

January 21, 2019

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

Dear Commissioner:

**Re: Submission of Commercially Sensitive Information**

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**I. Presumption – Documents to be Disclosed**

Parties with standing have been asked to make submissions in response to the January 17, 2019 submission of Nalcor Energy (“Nalcor”) concerning the treatment of alleged commercially sensitive information contained in the Grant Thornton Forensic Audit Report – Construction Phase.

We refer to the submission of the Consumer Advocate dated November 13, 2018 which was filed in relation to a previous submission by Nalcor regarding alleged commercial sensitivity. The Consumer Advocate again refers to the Commissioner’s interpretation note which 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].

As was submitted on November 9, 2018, the Consumer Advocate reiterates that this is a **public** inquiry, and on that basis the position of the Consumer Advocate is that the presumption of full disclosure should not be easily displaced. There should be a presumption that the public has the right to see all documents and that any exception to full disclosure, such as “commercial sensitivity” should be narrowly interpreted.

## **II. Application of Nalcor Energy – January 17, 2019**

The Commissioner has established that the burden is on the party seeking non-disclosure of information to demonstrate why it should not be disclosed. Nalcor has identified three general categories for which it seeks protection because of alleged commercial sensitivity:

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; and
3. Matters related in any way to Contract CH0007 for powerhouse and spillway construction awarded to Astaldi.

### **Category 1: Estimated and Forecast Costs for Individual Work Packages**

Nalcor does not want to publicly disclose the amount initially budgeted for a number of contract work packages. The Consumer Advocate submits that budgeting is an issue that goes to the heart of matters being examined at the Inquiry. The public, for whom the Inquiry is being conducted, must know whether budgeting and cost estimates conducted by Nalcor was accurate, reasonable and conducted according to industry standards. The argument put forward by Nalcor is that if contractors are made aware of initial budgets, it would encourage them to take advantage of room in the budget and request extra payment. The Consumer Advocate submits that (1) there is no evidence put forward by Nalcor which demonstrates this to be a true statement; and (2) it is the responsibility of Nalcor not to make extra payments to contractors if they are not entitled to such payments. Disclosure of budgeting should not have any effect on Nalcor's ability to properly manage the Muskrat Falls Project and to only make payments to contractors when they are entitled to be compensated.

Nalcor has not met the threshold of demonstrating, with the necessary evidence, that the estimated and forecast costs for individual work packages should not be disclosed.

### **Category 2: Bid Contents and Evaluations**

Nalcor does not want to publicly disclose responses to tender calls and requests for proposals. Similar to the argument made regarding contract work packages, Nalcor submits that disclosure of this information risks encouraging claims for extra payment after contracts have been awarded. Again, the Consumer Advocate submits that issues regarding financial planning and costs projections are key matters that has put forward to be examined at the Inquiry. Failure to publicly examine the tender calls and requests for proposals will result in a failure to satisfy the terms of reference.

The Consumer Advocate again submits that there is no evidence put forward by Nalcor which demonstrates disclosure will result in commercial harm, and that it is the responsibility of Nalcor not to make extra payments to contractors that are not entitled to such payments.

### **Category 3: Astaldi**

Nalcor submits that there should be a limit on disclosure of information related to Astaldi because there is a limit in what Nalcor is obligated to disclose in relation to an ongoing dispute that is before an arbitrator (the "Arbitration"). The Consumer Advocate takes the position that the level of disclosure in the Arbitration, whatever it may be, bears no relevance to the ongoing disclosure obligations in relation to the Inquiry. There is nothing in the terms of reference that limits Nalcor's disclosure obligations. The Inquiry is not subject to any rules established for the Arbitration.

### **III. Terms of Reference**

The three general categories for which Nalcor seeks protection because of alleged commercial sensitivity are categories which are specifically identified as issues into which the Commission shall inquire. These include, but are not limited to:

- **why there are significant difference between the estimated costs of the Muskrat Falls Project at the time of sanction and the cost by Nalcor during project execution to the time of the inquiry**, together with reliable estimates of the costs to the conclusion of the project including whether
  - **the terms of the contractual arrangements** between Nalcor and the various contractors retained in relation to the Muskrat Falls Project **contributed to delays and cost overruns**, and whether or not these terms provided sufficient risk transfer from Nalcor to contractors,
  - **the overall project management structure** Nalcor developed and followed was in accordance with best practice, and whether it contributed to cost increases and project delays,
  - **the overall procurement strategy** developed by Nalcor for the project to subdivide the Muskrat Falls Project into multiple construction practices followed industry best practices, and whether or not there was fair and competent consideration of risk transfer and retention in this strategy relative to other procurement models [emphasis added]


The sole shareholder of Nalcor – the Government of Newfoundland and Labrador (the "Government") – made the decision to have a public inquiry. The presumption is that in making that decision, the Government was fully aware that Nalcor would be required to disclose documents to ensure full disclosure. For Nalcor to submit that there should be limits on this principle files in the face of the intent of the Government in ordering this public inquiry.

#### **IV. Conclusion**

The Consumer Advocate submits that the redactions and *in camera* hearings as proposed by Nalcor should be denied. For this public inquiry, there is a presumption of full disclosure and for these items, and Nalcor has failed to establish that an exception should be applied. The public has the right to know what occurred regarding the cost of the Muskrat Falls Project, and this includes full knowledge regarding costs estimates and budgeting. Nalcor should not be permitted to hide behind the veil of commercial sensitivity to avoid the full disclosure that was mandated by the Government.

Yours truly,

**WADDEN PEDDIGREW HOGAN**



John Hogan

JH/