

February 13, 2024

Board of Commissioners of Public Utilities
Prince Charles Building
120 Torbay Road, P.O. Box 21040
St. John's, NL A1A 5B2

Attention: Jo-Anne Galarneau
Executive Director and Board Secretary

Re: Newfoundland and Labrador Hydro – 2021 Capital Budget Supplemental Application Approval of the Construction of Hydro's Long-Term Supply Plan for Southern Labrador – Request for Further Clarification – Reply

Further to the Board of Commissioners of Public Utilities ("Board") correspondence dated January 3, 2024,¹ and Newfoundland and Labrador Hydro's ("Hydro") reply to this correspondence dated January 12, 2024,² the Board has requested further clarification³ of issues related to Hydro's proposal for approval of its long-term supply plan for southern Labrador.⁴ Hydro's responses to the further questions posed by the Board follow.

i. Page 1, i. Hydro states: "Having received approval of the project, once the conditions have been met no further process would be necessary other than providing confirmation of the condition fulfillment to the Board."⁵

a. Does Hydro agree that if the result of the proposed conditions being met leads to either a change in the scope of the project or a change in the financials of the project, or both, further process should be required?

Hydro agrees that if there are any *substantive* changes to the project scope or costs that would materially deviate from the project scope or costs approved by the Board, the Board would be advised and further process *may* be necessary.

¹ "Newfoundland and Labrador Hydro – 2021 Capital Budget Supplemental Application Approval of the Construction of Hydro's Long-term Supply Plan for Southern Labrador – To NLH – Request for Further Information," Board of Commissioners of Public Utilities, January 3, 2024.

² "Newfoundland and Labrador Hydro – 2021 Capital Budget Supplemental Application Approval of the Construction of Hydro's Long-term Supply Plan for Southern Labrador – Request for Further Information – Reply," Newfoundland and Labrador Hydro, January 12, 2024.

³ "Newfoundland and Labrador Hydro - 2021 Capital Budget Supplemental Application Approval of the Construction of Hydro's Long-term Supply Plan for Southern Labrador - To NLH - Further Clarification," Board of Commissioners of Public Utilities, January 26, 2024.

⁴ "Long-Term Supply for Southern Labrador," Newfoundland and Labrador Hydro, rev. October 5, 2023 (originally filed July 16, 2021).

⁵ *Supra*, f.n. 2 at p. 1.

This is consistent with current practice⁶ and with the process in place for multi-year capital projects. As Hydro noted in its January 12, 2024 correspondence, the Capital Budget Application Guidelines (Provisional) note that if there is a material change in the scope, nature and magnitude of the project in a subsequent year of a multi-year project, the expenditures would be subject to further review.⁷

b. If Hydro does agree, what process or options are available to the Board to review the resulting changes? If Hydro does not agree, please explain why not.

Hydro views this scenario as similar to that of a multi-year project where further review would be necessary if there was a material change in the scope, nature, and magnitude of a project from what was initially approved. Hydro further notes that the *Board of Commissioners of Public Utilities Regulations, 1996* also provides guidance in this circumstance. Section 28(2) of the regulations states:

(2) When a decision or order of the board is sought to be reversed, changed, or modified by reason of facts and circumstances arising subsequent to the hearing, or to the order, or by reason of consequences resulting from compliance with that decision, order or requirement which are claimed to justify or entitle a reversal, change or modification of the facts, circumstances or consequences must be fully set out in the application.⁸

Additionally, the Board has the ability to require Hydro to provide information regarding the project to confirm whether the scope and costs continue to align with what was approved. The Board has the ability to provide an Order that is specific to the scope and costs proposed in Hydro's application, with a direction that if the scope materially changes or if costs increase by more than a certain percentage, Hydro would be required to provide information justifying those changes or costs before the Board will permit the continued implementation of the Order and/or before the Board will allow recovery of the costs associated with the increase in scope or magnitude of the project.

