system nor in identifying Hydro's options. Hydro noted that GRK admitted that the Bernander
42 reports do not address the adequacy or reliability of the Island Interconnected system and do not
43 draw specific conclusions in respect of the consequences of the failure of the North Spur for the
44 Island Interconnected system. Hydro argued that GRK's submission that the information is not in
45 scope but the conclusions are relevant is illogical. According to Hydro the Board did not err in
46 excluding the Bernander reports and these reports fail to assist in addressing the very questions
47 being asked. Hydro noted that GRK admitted that the Raphals report does not explicitly state that
48 a shortfall of 400 MW could have significant reliability implications for the Island Interconnected

1 system. Hydro argued that it was not an error for the Board to rely on the actual text of the report
2 to determine relevance when it found that the report does not provide analysis which addresses
3 impacts on the reliability of the Island Interconnected system. Hydro also argued in relation to the
4 other evidence filed in the proceeding:

5
6 Striking the Reports does not mean that the Board has accepted or is required to accept any
7 of the other evidence before it. All evidence remaining on the record in this inquiry will be
8 tested by the Board and parties during the course of any public hearing. As noted, to
9 Hydro's knowledge, the GRK is not precluded from participating in a hearing and can thus
10 test the veracity of any evidence presented during cross-examination (to the extent such
11 questions are relevant to the defined scope of this proceeding). There is no error of fact or
12 of law in this regard.¹

13
14 The Consumer Advocate stated in his February 13, 2017 submission that, insofar as the Island
15 Interconnected system will be reliant on the supply of energy via Muskrat Falls, any identifiable
16 risks of potential failures in the delivery of Muskrat Falls' energy should be generally considered
17 in planning the island energy requirements. The submission stated that the Consumer Advocate
18 makes no submission as to whether Order No. P.U. 2(2017) striking the three GRK reports
19 amounts to a reviewable error of law in the circumstances.

20
21 Newfoundland Power did not have any comments.

22
23 The Industrial Customer Group refrained from commenting on the merits of GRK's submissions
24 but expressed concerns about the potential impact on the review process.

25
26 GRK filed a submission on February 27, 2017 which was amended on March 5, 2017. GRK argued
27 in its submission that the exclusion of all of GRK's relevant evidence is a breach of its right to be
28 heard and is valid ground for a reconsideration. GRK submitted the correct interpretation of Order
29 No. P.U. 15(2014) is that risks associated with the unavailability of some or all of the planned
30 energy and capacity from Muskrat Falls are relevant, even if they also constitute construction,
31 legal, contractual and physical risks of the Muskrat Falls development. GRK argued that the
32 Bernander reports deal specifically with risks and rebut Hydro's claim that the risk is negligible.
33 GRK stated:

34
35 The fact that to identify this risk, Dr. Bernander addressed engineering and construction
36 issues associated with Nalcor's approach in relation to the North Spur is only accessory to
37 its conclusions and does not affect their relevance.²

38
39 GRK submitted that the Board misquoted or modified the hearing and investigation issues by
40 stating that the subject of the inquiry was Hydro's management of the reliability and adequacy of
41 the Island Interconnected system. GRK argued that, if these reports are struck, Hydro's position is
42 the only position supported by the evidence.

43
44 In relation to the Raphals report GRK argued that it addresses the consequences of the Quebec
45 Superior Court declaratory judgement regarding the renewal of the Churchill Falls Power Contract.

¹ Hydro Submission, February 15, 2017, page 7.

² GRK Submission, March 5, 2017, page 9.

