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Our File: 161520

January 17, 2019

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: Grant Thornton Forensic Audit Report – Construction Phase
Review for Commercial Sensitivity
Nalcor Energy Submission – Part 1

Commission Co-Counsel have given Nalcor the opportunity to review the Grant Thornton Forensic Audit Report, Construction Phase, in order to assess whether it discloses commercially sensitive information. Commission Co-Counsel and Nalcor counsel have met, but have failed to reach agreement on redactions to be made to the report for commercial sensitivity prior to its release to parties with standing. Nalcor has been invited to submit an application to the Commissioner for a ruling. This is Part 1 of the application, which may be circulated to parties with standing and published. Nalcor's Part 2 confidential submission will be provided separately.

Nalcor has identified passages in the Report that are commercially sensitive that generally fall into three categories:

1. Estimated and forecast costs for individual work packages.
2. The amounts and other terms and provisions of bids, tenders and proposals and the evaluation of bids, tenders and proposals.
3. Matters related in any way to Contract CH0007 for powerhouse and spillway construction awarded to Astaldi.

Nalcor submits that disclosure of the Construction Phase Report and the commercially sensitive passages should be as follows:

1. The Report, without redaction of commercially sensitive passages, may be disclosed to parties with standing, other than Astaldi, subject to their undertakings given to the Commission to maintain confidentiality and non-disclosure of the commercially sensitive passages.
2. The Report, with redaction of commercially sensitive passages, may be disclosed to Astaldi, subject to such undertakings as the Commission may require.

3. The Report, with redaction of commercially sensitive passages, may be disclosed publicly as and when the Commission may determine.

Nalcor understands from Commission Co-Counsel that for this application it has not been asked to make submissions concerning the use to be made of the Construction Phase Report in the Phase 2 hearings scheduled to commence February 18, 2019, however Nalcor has no objection in principle to appropriate disclosure and use of the commercially sensitive passages from the Construction Phase Report at *in camera* sessions of the Phase 2 hearings, provided representatives of Astaldi and its counsel are excluded. Nalcor further understands from Commission Co-Counsel that for this application it has not been asked to make submissions concerning the commercial sensitivity of any other documents or of oral evidence.

Guidelines for Assessing Non-disclosure for "Commercial Sensitivity"

The recognition of information as commercially sensitive and the determination of whether and how to protect the interests of parties that may be harmed by its disclosure are matters within the discretion of the Commissioner. On June 7, 2018 the Commissioner issued guidelines titled "Assessing Non-disclosure for 'Commercial Sensitivity'", that set out seven principles that should be applied. Paraphrasing those principles, there is an initial presumption in favour of public disclosure; the onus is on a party requesting limits on that disclosure; information that might reasonably be expected to cause commercial harm if disclosed is to be considered commercially sensitive; and whether limits will be placed on public disclosure will depend on consideration of the nature and extent of the harm that may be caused.

This submission is drafted to minimize premature disclosure of the contents of the Construction Phase Report. More detailed discussion of the specific redactions requested is contained in the Part 2 confidential submission.

Category 1: Estimated and Forecast Costs for Individual Work Packages

The Report, in a table listing a number of contract work packages, discloses (1) the amount budgeted prior to contract award at time of sanction, (2) the recommended award value which included the value of the successful contractor's bid plus a growth allowance based on identified package risk and (3) the difference between those two values. Only the value of the successful contractor's bid is known to the contractor. The amount initially budgeted for the work package and the amount of any allowance for potential changes in work scope or contractor claims is not disclosed to the contractor. Doing so would risk encouraging claims by contractors to attempt to take advantage of room in the budget and would compromise the ability of Nalcor to negotiate the cost of any necessary extra work and/or contractor claims for extra payment.

Nalcor submits that the budgeted amounts and recommended award values may be disclosed to parties with standing, subject to the conditions discussed above, but should not be disclosed publicly, which would make that information available to the contracting parties. Budgeted amounts and recommended award values for contract CH0007 should not be disclosed to Astaldi.