In Hydro's reply to party comments,⁹ as well as in Hydro's replies to the further information requested by the Board, Hydro is endeavoring to propose to the Board a methodology to achieve approval of the project while taking the concerns of the Board and the intervenors into consideration. Hydro's proposal for full project approval with conditions related to implementation is intended to allow Hydro to proceed with the work necessary to advance the project and to retain the current schedule as much as reasonably possible, while also

⁶ On April 17, 2020, Hydro advised the Board that it would not be proceeding with the Ebbegunbaeg Control Structure Refurbishment project, which was filed as part of the Hydraulic Generation Refurbishment and Modernization project within Hydro's 2019 Capital Budget Application ("CBA"), approved as per *Public Utilities Act*, RSNL 1990, c P-47, "Board Order No. P.U. 46(2018)", Board of Commissioners of Public Utilities, December 10, 2018. The project was cancelled because of additional unplanned work required for proceeding with the project, discovered during the assessment performed prior to the commencement of the project. As the scope of work would be beyond that which was proposed and approved by the Board and because the estimated project cost did not reflect the full project scope, additional Board approval would be required. Hydro submitted a replacement proposal in its 2021 CBA.

⁷ "Capital Budget Application Guidelines (Provisional)," Board of Commissioners of Public Utilities, December 20, 2021, p. 5 of 18, para. 6.

⁸ NLR 39/96, s. 28(2).

⁹ "Newfoundland and Labrador Hydro – 2021 Capital Budget Supplemental Application Approval of the Construction of Hydro's Long-term Supply Plan for Southern Labrador – Reply," Newfoundland and Labrador Hydro, December 18, 2023.

being cognizant of the obligation to address the duty to consult, and to ensure that Hydro meets its obligations to the Board and intervenors.

Hydro has committed, as is the normal process in any project that receives Board approval and as is required for multi-year projects, to advise the Board if the project deviates in scope or cost in any material way from what the Board has approved. The Board also retains the ability to disallow the recovery of costs related to scope and expenditures that have not been approved, if they are shown not to be reasonable costs that meet the criteria of lowest possible cost necessary for reliable, environmentally responsible service.

- ii. **Page 1, i. Hydro states: “If only partial approval were provided and further process was necessary after the initial non-construction work, there would be substantial risk to the schedule currently in place to complete the project, further delaying services to the region and likely increasing the project costs due to the delay.”¹⁰ If the Board was to approve specific parts and expenditures of the project, providing partial approval, would this allow Hydro sufficient certainty to progress the project while it continues its ongoing consultation with NunatuKavut Community Council (“NCC”)?**

Yes. Approval of the initial pre-construction stages of the project would allow Hydro to proceed with detailed engineering and award the environmental assessment consultant contract, design consultant contract, and genset tender to enable the compilation of the information necessary to proceed effectively through the environmental assessment process as well as the ongoing discussions and consultation with the NCC.

Hydro’s concern with respect to the concept of a partial Order instead of a full Order with conditions related to implementation as proposed is the risk of delay due to additional regulatory process in obtaining the subsequent Order permitting construction, once the duty to consult has been met and the environmental approval received. Additional schedule delay would cause further implementation delay, resulting in a substantial risk of increased costs and a longer reliance on temporary supply.

Hydro acknowledges, as noted herein, that if there are material changes to the scope or magnitude of the project as a result of the environmental assessment process or the duty to consult, there will be additional process necessary which could cause additional delay; this is risk that is present in any project. Hydro expects that the proposed project will receive environmental approval without requiring material change and that Hydro will also be able to address any concerns of the NCC and impacts to the NCC’s asserted rights without substantive change to the proposed project.

As Hydro notes herein, its concern with a partial Order is the risk of additional process in the absence of material change to the proposed project and the impact that the delay from additional process could have on the project schedule and related costs.

¹⁰ *Supra*, f.n. 2 at p. 2.

iii. Page 2-3, iii.