1 According to GRK the Raphals report demonstrates that the power available from the Muskrat
2 Falls Generating Station is far lower than the value set out by Hydro and therefore Hydro's
3 availability and reliability analysis is flawed. GRK stated:

4
5 The fact that, in his expert report, Mr. Raphals did not explore the precise implications of
6 his findings with respect to the validity of Hydro's availability and reliability analysis in
7 no way reduces their relevance. As noted earlier, GRK intends to make that relationship
8 explicit through its non-expert evidence, which will be prefiled according to the calendar
9 to be established by the Board.³

10 11 **Board Findings**

12
13 GRK has requested that the Board rescind Order No. P.U. 2(2017) or that it be amended to suspend
14 judgement until after hearing of the witnesses' testimony. Section 76 of the *Public Utilities Act*
15 sets out that the Board may rescind, alter or amend an order. Further, the regulations provide for
16 the filing of an application for rehearing after a final order where there is new evidence or errors
17 of law or fact.⁴ Such an application must set out the findings of fact or law which are claimed to
18 be erroneous and a brief statement of the alleged error. The Board believes that in the interests of
19 expediency, finality and certainty, a matter should not be reconsidered after a final decision unless
20 it has been shown that the order contains an error of fact or law upon which the decision is based
21 or that material new evidence has arisen. There is no suggestion in this case that new evidence has
22 arisen. GRK makes the request on the basis that the Board's decision contained several errors in
23 law or fact.

24
25 GRK argued that Order No. P.U. 2(2017) was in error in finding that the Bernander and Raphals
26 reports do not address adequacy or reliability of the Island Interconnected system. GRK
27 acknowledged that it is literally true that the Bernander reports do not address adequacy or
28 reliability on the Island Interconnected system and also that the information contained in the
29 Bernander and Raphals reports may fall outside of the scope of this review. Nevertheless GRK
30 submitted that the conclusions of the reports are relevant to the issues in the review and that it was
31 difficult to see how the reports would not be of assistance to the Board. It was GRK's position that
32 all three reports fall within the generally understood definition of relevance.

33
34 The Board began this review in January of 2014 following supply issues and power interruptions
35 on the Island Interconnected system in late December 2013 and early January 2014. At the time
36 the Board advised the utilities that it was satisfied that there were sufficient grounds to warrant an
37 inquiry and hearing into the events and circumstances surrounding and leading up to the supply
38 issues and power interruptions. In Order No. P.U. 3(2014) the Board established the issues to be
39 addressed in this review which included "Evaluation of Island Interconnected system adequacy
40 and reliability up to and after the interconnection with the Muskrat Falls generating facility." The
41 Board stated that it was appropriate and necessary:

42
43to address how Hydro and Newfoundland Power will ensure adequacy and reliability
44 on the Island Interconnected system over the short, medium and long-term, which will

³ GRK Submission, March 5, 2017, page 11.

⁴ Section 28, *Newfoundland and Labrador Regulation 39/96* under the *Public Utilities Act*, RSNL 1990, c. P-47.

1 require analysis of the adequacy and reliability of the system after the commissioning of
 2 the Muskrat Falls generating facility and the Labrador Island Link...⁵
 3

4 In the order granting intervenor status to GRK the Board cautioned that, to ensure an efficient and
 5 effective process, the proceeding should not be allowed to be complicated by issues and evidence
 6 which are not relevant and helpful to the Board.⁶ In subsequent orders the Board found that a
 7 number of information requests related to the North Spur and the Quebec litigation were outside
 8 of the scope of the review.⁷ The Board explained:
 9

10 The Board notes that there is a particular interest in information surrounding the Muskrat
 11 Falls Project. While certain concerns in relation to the reliability and adequacy of the Island
 12 Interconnected system may involve aspects of the Muskrat Falls Project this proceeding
 13 does not involve an evaluation of the Muskrat Falls Project. The Board was specifically
 14 exempted from review of this project and from the regulation of Nalcor which is
 15 responsible for this project.⁸
 16

17 While it is clear that there continues to be a great deal of interest in the Muskrat Falls project, this
 18 investigation relates to adequacy and reliability on the Island Interconnected system and does not
 19 extend to the examination of the Muskrat Falls project. The jurisdiction of the Board with respect
 20 to the development of the Lower Churchill has been limited by government. In particular, Nalcor
 21 was specifically exempted from the provisions of the *Public Utilities Act*.⁹ Further, Hydro was
 22 specifically exempted from the application of the *Public Utilities Act* and Part II of the *Electrical*
 23 *Power Control Act, 1994* with respect to:
 24

25 any activity relating to the receipt of delivery, use, storage or enjoyment by Newfoundland
 26 and Labrador Hydro of any electrical power and energy, interconnection facilities, ancillary
 27 services, and greenhouse gas credits under paragraph (a);
 28