The Report examines a number of individual work packages in more detail. It includes disclosure of (1) the pre-sanction cost estimate for that work package including the base estimate and escalation, (2) the forecast cost of that work package as of March 2018 (3) the difference between pre-sanction estimate and March 2018 forecast and (4) the portion of the

overall project cost increase that is accounted for by that difference. In some cases allowances that are built into the current budget are also disclosed. All that information is treated confidentially by Nalcor and is not disclosed to the contractors. Disclosing that information to the contractors would risk the same adverse commercial consequences described above.

The construction work included in some, but not all, of those work packages is incomplete and/or there are outstanding claims and disputes with the contractors. Those work packages are identified in the confidential submission. Nalcor submits that in respect of those work packages the information described may be disclosed to parties with standing subject to the conditions discussed above, but should not be disclosed publicly, which would make that information available to the contracting parties. The information for contract CH0007 should not be disclosed to Astaldi.

Category 2: Bid Contents and Evaluations

Responses to tender calls and to requests for proposals have been kept confidential by Nalcor. For example, Nalcor document LCP-SN-CD-0000-SC-PR-0003-01 Bid Receipt and Opening, in section 6.3, says that strict confidentiality of priced copies of bids is to be maintained at all times. Nalcor document LCP-SN-CD-0000-SC-FR-0031-01 Bid Evaluation and Award Recommendation, in section 6 states, "As with all Procurement activities, it is of the utmost importance to protect the confidentiality of the evaluation process and the integrity of the bidding process." Nalcor's practice for the Lower Churchill Project has been to maintain the confidentiality of all bid submissions and evaluations.

Disclosure of bid evaluations to the successful bidder risks encouraging claims for extra payment after contract award, such as by giving the contractor insight into the evaluation of aspects of the work that are assessed as over or under bid when compared to budget. Disclosure of bids and bid evaluations to unsuccessful bidders also risks encouraging claims for perceived unfairness in the bidding process which must be defended and which create budgetary uncertainty.

Outside of legislated public tendering processes where public bid openings and disclosure are required, it is common industry practice to maintain confidentiality of bid submissions and evaluations.

The Construction Phase Report includes disclosure of unsuccessful bids for one work package and discusses the bid evaluation process for another, as identified in the confidential submission. That information may be disclosed to parties with standing subject to the conditions discussed above, but should not be disclosed publicly, which would make that information available to successful and unsuccessful bidders. It should not be disclosed to Astaldi.

Category 3: Astaldi

In its submission on November 9, 2018 concerning protection of commercially sensitive information in Phase 1 of the Inquiry hearings Nalcor submitted as follows:

> That there is a dispute between Astaldi Canada Inc. (Astaldi) and Nalcor Energy subsidiary Muskrat Falls Corporation (MFC) is publicly known. Astaldi and MFC are parties to a Civil Works Agreement for the construction of the Muskrat Falls Generating Station intake and powerhouse, spillway and transition dams (Contract CH0007), and to

> subsequent agreements including those known as the Bridge Agreement and the Completion Agreement.
>
> Astaldi has delivered a Notice of Arbitration dated September 27, 2018, a copy of which is enclosed. MFC placed Astaldi in default on September 28, 2018 and issued a stop work order on October 18, 2018. Procedural disputes concerning the Notice of Arbitration have been before the courts of Newfoundland and Labrador and the courts of Ontario.
>
> By the Notice of Arbitration Astaldi has given notice of its positon that Contract CH0007, the Bridge Agreement, the Completion Agreement and subsequent agreements fixing Astaldi's entitlement to compensation for work performed are unenforceable, that Astaldi is entitled to payment for "all work done and all services and materials supplied on a cost reimbursable, *quantum meruit* or *quantum valebant* basis, with industry overhead and profit in each case," or alternatively to "damages for negligence and breach of contract in an amount equal to the difference between the price of the original Agreement, and Astaldi's incurred cost at completion, including reasonable overhead and profit." The relief claimed by Astaldi in the Notice of Arbitration includes an award "compensating Astaldi for all work, services and materials supplied to the Project, including reasonable overhead and profit" and an award "of damages in the amount of $500,000,000."
>
> Disclosure of documentation, testimony and other evidence by each of Astaldi and MFC to the other will be governed by the procedural rules found to be applicable to the arbitration proceeding and to rulings of the arbitration panel. It cannot and should not be presumed that those procedural rules and rulings will provide for the same disclosure as do the rules of procedure of this Inquiry, or as would apply under the *Rules of the Supreme Court, 1986*.
>
> 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.