- a. Please provide a detailed description of the work that Hydro proposes would be completed prior to the proposed conditions being met, as well as a detailed breakdown of the estimated cost commitment of \$10 million associated with the listed planning, design and procurement work.**

As Hydro noted in its response to item iii of the January 12, 2024 correspondence, the following planning, design, and procurement activities would commence upon approval:

- Detailed engineering and design;
- Issue, award, and execution of the environmental assessment consultant contract;
- Issue and award of the genset tender (required for overall genset data for environmental assessment/duty to consult - emissions, fuel consumption, and physical footprint);
- Issue, award, and initial execution of the design consultant contract;
- Internal scope to support the environmental assessment process, the duty to consult, design, procurement, and contract management; and
- Issue and award switchgear and transformer tenders (required due to long lead times to meet the required schedule).

The associated costs of approximately \$10 million are provided in further detail in Table 1.

Table 1: Pre-Construction Cost Estimate¹¹ (\$000)

Project Cost	2024	2025	Total
Material Supply	0.0	1,158.4	1,158.4
Labour	1,548.8	275.2	1,824.0
Consultant	1,484.3	250.0	1,734.3
Contract Work	80.0	4,297.1	4,377.1
Other Direct Costs	30.5	0.0	30.5
Interest and Escalation	113.8	31.8	145.6
Contingency	313.6	60.2	373.8
Total	3,571.0	6,072.7	9,643.7

The “Material Supply” and “Contract Work” line items reflect progress payments associated with the genset, transformer, and switchgear procurement contracts as well as the engineering design consultant contract. It is assumed that these progress payments would be surrendered in the event the project did not proceed and these contracts were cancelled.

¹¹ Front-end engineering and design costs to date shown in 2023 within Schedule A are included in 2024 herein in Table 1.

b. Please explain why these aspects of the project are required to meet the duty to consult.

It is important to note that there is no specific aspect of the proposed work necessary *solely* for the duty to consult. As Hydro has described, these aspects of the project will allow Hydro to gather the information required for the environmental assessment. However, the information required for the environmental assessment is also necessary to facilitate informed consultation with the NCC. They will also allow Hydro to obtain the level of detail necessary, such as detailed project construction plans, to discuss if and how the proposed project will impact any of the NCC's asserted rights. For example, the environmental assessment will include an examination of the air emissions related to operation of the generating station. These results will inform the NCC regarding possible impacts on its communities and its asserted rights. Emissions modelling cannot take place until Hydro has tendered and awarded the major equipment for the project. Therefore, without approval of the funds to complete the required purchases, Hydro cannot complete the consultations necessary with the NCC.

iv. Page 2, ii.

a. Please provide a detailed description of the construction and commissioning work that would not be undertaken prior to the proposed conditions being met, as well as a detailed breakdown of the estimated costs.

Hydro would not undertake any construction or commissioning work prior to meeting the proposed conditions. Following the conditions being met, construction and commissioning work includes:

- Design of the remaining distribution line along with full procurement and construction scopes;
- Detailed design of the diesel generating station power systems, including genset installation, protection and controls systems, and the substation;
- Physical development of the diesel generating station site—including site works, grounding, below grade piping, water, septic, substation foundations, building foundations, fuel storage, general site grading, and fencing—followed by the construction of the diesel generating station building and installation of the building's general, mechanical, and electrical systems; overhead crane; and the fire suppression system;
- Installation of gensets, switchgear, control systems, automation, and communication systems;
- Full project commissioning for the diesel generating station and distribution systems; and
- Project management, contract administration, environmental oversight, safety, and quality control scopes to successfully execute the construction scope of the full project.