29 ...and
 30

31 any activity relating to the receipt of delivery, use, storage, or enjoyment by Newfoundland
 32 and Labrador Hydro of any transmission services and ancillary services, electrical power
 33 and energy, with respect to the LiL under paragraph (c)¹⁰
 34

35 While the Board acknowledges the concerns raised in relation to the North Spur and the Quebec
 36 litigation, the Board has been exempted from oversight of the Muskrat Falls project and must
 37 respect the limits of its jurisdiction established in accordance with the legislative provisions.
 38

39 In Order No. P.U. 2(2017) the Board found that the information contained in the Bernander and
 40 Raphals reports is substantially outside of the scope of the review. The Board stated that the

⁵ Order No. P.U. 3(2014), page 3.

⁶ Order No. P.U. 15(2014).

⁷ Order Nos. P.U. 41(2014), P.U. 5(2015) and P.U. 12(2016).

⁸ Order No. P.U. 41(2014), page 4.

⁹ *Energy Corporation Act*, SNL 2007, c. E-11.01, ss. 17(2); See also OC2009-294, 2009/10/01 (Nalcor was formerly the Energy Corporation).

¹⁰ Subsections 4(1)(b) and (d), *Newfoundland and Labrador Regulation 120/13*, under the *Electrical Power Control Act, 1994*.

1 Bernander reports go to the engineering, design and construction of the Muskrat Falls project but
2 do not address adequacy and capacity on the Island Interconnected system. The Board stated:
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4 It is not necessary or appropriate in this investigation for the Board to reach conclusions
5 on the engineering and construction issues associated with Nalcor's approach in relation to
6 the North Spur. Rather the Board must assess Hydro's management of the reliability and
7 adequacy of the Island Interconnected system in advance of and upon interconnection with
8 the Muskrat Falls generation facility. The Board finds that the information contained in the
9 Bernander reports is not relevant to this issue and would not be useful to the Board in its
10 determination.¹¹
11

12 Further, the Board stated that the Raphals report addresses the physical characteristics and inflows
13 of the Muskrat Falls generating station, the role of the water management agreement and the
14 Quebec Superior Court decision and that the report is primarily related to issues which are outside
15 of the scope of the review. The Board found that the Raphals report does not provide analysis
16 which addresses impacts on the reliability of the Island Interconnected system. The Board stated
17 that it must assess Hydro's management of the reliability and adequacy of the Island
18 Interconnected system and that the Bernander and Raphals reports would not be helpful to the
19 Board's understanding of the issues and may serve to unduly complicate the review.
20

21 Order No. P.U. 2(2017) set out that this review is to address how Hydro will ensure the supply of
22 adequate and reliable supply on the Island Interconnected system. This is consistent with the scope
23 established in Order No. P.U. 3(2014). The Bernander and Raphals reports address issues related
24 to Nalcor's development and operation of the Muskrat Falls generating facility. These issues were
25 expressly excluded from this review. The Board accepts that Hydro faces a number of risks in
26 relation to the purchase of power from the Muskrat Falls generating station and, as part of this
27 review, Hydro must demonstrate proper planning to ensure an adequate and reliable supply on the
28 Island Interconnected system. In particular, Hydro must show that its planning has reasonably
29 accounted for the range of risks associated with its power purchases, which would include the
30 potential interruption of supply from Nalcor and other suppliers as well as the potential loss of
31 transmission capacity. However, the scope of this review does not include an assessment of the
32 risks associated with the design and construction of the North Spur or the Quebec litigation. The
33 Board believes that this would be an unduly broad approach and, as found in Order No. P.U.
34 2(2017), may serve to unduly complicate this review. The Board finds that Order No. P.U. 2(2017)
35 did not err in finding that the Bernander and Raphals reports do not address adequacy and
36 reliability of the Island Interconnected system.
37

38 GRK argued that, in excluding the Bernander reports, the Board misquoted or modified the issues
39 without providing reasons. The Board does not agree as the scope of this review has, from the start,
40 excluded the design, construction and operation of the Muskrat Falls development. In addition
41 GRK argued that Order No. P.U. 15(2014) contained contradictory statements that, read together,
42 would suggest that the scope of the inquiry would include the risks associated with the
43 unavailability of some or all of the planned energy and capacity from Muskrat Falls. Order No.
44 P.U. 15(2014) stated that the construction, legal and contractual and physical risks of the Muskrat
45 Falls development are outside of the scope of this proceeding but accepted that GRK's stated

¹¹ Order No. P.U. 2(2017), page 4.