Since that submission Astaldi's legitimate interest in the Inquiry proceedings has been substantially diminished. Astaldi's contract has been terminated. It no longer performs any work at the site and the services of a replacement contractor have been arranged. Astaldi's interest is now focussed on pursuit of a monetary award and the obstruction of Nalcor's right to realize on performance security, both being conducted through the arbitration process.

Enclosed is a copy of Exhibit 16 to contract CH0007, Rules for Dispute Review Board and Arbitration. Part B clause 11.3 provides for each party to append to a written statement of its position a list of the documents "upon which the Party intends to rely", and clause 12.1 provides for the exchange of copies of those documents. Clause 12.2 gives the arbitrator the discretionary power to order production of additional documents that "the arbitrator considers to be relevant". While the arbitration tribunal has discretion to order production of relevant documents, the typical standard for relevance in commercial arbitration is whether a document is both 'relevant to a matter in issue and material to its outcome.'

These provisions are an example of how the scope of documentary and evidentiary production is narrower in the arbitration than it would be under the *Rules of the Supreme Court, 1986*, and much narrower than Nalcor's obligation to produce to the Commission documentation and information that is related to the Terms of Reference.

Access to information gathered by Grant Thornton and its analysis of the CH0007 contract will give Astaldi procedural advantages concerning the timing and scope of disclosure of documentation and information that are unavailable to it under the arbitration rules, increasing the risk of commercial harm to the interests of Nalcor and by extension, the Province and its ratepayers and tax payers.

Nalcor submits that all passages in the Construction Phase Report concerning the Astaldi contract that are identified as commercially sensitive in the confidential submission may be disclosed to parties with standing subject to the undertaking described above. Those passages should not be disclosed to Astaldi, or disclosed publicly, which would make that information available to Astaldi.

Yours very truly,

Daniel W Simmons Q.C.

EXHIBIT 16

RULES FOR DISPUTE REVIEW BOARD AND ARBITRATION

PART A – DISPUTE REVIEW BOARD (PURSUANT TO ARTICLE 31.3 OF THE ARTICLES OF AGREEMENT)

Appointment of the Dispute Review Board

1.1 In accordance with Article 31.3 of the Articles and provided a Party has complied with Articles 31.1 and 31.2, a Party may require a Dispute to be adjudicated by a Dispute Review Board constituted pursuant to Exhibit 16 Part A clauses 1.2 and 1.3 (the "**DRB**").

1.2 Within 15 Business Days following the completion of the meetings contemplated by Article 31.2 without resolution of the Dispute, but not later than ninety (90) days from the date of the Notice of Dispute or such other date as may be agreed to by the Parties, the Parties shall jointly appoint a DRB in accordance with Article 31.3 of the Articles and Exhibit 16 Part A clause 1.3.

1.3 The DRB shall comprise three suitably qualified persons (the "**members**"). Each Party shall nominate one member for the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman and who shall be a lawyer resident in Canada and a practising member of a provincial bar association. The terms of the remuneration of each of the three members shall be mutually agreed upon by the Parties when agreeing the conditions of appointment. Each Party shall be responsible for paying one-half of this remuneration.

1.4 If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace any one or more members of the DRB. Unless the Parties agree otherwise, the appointment will come into effect if a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment. The replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as described in this Exhibit 16 Part A.

1.5 The appointment of any member may be terminated by mutual agreement of both Parties, but not by the either Party acting alone.

1.6 Unless otherwise agreed by both Parties, the DRB for the Dispute that is the subject of the Notice issued pursuant to Article 31.1 shall expire upon rendering its decision.

Failure to Agree Dispute Review Board

2.1 If any of the following conditions apply, namely:

(a) the Parties fail to agree upon the appointment of a member of the DRB by the date stated in Exhibit 16 Part A clause 1.1,

(b) either Party fails to nominate a member (for approval by the other Party) by date stated in Exhibit 16 Part A clause 1.1,

(c) the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DRB by date stated in Exhibit 16 Part A clause 1.1, or

(d) the Parties fail to agree upon the appointment of a replacement person within 15 days after the date on which one of the three members declines to act or is unable to act as a result of death, disability, resignation or termination of appointment,

then either Party may, without prejudice to any other rights it may have, refer the matter to a single arbitrator to appoint the member as soon as possible, in accordance with Article 31.4 of the Articles.

