

November 13, 2018

The Honourable Justice Richard Leblanc, Commissioner
Commission of Inquiry Respecting the Muskrat Falls Project
5th Floor, Suite 502, Beothuck Building
20 Crosbie Place
St. John's, NL A1B 3Y8

Dear Commissioner:

Re: Submission of Commercially Sensitive Information

I. Presumption – Documents to be Disclosed

Parties with standing have been asked to make submissions in response to McInnes Cooper's November 9, 2018 submission on behalf of Nalcor Energy ("Nalcor") concerning the identification and treatment of (alleged) commercially sensitive information.

In the Commission's interpretation note it states as follows with respect to "commercially sensitive information":

Having taken all of this into account and recognizing here that Nalcor, its subsidiaries and the Government of Newfoundland and Labrador are public bodies, for the purposes of this Commission of Inquiry Respecting the Muskrat Falls Project **all relevant documents required, relied upon and to be used by the Inquiry should be presumed to be open to disclosure to the parties and to the public.** This presumption will however be subject to a claim for nondisclosure to the parties and/or the public where there is a valid legal privilege asserted, such as solicitor-client or litigation privilege, and where the disclosure relates to commercially sensitive information [emphasis added].

Because this is a **public** inquiry, the Consumer Advocate's position is that the presumption of full disclosure should not be easily displaced. The presumption is that the public has the right see all documents and any exception to full disclosure, such as "commercial sensitivity", should be strictly proven.

II. Application of Non-Disclosure to Date

The Commissioner has established that the burden is on the party seeking non-disclosure of information to demonstrate why it should not be disclosed. To date, the Consumer Advocate has not been a party to any discussions or negotiations regarding what has been redacted, or why there have been redactions, in any of the documents or transcripts that are before the Commission. The Consumer Advocate does not know: (i) what information is being claimed as commercially sensitive; (ii) the basis for the claims of commercial sensitivity (other than broad assertions about ongoing litigation, arbitration and potential harm resulting from disclosure); or (ii) who is making the final decision as to what is deemed to be

“commercially sensitive” and therefore not disclosed. It is apparent, however, that there have been discussions/negotiations and decisions made regarding redactions of certain documents (see for example, generally, interview transcripts). The Consumer Advocate has not seen what has been redacted from the various documents (including the interview transcripts of witnesses) and so other than generally arguing in favour of the principle of full disclosure, the Consumer Advocate is unable to offer specific commentary on the redactions. This, from a public disclosure perspective, is troubling.

With respect to other redactions, even though parties may have subsequently seen what was redacted, the parties are not aware of the basis for any party’s position that there is a risk of harm if the redactions are disclosed. Therefore, it is difficult for the Consumer Advocate to offer an informed position regarding whether what was redacted meets the definition of “commercial sensitivity” as contained in the Commission’s interpretation note or whether it should be disclosed to the public. The Consumer Advocate needs to be in a position to offer an informed position to the ratepayers of the Province on the issue of document disclosure.

The Consumer Advocate refers to the letter of Daniel W. Simmons, Q.C. dated 9 November 2018. On page 2, Mr. Simmons states:

Considering the initiation of arbitration by Astaldi and the nature and value of the claims asserted by Astaldi, there is significant potential for adverse impact on the commercial interests of Nalcor Energy if evidence relating to that dispute, which is at present not available to Astaldi, is released to it other than through the arbitration process.

With respect, Nalcor has simply asserted that there is potential for adverse impact but has not demonstrated why redacted information should remain confidential. The Consumer Advocate’s position is that more than vague assertions of potential risk of harm to Nalcor is required to displace the presumption of full disclosure. While Nalcor may have presented such arguments to Commission counsel, the parties with standing (including the Consumer Advocate) have not heard these arguments or been given an opportunity to consider and reply to them. What the Consumer Advocate is able to say at this point, however, is that what has been redacted from certain transcripts does not meet the definition of “commercial sensitivity” sufficient enough to warrant non-disclosure and is therefore concerned that a broad approach is being taken to the application of the Commission’s interpretation note.

The Consumer Advocate wishes to ensure that the interest of those who assert a document meets the definition of “commercial sensitivity” is balanced with the interest of the public, for whom this Inquiry is being conducted. The purpose of the Inquiry cannot be undermined by allowing the public to be uninformed due to a lack of complete knowledge in terms of document disclosure. The Consumer Advocate submits that a party cannot simply rely on the fact that there is ongoing and/or potential litigation to justify non-disclosure without explaining how disclosure of the particular information “might harm the competitive position, interfere with the negotiation position or result in financial loss of harm”. When Nalcor, or any party, seeks non-disclosure, parties with standing should be given an opportunity to see the redacted information, hear and consider Nalcor’s arguments in favour of non-disclosure, and take a position in response to Nalcor’s arguments. The Consumer Advocate is of the view that the Commissioner should be tasked with (and it is within his jurisdiction) determining whether information is commercially sensitive to the extent that it should not be disclosed.

Above all, it must be remembered that this Inquiry was called for the benefit of the public. It is being conducted for and on behalf of the public.

III. Conclusion

To address the Consumer Advocate's position that full disclosure to the public is required, the Consumer Advocate suggests the following procedure when a party is seeking an exception to the rule of openness, transparency and full disclosure:

1. If there is information a party (i.e. Nalcor) opines is commercially sensitive and that should not be disclosed, all parties will be given a reasonable opportunity to see and review the information that is proposed to be redacted;
2. Each party shall advise Commission Counsel whether it agrees or disagrees with the proposed redactions;
3. If there is no consensus on the proposed redactions, the parties shall have the opportunity to present arguments to the Commissioner, *in camera*;
4. The Commissioner shall make a determination as to whether the proposed information meets the definition of "commercially sensitive" and whether the party seeking non-disclosure has met the burden established by the Commissioner; and
5. Even if the Commissioner determines that the information is commercially sensitive and should not be disclosed to the public, all parties with full standing should nevertheless have the opportunity to ask questions about the redacted information in an *in camera* proceeding.

Your truly,

WADDEN PEDDIGREW HOGAN



John Hogan and Christopher Peddigrew