There will be design activities that will carry into later 2025, possibly into early 2026. While the majority of the design to support Hydro's site work and building contract will be completed by April 2025, contingent on Hydro receiving regulatory approval by the end of the first quarter of 2024, detailed engineering will continue in parallel with initial

construction activities. The majority of the costs remaining after the expenditures described in response to item iii herein would be considered construction, commissioning, and efforts to support that phase; however, without a detailed plan prepared with Hydro's consultant (to be hired pre-construction), Hydro cannot provide an accurate breakdown in more detail than that provided in Table 1 of Schedule 3 of the "Long-Term Supply for Southern Labrador" application.¹²

- b. Hydro states "Hydro notes that the estimated costs are noted in Hydro's application, and are estimates based on the current schedule."¹³ Please provide the reference.**

Table 1 of Schedule 3 of the "Long-Term Supply for Southern Labrador" application.

v. Page 3-4, vi.

- a. Does Hydro believe that the Board is the appropriate adjudicator to determine if the duty to consult for this project has been met?**

Hydro believes that the Board can be an adjudicator in determining whether the duty to consult has been met; however, Hydro believes that the Department of Environment and Climate Change can also be an appropriate adjudicator to make that determination in this circumstance. The Department of Environment and Climate Change, through its established environmental assessment process, which Hydro has yet to complete, examines the Indigenous consultation conducted to address construction concerns.

Over the course of the coming months, Hydro will continue to work with the NCC on sharing information with respect to the project to assist with meeting Hydro's duty to consult. Hydro will also file documentation during the environmental assessment that will include more detail and definition about the project and the ongoing Indigenous consultation than is currently available at this stage of the project. Hydro will update the Board on the status both of the consultation with the NCC and the progress of the environmental assessment, and any conclusions made therein. As the consultation is continuing, with substantial information still to be developed and shared, out of an abundance of caution Hydro has proposed the project be approved at this time with the condition that *construction not proceed* until Hydro can confirm to the Board that the duty to consult has been met.

- b. If NCC does not agree that the duty to consult has been met, what process will Hydro follow to bring the details to the Board to request a determination that the condition has been met?**

As Hydro noted in its January 12, 2024 correspondence, if the NCC does not agree at some later date that the duty to consult has been met, but Hydro feels it has taken all reasonable steps to consult and address possible impacts, Hydro would provide the details of the consultation, discussions, and steps of mitigation to the appropriate adjudicator¹⁴ for review and consideration to determine if the legal standard of duty to consult has been met.¹⁵

¹² *Supra*, f.n. 4 at sch. 3, p. 1, Table 1.

¹³ *Supra*, f.n. 2 at p. 2.

¹⁴ The regulator identified as the appropriate adjudicator may depend on the stage of the consultation and the environmental assessment.

¹⁵ Various decisions of Canadian tribunals and courts provide guidance on the process to follow to request such a determination.

Hydro, as previously noted, is committed to ensuring meaningful consultation with the NCC with respect to the project. This commitment has been noted by the NCC in its submissions. Hydro believes that it will be able to confirm to the Board, with the support of the NCC, that the duty to consult has been met prior to proceeding with the construction of the project and that a determination through adjudication will not be necessary.

vi. Page 6, x. Hydro states “ ...Hydro would transfer the costs incurred up to that date from work in progress into a newly defined and approved deferral account for future recovery from customers.”¹⁶

a. Please explain why, if the proposed conditions are not met, Hydro should be granted approval to defer the expended costs for possible future recovery from customers?

The costs that Hydro would incur in the pre-construction stages are necessary to progress the project and— if a project is approved on the basis of being the lowest-cost solution that achieves reliable, environmentally responsible service—these costs are reasonable and prudently incurred and should be recovered from customers. These costs are consistent with the costs Hydro incurs in any project. If the project, once approved and these costs incurred, did not proceed because of conditions that are unrelated to the determination of the project as the lowest-cost solution that achieves reliable, environmentally responsible service, the costs were, in Hydro’s view, still prudently incurred and should be recovered.

The pre-construction work is necessary to develop a project sufficiently to bring to the Department of Environment and Climate Change for environmental assessment and, in this particular case, to have sufficient information for substantive consultation with the NCC. The associated costs are necessary and prudent expenditures by Hydro and should be recovered.

b. Why should the risks associated with Hydro not meeting its proposed conditions be borne by the ratepayers?