Obtaining Dispute Review Board's Decision

3.1 Within 10 Business Days of the appointment of the chairman of the DRB, a Party "Claiming Party") may refer the Dispute in writing to the DRB for its decision, with a copy to the other Party ("Responding Party"). Such reference shall state that it is given under Article 31.3. The written claim submission to the DRB by the Claiming Party shall state:

(a) the nature of the Dispute and full particulars of its claim;
(b) the terms of the Agreement upon which the Party relies (including the relevant Articles and Sections in Exhibits);
(c) any documents relied upon by the Party for its position on the Dispute; and the remedy being sought.

3.2 The DRB shall be deemed to have received such reference on the date when it is received by the chairman of the DRB.

3.3 The Responding Party submit its response to the Dispute in writing to the DRB, with a copy to the Claiming Party, within 15 Business Days from the date of receipt of the Claiming Party's submission to the DRB, which response shall include:

(a) its position on the Dispute, including particulars;
(b) the terms of the Agreement upon which the Party relies (including the relevant Articles and Sections in Exhibits); and
(c) any documents relied upon by the Party for its position on the Dispute.

3.4 Both Parties shall promptly make available to the DRB all information, access to the Site, and appropriate facilities, as the DRB may require for the purposes of making a decision on the Dispute.

3.5 The DRB shall be deemed to not be acting as arbitrator.

3.6 Within 30 days after receiving the written submission of the Responding Party, or within such other period as may be proposed by the DRB and approved by both Parties, the DRB shall give its decision, which shall be reasoned and shall state that it is given pursuant to this Exhibit 16 Part A clause 3.4. Unless the Agreement has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Work in accordance with the Agreement.

3.7 If either Party is dissatisfied with the DRB's decision, then either Party may, within 15 days after receiving the decision, give Notice to the other Party of its dissatisfaction. If the DRB fails to give its decision within the period of 30 days (or as otherwise approved by the Parties) after receiving the Responding Party's submission, then either Party may, within 30 days after this period has expired, give Notice to the other Party of its dissatisfaction. In either event, the Notice of dissatisfaction shall state that it is given under this clause.

3.8 If the DRB has given its decision on a Dispute to both Parties, and no Notice of dissatisfaction has been given by either Party within 30 days after it received the DRB's decision, then the decision shall become final and binding upon both Parties.

3.9 Except as stated in Exhibit 16 Part A clause 5 and clause 6, neither Party shall be entitled to commence arbitration of a Dispute unless a Notice of dissatisfaction has been given in accordance with Exhibit 16 Part A clause 3.7.

Not Used

4.1 Not Used.

Arbitration

5.1 Unless settled amicably, any Dispute in respect of which the DRB's decision has not become final and binding shall be finally settled by arbitration in accordance with Article 31.4 of the Articles and Exhibit 16 Part B.

5.2 Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DRB to obtain its decision, or to the reasons for dissatisfaction given in its Notice of dissatisfaction.

Failure to Comply with Dispute Review Board's Decision

6.1 In the event that:

(a) neither Party has given Notice of dissatisfaction within the period stated in Exhibit 16 Part A Clause 3.7,

(b) the DRB's decision has become final and binding, and

(c) a Party fails to comply with the decision,

then the other Party may, without prejudice to any other rights it may have, refer the failure to comply with the decision to arbitration in accordance with Article 31.4 of the Articles and Exhibit 16 Part B, and the decision of the DRB shall be admissible in evidence in the arbitration .

PART B – ARBITRATION (PURSUANT TO ARTICLE 31.4 OF THE ARTICLES OF AGREEMENT)

Interpretation

1.1 In this Exhibit 16 Part B (the "**Rules**"):

(a) the terms and phrases have the same meaning as may be attributed to them under

(i) the *Arbitration Act*, c. A-14, RSNL 1990, and

(ii) the Agreement;

(b) "the Court" means the Supreme Court of Newfoundland and Labrador.