1 interest may fall within the scope. This did not expand the scope of the review as submitted by
2 GRK but permitted GRK to intervene within the established scope. Further the Board cautioned
3 that the parties should restrict the evidence and submissions to matters which may be of assistance
4 to the Board.

5
6 GRK argued that it is difficult to see how these reports could not add to the Board's understanding
7 of the issues or assist the Board in its review unless the Board had already drawn conclusions based
8 on Hydro's evidence, which would constitute an error in law. GRK further argued that the Board
9 erred in relying on untested evidence to exclude the Raphals report. The Board does not accept
10 these arguments: the Bernander and Raphals reports were excluded on the basis of relevance. Order
11 No. P.U. 2(2017) sets out that the reports were excluded on the basis that the information contained
12 in the reports is outside of the scope of the review and would not add to the Board's understanding
13 of the issues and may serve to unduly complicate the review. The Board did not state that the
14 exclusion of the reports was based on its findings with respect to other evidence.

15
16 GRK argued that, in the absence of the Raphals report, the Board would have no alternative but to
17 take Hydro's claim of 824 MW of available capacity from Muskrat Falls and draw conclusions
18 based on that value concerning the need for additional resources to ensure adequacy and reliability
19 for the Island Interconnected system. The Board does not agree. Hydro will have to demonstrate
20 how its planning will ensure the adequate and reliable supply of power on the Island Interconnected
21 system in the context of the planned purchases from Nalcor, which would include planning for the
22 possibility that purchased power is unavailable for any reason.

23
24 GRK argued that there was an error in fact in that there was a discrepancy in the treatment of the
25 Bernander and Raphals reports and the other evidence which has been filed in the review. The
26 Board does not agree. A party may challenge the relevance of a piece of evidence at any time and
27 the Board must make a determination based on a consideration of the challenged evidence in the
28 context of the issues to be addressed without regard to other evidence which may or may not be
29 challenged later in the proceeding.

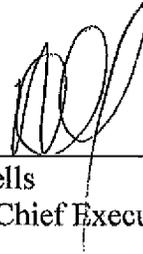
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31 GRK argued that it was deprived of the right to be heard when the Bernander and Raphals reports
32 were excluded. The Board does not agree. A party's right to be heard is violated where it is denied
33 the opportunity to speak to or provide evidence on issues which are relevant in the proceeding. The
34 Board has determined that the design, construction and operation of the Muskrat Falls development
35 is outside the scope of this investigation. Striking these reports does not impact GRK's right to
36 present evidence and be heard in relation to matters within the scope of this investigation relating
37 to how Hydro and Newfoundland Power will ensure an adequate and reliable supply on the Island
38 Interconnected system.

39
40 The Board finds that there was no error of law or fact in Order No. P.U. 2(2017) and will therefore
41 not rescind or amend this order.

42
43
44 **IT IS THEREFORE ORDERED THAT:**

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46 1. The GRK application to rescind or amend Order No. P.U. 2(2017) is denied.

DATED at St. John's, Newfoundland and Labrador this 29th day of March, 2017.



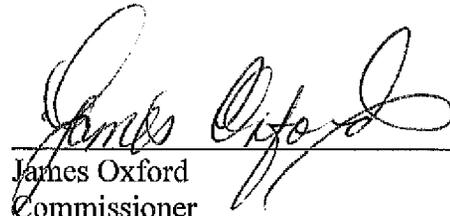
Andy Wells
Chair & Chief Executive Officer



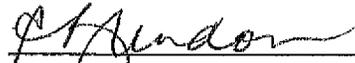
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Commissioner



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Board-Secretary