Please refer to Hydro’s response to item vi(a) herein. Hydro must incur these costs to provide as much detail as is necessary to meet the duty to consult and to obtain environmental approval. Depending on the size of the project, the costs can be substantial, even if only necessary for an environmental assessment in the absence of a requirement to meet a duty to consult. In balancing the risk to the utility versus the cost to customers, Hydro believes that, as noted herein, if a project is approved on the basis of being the lowest-cost solution that achieves reliable, environmentally responsible service, these costs are reasonable and prudently incurred and should be recovered from customers.

vii. Page 6, xii. Hydro states certain of the work required to submit the project for environmental assessment is also required for the duty to consult process.

a. Please explain why the work is required for the duty to consult.

Through consultation with the NCC, the objective is to help ensure that land and resource development decisions minimize or, where reasonably practicable, eliminate adverse impacts on asserted rights. In the context of this project, important information will include the timing of major construction activities, such as the development of the diesel generating

¹⁶ *Supra*, f.n. 2 at p. 6.

station site, construction of the distribution line, air emissions related to the operation of the diesel generating station, employment, regional economic impacts, etc. For Hydro to determine how to minimize or eliminate adverse impacts, it needs to have any adverse impacts identified by the NCC. For the NCC to identify those impacts, it needs to have detailed information regarding the project—more detailed than has yet been developed. The detailed design work necessary for the environmental assessment will provide the more granular information needed, as described herein, for substantive discussions and consultations with the NCC about the impacts of the project on its asserted rights.

b. Please provide, if able, a breakdown of the costs which are necessary for the duty to consult process vs. submitting the project for environmental assessment.

There are no divisions in the costs. The costs noted herein, associated with advancing project design and procurement of equipment and contracts necessary to proceed with environmental assessment, would be incurred for the environmental assessment process even if there were no duty to consult requirement.

viii. Page 7, xiv. Please provide the proposed Schedule A for clause 1 and a proposed schedule for the expenditures for clause 2.

The proposed Schedule A, provided as Attachment 1, is Table 1 of Schedule 3 of the “Long-Term Supply for Southern Labrador” application. The proposed schedule for the pre-construction expenditures is provided herein in Table 2.

Table 2: Schedule for Pre-Construction Expenditures

Activity	Start Date	End Date
Planning:		
Environmental Assessment Consultant Tender/Award	February 2024	March 2024
Procurement:		
Genset Tender/Award	February 2024	April 2024
Planning:		
Design Consultant Tender/Award	March 2024	May 2024
Environmental Assessment Preparation/Registration/Release	March 2024	April 2025
Procurement:		
Switchgear Tender/Award	October 2024	November 2024
Transformer Tender/Award	October 2024	November 2024

ix. Page 2, ii, footnote 3. Please confirm that the correct reference in this footnote is “Long-Term Supply for Southern Labrador-Revision 2,” dated October 5, 2023.

It is confirmed.

Should you have any questions or comments about any of the enclosed, please contact the undersigned.

Yours truly,

NEWFOUNDLAND AND LABRADOR HYDRO



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Table 1: Project Estimate (\$000)¹

Project Cost	2024	2025	2026	2027	2028	Total
Material Supply	0.0	1,158.4	15,311.1	11,874.2	3,195.0	31,538.7
Labour	1,548.8	1,886.2	1,798.5	985.6	219.5	6,438.6
Consultant	1,484.3	1,040.4	961.4	658.6	474.8	4,619.6
Contract Work	80.0	8,308.4	11,323.3	5,093.8	1,019.4	25,825.0
Other Direct Costs	30.5	1,325.8	2,259.5	677.4	228.7	4,521.9
Interest and Escalation	113.8	831.9	2,524.6	3,442.3	543.6	7,456.3
Contingency	313.6	1,571.8	3,253.8	1,883.3	522.5	7,545.0
Total	3571.0	16,122.8	37,432.4	24,615.3	6,203.5	87,945.0

¹ Numbers may not add due to rounding.