1.2 In these Rules time shall be calculated in the same manner as time is calculated in the Agreement.

1.3 In these Rules a reference to an arbitrator includes a reference to a 3-person arbitral tribunal, as the case may be.

1.4 If any provision of these Rules is inconsistent with or contrary to a mandatory provision of the *Arbitration Act*, c. A-14, RSNL 1990, the mandatory provision of the arbitration legislation shall be applied.

Application of Rules

2.1 These Rules apply to an arbitration conducted under the Agreement.

2.2 The Parties may, by agreement in writing, change or make additions to these Rules.

Communications

3.1 All written communications under these Rules shall be given in the same manner as Notices are to be given in the Agreement or, upon appointment of counsel, to counsel for a Party by ordinary mail or e-mail.

3.2 A copy of all written communications between the arbitrator and a Party shall be given to the other Party at the same time.

3.3 There shall not be any oral communications with respect to the Dispute between a Party and the arbitrator unless it is made in the presence of both Parties or their legal representatives.

Objections to Process

4.1 A Party shall state any objections to any aspect of the arbitral proceedings or to the conduct of the other Party or the arbitrator at the earliest possible time.

4.2 The arbitrator may refuse to consider an objection if a Party fails to comply with clause 4.1.

Location of Arbitration

5.1 The arbitration shall be conducted in Toronto, Ontario, Canada at a location to be determined by agreement of the Parties.

Notice to Arbitrate

6.1 Either Party (the "claimant") shall submit a Dispute to arbitration, as permitted under the Agreement, by giving the other Party (the "respondent") a Notice containing the following:

(a) a description of the Agreement;

(b) a statement of the issues in the Dispute;

(c) a request that the Dispute be referred to arbitration;

(d) a description of the claim being made;

(e) the name or names of proposed arbitrators, along with the resume described in clause 8.6.

Commencement of Arbitration

7.1 For purposes of the calculation of time under the Rules, the arbitration shall be deemed to have commenced on the date the respondent receives the Notice under Exhibit 16 Part B clause 6.1.

Appointment of Arbitrator

8.1 Subject to Exhibit 16 Part B clause 8.2, the arbitration shall be conducted before a single arbitrator who possesses the qualifications specified in Exhibit 16 Part B clause 8.5.

8.2 The arbitration shall be conducted before a 3-person arbitral tribunal, each of whom possess the qualifications specified in Exhibit 16 Part B clause 8.5, if:

(a) the amount involved in the Dispute exceeds $5,000,000.00, and

(b) one of the Parties gives Notice of a request for a 3-person arbitral tribunal within 15 days after the arbitration commences.

8.3 The Parties shall make every reasonable effort to reach agreement on a single arbitrator within 30 days after the arbitration commences.

8.4 If the arbitration is to be conducted before a 3-person arbitral tribunal:

(a) each Party shall appoint an arbitrator within 30 days after the arbitration commences, and

(b) the 2 appointed arbitrators shall make every reasonable effort to reach agreement on a third arbitrator who shall be chairperson within 45 days after the arbitration commences.

8.5 An arbitrator must be impartial and independent of the Parties and be an experienced and skilled arbitrator and preferably shall reside in Canada and have knowledge of relevant construction industry issues. The chairperson of the 3-person arbitral tribunal shall be a lawyer resident of Canada and a practising member of a provincial bar association. No arbitrator shall be a resident of Newfoundland and Labrador or a resident of Italy.

8.6 If a Party or an arbitrator proposes an individual as an arbitrator, the Party or arbitrator shall provide a written resume of that individual's work background, qualifications and arbitration experience.

8.7 If an agreement is not possible under Exhibit 16 Part B clause 8.3 or 8.4(b) or a Party fails to make an appointment under Exhibit 16 Part B clause 8.4(a), either Party may make a written request to the Court to appoint an arbitrator as soon as possible.

8.8 Before accepting an appointment, an arbitrator shall provide the Parties with a written statement declaring that there are no circumstances likely to give rise to reasonable doubts as to the arbitrator's independence or impartiality and that the arbitrator will disclose any such circumstances to the Parties if they should arise before the arbitration is concluded.

