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June 5, 2019

Cheryl Blundon
Board Secretary
Board of Commissioners of Public Utilities
Prince Charles Building
210-120 Torbay Road
St. John's, NL, A1A 2G8

Dear Ms. Blundon:

Re: Newfoundland and Labrador Hydro's Labrador Interconnected System Transmission Expansion Study and Network Additions Policy – Hydro's Reply

On behalf of the Labrador Interconnected Group (“LIG”), we are in receipt of Hydro’s Reply in the above-noted proceeding, dated June 4, 2019. Hydro’s Reply creates a number of concerns with respect to procedural fairness. As detailed below, the LIG requests an opportunity to file a reply expert report by Mr. Philip Raphals and further reply submissions.

Hydro’s Reply makes allegations of “factual inaccuracies with the Labrador Interconnected Group’s Submission”. It relies on a “Memorandum” attached to its Reply for support of these allegations. The Memorandum was authored by Christensen Associates Energy Consulting (the “Christensen Memo”). The Christensen Memo is six pages in length and consists entirely of allegations of factual inaccuracies in the evidence given by Mr. Raphals in responses to Requests for Information (“RFIs”).

The preamble to the Christensen Memo states they seek to “correct what [they] perceive to be misstatements” in Mr. Raphals’ answers to RFIs. The Memo goes on to provide Christensen’s responses to six of Mr. Raphals’ RFI answers, stating that Christensen believes Mr. Raphals has misunderstood aspects of its report, and that it demurs from certain of Mr. Raphals’ conclusions. Hydro, in its Reply, relies on the new Christensen Memo for the proposition that Mr. Raphals’ report contains “factual inaccuracies” that are “incorrect or based on misconceptions.” Hydro cites the new Memo throughout its Reply and relies on it in its conclusion, stating that the “... LIG’s concerns regarding the Labrador Network Additions Policy as well as the Transmission Expansion Study are either based on misconceptions or factual inaccuracies, and have been addressed above or in Christensen’s attached memorandum.”

Hydro's Reply raises two issues of basic procedural fairness. First, in attaching the Christensen Memo to its Reply, it is in effect attempting to file a further expert report to bolster its case. Second, the Christensen Memo and Hydro's submissions both seek to impugn the credibility of Mr. Raphals and the evidence he has given, while never having given him the opportunity to respond to those points, even though Hydro had the opportunity to do so. This is in breach of the rule in *Browne v Dunn*.¹ We deal with each point in turn.

Fresh Evidence in Reply

In attaching the Christensen Memo to its Reply submissions, Hydro is essentially trying to introduce fresh evidence into the proceeding after the point at which it would have been proper to do so. We note that the Board's procedural order of May 1, 2019 makes no provision for fresh evidence. The common law frowns on a party splitting its case, and evidence should be admitted all at once if it could have been led by a party initially.² Nonetheless, within the Board's procedural framework as established in the May 1 order, if Mr. Raphals' reports or responses to RFIs had created a need for Hydro to file reply evidence, it had ample opportunity to ask the Board for leave to do so. The LIG would have consented to any reasonable request. However, Hydro did not do so. Instead, it has chosen to file an expert report as an attachment to its final submissions, depriving other parties of the ability to test that evidence, or to make submissions on it. Hydro's conduct has the effect of taking an end run around basic procedural fairness, and this should not be countenanced by the Board.

Browne v Dunn

Second, it is a basic rule of evidence, first articulated in *Browne v Dunn*, that a party is required "to give notice to those witnesses whom the cross-examiner intends to later impeach."³ The Christensen Memo seeks repeatedly to impugn the evidence given by Mr. Raphals. It alleges that Mr. Raphals misunderstands the evidence, is inaccurate, or has misinterpreted the facts. Hydro's Reply relies on the Christensen Memo for the submission that the LIG's submissions contain factual inaccuracies. While Hydro is free to contest Mr. Raphals' presentation of the evidence, it is under an obligation to do so in a way that gives Mr. Raphals a fair chance to respond. It could have done so by presenting the points it has now raised in its Reply to Mr. Raphals during the RFI process so that he had an opportunity to respond. It also could have done so by calling Mr. Raphals as a witness. But Hydro did neither and instead now seeks to introduce a fresh expert report, as an attachment to its final submissions, impugning Mr. Raphals.

The rules of evidence discourage a party from waiting in the weeds to present its case, in large part because other parties need to have the opportunity to test evidence and to respond to it. The LIG has had no such opportunity with respect to Hydro's Reply and the Christensen Memo.

¹ (1893), 6 R. 67.

² *Halford v Seed Hawk Inc.*, [2003] FCJ No 237, para 15.

³ *R v Lyttle*, 2004 SCC 5, at para 64.

To safeguard procedural fairness, the LIG requests the opportunity (1) to file a supplemental report from Mr. Raphals in reply to the Christensen Memo, and (2) to file a reply submission in response to the new evidence and issues brought up by Hydro's Reply and the Christensen Memo.

Please be sure to let us know if the Board has any questions in respect of the above.

Yours truly,
Olthuis, Kleer, Townshend LLP
PER:

A handwritten signature in black ink, appearing to read 'Senwung Luk', written over a horizontal line.

SENWUNG LUK
LAWYER

CC: Geoff Young (Newfoundland and Labrador Hydro)
Gerard Hayes (Newfoundland Power Inc)
Dennis Browne (Consumer Advocate)

SL/jb