8.9 A single arbitrator who resigns for any reason, is unable or refuses to act or is removed from office, shall be replaced by another arbitrator under these Rules and any oral hearings previously held shall be rescheduled.

8.10 If the Parties do not agree that the circumstances specified in Exhibit 16 Part B clause 8.9 exist, either Party may apply to the Court for an order that the arbitrator should be replaced as required under Exhibit 16 Part B clause 8.9.

Procedural Meeting

9.1 Within 5 days after being appointed, the single arbitrator or the chairperson of the arbitral tribunal shall convene a procedural meeting of the Parties to reach a consensus, if possible, and to make orders, if necessary, on:

(a) the procedure to be followed in the arbitration;

(b) the time periods for taking steps in the proceedings;

(c) the scheduling of any oral hearings or meetings;

(d) any preliminary applications or objections a Party may have, and

(e) any other matter which will assist the arbitration to proceed in an efficient and expeditious manner taking into account the complexity and numbers of issues in dispute.

9.2 The arbitrator shall prepare and distribute promptly to the Parties a written record of all the business transacted and decision and orders made at the procedural meeting in Exhibit 16 Part B clause 9.1.

9.3 The procedural meeting in Exhibit 16 Part B clause 9.1 may be conducted by conference call.

Powers of the Arbitrator

10.1 Subject to any limitations in these Rules or any agreement reached by the Parties, the arbitrator may conduct the arbitration in any manner the arbitrator considers appropriate but each Party shall be treated fairly and shall be given full opportunity to present its case and make written or oral comments on the other Party's case, including, where a Party calls witnesses, to cross-examine such witnesses.

10.2 The arbitrator may rule on the arbitrator's jurisdiction.

10.3 The arbitrator may:

(a) adjourn the proceedings from time to time to facilitate settlement discussions between the Parties or for any other reasonable purpose,

(b) make an interim order on any matter with respect to which a final award may be made, including an interim order for preservation of property which is subject matter of the dispute,

(c) order inspection of documents, exhibits or other property at any location,

(d) order the recording of any oral hearing or meeting,

(e) order oral discovery,

(f) inspect the Site after giving the Parties 7 days written notice of the intention to do so, and

(g) if the arbitrator considers it just and appropriate in the circumstances, extend or abridge a period of time:

(i) required in these Rules, except a period of time specified under Exhibit 16 Part B clause 17.2, or

(ii) fixed or determined by the arbitrator.

10.4 If the arbitration is before a 3 person arbitral tribunal, the award may be made by a majority of arbitrators, but if there is no majority decision on any matter to be decided, the decision of the chairperson shall be the decision of the tribunal on that matter.

Exchange of Statements

11.1 The Parties shall exchange written statements of their respective positions in the Dispute in the following manner:

(a) the claimant shall give a statement outlining the facts, the matters in issue and the relief or remedy requested not later than 14 days after the procedural meeting is held in Exhibit 16 Part B clause 9.1;

(b) the respondent shall give a statement outlining the response to the claimant's statement and the respondent's counterclaim, if any, not later than 14 days after receiving the claimant's statement;

(c) the respondent to the counterclaim shall give a statement outlining the defence to the counterclaim not later than 14 days after receiving the counterclaim.

11.2 The Parties shall provide the arbitrator with copies of the statements exchanged in Exhibit 16 Part B clause 11.1.

11.3 Each Party shall attach to each statement provided in Exhibit 16 Part B clause 11.1, or at such other time as the arbitrator may order, a list of documents:

(a) upon which the Party intends to rely, and

(b) which describes each document by kind, date, author, addressee and subject matter.

11.4 During the proceedings the arbitrator may allow a Party to amend or add to any statement made in Exhibit 16 Part B clause 11.1, including the list of documents, unless:

(a) the amendment or addition goes beyond the terms of the arbitration agreement in the Agreement, or

(b) the other Party would be prejudiced by the delay in making the amendment or addition.

Disclosure

12.1 Each Party shall provide to the other Party a copy of the documents listed by the Party pursuant to Exhibit 16 Part B clause 11.3 not later than 14 days after the last statement has been issued under Exhibit 16 Part B clause 11.1 or at such other time as the arbitrator may order. Such documents shall be produced as paper copies unless otherwise ordered by the arbitrator.

12.2 The arbitrator may order a Party to produce, within a specified time, any documents which:

(a) have not been listed under Exhibit 16 Part B clause 11.3,

(b) the Party has in its care, custody or control, and

(c) the arbitrator considers to be relevant.

12.3 Each Party shall allow the other Party the necessary access at reasonable times to inspect and take copies of all documents that the former Party has listed pursuant to Exhibit 16 Part B clause 11.3 or that the arbitrator has ordered to be produced in Exhibit 16 Part B clause 12.2.

12.4 If the arbitrator has determined that an agreed statement of facts is appropriate, the Parties shall prepare and send to the arbitrator an agreed statement of facts within the time specified by the arbitrator.

12.5 Not later than 21 days before any oral hearing commences, each Party shall give to the other Party:

(a) the name and address of any witness and a written summary of such witness' evidence, and

(b) in the case of an expert witness, a written statement or report prepared by the expert witness.

12.6 Not later than 15 days before the oral hearing commences, each Party shall give to the other Party and the arbitrator an assembly of all documents to be introduced at the hearing.

12.7 The arbitrator shall determine whether oral discovery is appropriate and may set dates for completion of oral discovery and limits on the number of witnesses for discovery.

Hearings and Meetings

13.1 The arbitrator shall give the Parties written notice of not less than:

(a) 14 days of any oral hearings, or

(b) 7 days of any meetings

that have not been previously scheduled under Exhibit 16 Part B clause 9.1.

13.2 All oral hearings and meetings in the arbitration shall be conducted in private and all written communications and documents in respect of these proceedings shall be kept strictly confidential by the arbitrator and the Parties.

13.3 Oral hearings shall be scheduled for consecutive days until completion.

Evidence

14.1 The arbitrator shall not be required to apply the legal rules of evidence and shall determine the relevance and materiality of the evidence presented.

14.2 All oral evidence shall be taken in the presence of the arbitrator and all the Parties unless a Party is absent by default or has waived the right to be present.

14.3 The arbitrator may order any individual to be examined by the arbitrator under oath or on affirmation in relation to the issues in dispute and to produce before the arbitrator all relevant documents within the individual's care, custody or control.

14.4 The document assemblies delivered under Exhibit 16 Part B clause 12.5 shall be deemed to have been entered into evidence at the oral hearing without further proof and without being read out at the hearing but a Party may challenge the admissibility of any document so introduced.

14.5 If the arbitrator considers it just and reasonable to do so, the arbitrator may permit a document to be introduced at the oral hearing which was not previously listed under Exhibit 16 Part B clause 11.3 or produced as required under Exhibit 16 Part B clause 12.1 or 12.5, but the arbitrator may take that failure into account when fixing the costs to be awarded in the arbitration.

14.6 If the arbitrator permits the evidence of a witness to be presented as a written statement, the other Party may require that witness to be made available for cross examination at the oral hearing.

14.7 The arbitrator may order any witness (including a witness not included in the lists and reports contemplated in Exhibit 16 Part B clause 12.5) to appear and give evidence, and, in that event, the Parties may cross examine that witness and call evidence in rebuttal.

Default of Parties

15.1 If a claimant, without sufficient cause and after 10 days notice from the arbitrator, fails to provide the statement required in Exhibit 16 Part B clause 11.1(a), the arbitrator may terminate the arbitration with respect to that claim.

15.2 If the respondent or the respondent to the counterclaim, without sufficient cause and after 10 days notice from the arbitrator, fails to provide the statement required in Exhibit 16 Part B clause 11.1(b) or (c), the arbitrator shall:

(a) continue the arbitration, and

(b) require the claimant or the claimant by counterclaim, as the case may be, to submit such evidence to support the claim as the arbitrator may require before making an award.

15.3 If a Party:

(a) without sufficient cause, fails to appear at a scheduled oral hearing, or

(b) fails to produce any evidence,

the arbitrator may continue the arbitration and make an award based upon the evidence before the arbitrator.

Close of Hearings

16.1 The arbitrator shall close any oral hearings when:

(a) the Parties advise they have no further evidence to give or submissions to make, or

(b) the arbitrator considers further hearings to be unnecessary or inappropriate.

16.2 If the arbitrator considers it to be just and appropriate to do so, the arbitrator may reopen the oral hearings at any time before making the final award.

Final Award

17.1 The arbitrator shall decide the dispute in accordance with the law.

17.2 The arbitrator shall make the final award as soon as possible and, in any event, not later than 45 days after:

(a) the hearings have been closed, or

(b) the final submission has been made,

whichever is the later date.

17.3 The final award of the arbitrator shall be in writing, shall state the reasons upon which it is based and shall be signed and dated.

17.4 The arbitrator shall give a copy of the award to each Party.

17.5 The arbitrator may order interest to be paid in the final award in accordance with the Agreement.

17.6 The final award is final and binding on the Parties and the Parties agree to comply with it as soon as possible, unless the arbitrator has made an error of law or has otherwise breached these Rules, in which case either Party may appeal such final award to the Courts for determination based solely on such error or breach.

Costs

18.1 The arbitrator shall fix the costs of the arbitration in the final award, which costs may include, but are not limited to, the following:

(a) the fees of the arbitrator;

(b) any necessary and reasonable expenses incurred by the arbitrator to fulfil the arbitrator's functions;

(c) the fees and other necessary and reasonable expenses of the witnesses, as approved by the arbitrator;

(d) any necessary and reasonable fees, charges or expenses for providing services to the arbitrator or the Parties in connection with the arbitration.

18.2 Except for the costs of legal fees and legal expenses of the successful Party, the costs of the arbitration shall be borne by the unsuccessful Party unless the arbitrator considers it appropriate in the circumstances to apportion them between the Parties.

18.3 The arbitrator:

(a) may decide which Party shall bear the cost of legal fees and legal expenses of the successful Party, if they were claimed during the arbitration,

(b) may apportion those costs if the arbitrator considers it just and reasonable to do so, and

(c) in either event, shall specify the amounts of those costs or the manner of determining those costs.

18.4 In making a decision under Exhibit 16 Part B clause 18.3, the arbitrator is not limited to awarding the legal fees and legal expenses which a Court may award to a successful Party in a civil judicial proceeding.

18.5 Subject to any agreement entered into among the Parties and the arbitrator, the fees of the arbitrator shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrator and any other relevant circumstances.

Amendments and Corrections to the Award

19.1 The arbitrator may amend or vary a final award to correct:

(a) a clerical or typographical error,

(b) an accidental error, slip, omission or other similar mistake, or

(c) an arithmetical error made in a computation.

19.2 An application by a Party to the arbitrator to amend or vary a final award shall be made within 15 days after that Party receives the award.

19.3 The arbitrator shall not amend or vary the final award, without the consent of all Parties, more than 30 days after all Parties have received it.

19.4 Not later than 15 days after receiving the final award, a Party may supply to the arbitrator for clarification of the award, and the arbitrator may amend the award if the arbitrator considers that the amendment will clarify it.

19.5 Not later than 30 days after receiving the final award, a Party may apply to the arbitrator to make an additional award with respect to claims presented in the proceedings but inadvertently omitted from the award.

Consolidation

20.1 A Party to any of the arbitrations may, by Notice given to each of the Parties to the arbitrations, request that the arbitration be consolidated if:

(a) a common question of law or fact arises in more than one arbitration,

(b) the relief claimed in these arbitrations is in respect is in respect of or arises out of substantially the same factual situation, and

(c) the arbitrations are being conducted under these Rules.,

20.2 If any Party disputes the consolidation of the arbitrations, the Party may refer the Dispute to the Court by giving Notice within 7 days of receiving the Notice for consolidation.

20.3 If none of the Parties disputes the Notice given under Exhibit 16 Part B clause 20.1, within the time permitted in Exhibit 16 Part B clause 21.2, each of the Parties to the arbitrations shall be conclusively deemed to have agreed to the consolidation of the arbitrations.

20.4 If the Parties to the consolidated arbitration are unable to agree on any of the procedural issues arising out of the consolidation of the arbitrations, including identifying whom the arbitrator shall be, any Party to the consolidated arbitration may refer the outstanding issues to the Court.