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Commission of Inquiry in Respect  
Of the Muskrat Falls Inquiry  
3<sup>rd</sup> Floor, 20 Crosbie Road  
St. John's, NL  
A1B 3Y8

Dear Sir/Madam:

**RE: Commission of Inquiry Respecting the Muskrat Falls Project**

Nalcor Energy (“Nalcor”) has filed an application to the Commission of Inquiry Respecting the Muskrat Falls Project (the “**Commission**” or the “**Inquiry**”) requesting redactions to the Grant Thornton Forensic Audit Report, Construction Phase. Nalcor has completed its Application in two parts. The Commission has provided Part 1 of the Application to all Parties with Standing. Part 2 of the Application is confidential and Nalcor has only provided copies to the Commission and the Government of Newfoundland and Labrador (the “**Province**”). This submission of the Province only references the public information referenced within Part 1 of Nalcor’s Application.

### ***Commission Disclosure Principles***

The Terms of Reference for the Inquiry were created on November 20, 2017. The Province established the Terms of Reference with the understanding that decisions pertaining to the disclosure of information, including commercially sensitive information, brought forward by a Party with Standing, including Nalcor, would be within the jurisdiction of the Commission to decide. In the Commissioner’s Interpretation of the Terms of Reference, dated March 14, 2018, (the “**Interpretation Decision**”) and a memo dated June 7, 2018, the Commissioner outlined the principles that the Commission will use when determining if information is commercially sensitive (the “**Guiding Principles**”).

Though circumstances pertaining to the Project may have changed, the Province maintains that decisions pertaining to the disclosure of information remain within the authority of the Commission as set out in the Interpretation Decision and Commissioner Guidelines.

The Province is the sole shareholder of Nalcor. As such, the Province, and therefore its taxpayers and ratepayers, have a vested interest in the financial welfare of Nalcor. As such, the Province also has a vested interest in ensuring the Project is completed without additional costs. The Province understands the Commission shares this concern, as per paragraphs 14-15 of the Interpretation Decision, provided in part below:

*5. Openness to the Public: That the Inquiry be conducted in a transparent and an open manner subject to the need to respect any applicable legal privilege claims as well as to ensure that commercially sensitive material not be made public where such could negatively impact the overall construction and costs of the Project.*

.....

*[15] Aside from these principles, it is also important that I acknowledge that the Government of Newfoundland and Labrador has decided that the Project will continue to its completion. As such, it is in the public interest that the Inquiry, in fulfilling its mandate, cause the least possible disruption to the continued construction of the Project as well as the least possible impact on the ultimate costs for the Project.*

The Province submits that the Commission's determination of commercially sensitive information involves balancing the probative value of the evidence in relation to the objectives of the Inquiry and the public interest in disclosure with the harm that disclosure may bring to the Project. The Province further submits that the appropriate approach for determining if information is commercially sensitive is to continue to review documents in the same manner as was undertaken during Phase 1.

### ***Nalcor Application***

The Province makes this submission in relation to Nalcor's Application to assist the Commission with its decision. The Province submits that the Commissioner is required under the Terms of Reference and the established principles within the Interpretation Decision and Guiding Principles to make a decision on Nalcor's Application while taking into account the aforementioned factors of relevance to the Inquiry's objectives, public interest in disclosure, and the potential harm to the Project.

Regarding the Application broadly, the Province submits that as an alternative to the disclosure of certain contents of the Report, the Commission may wish to consider requesting Nalcor provide additional information that may satisfy the Commission's purpose for releasing the information publically. As an example, this could include a written statement summarizing the redacted information in a manner that limits the commercial harm but satisfies the intention of the statements of Grant Thornton, subject to the approval of the Commission. Similarly, if there are disputed statements within the Report that do not highlight issues with the actions of Nalcor, there may be opportunities to limit precision on the exact figures referenced that allegedly cause commercial harm.

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

The Province supports Nalcor's submission that the Commission should not disclose the budgeted amounts for individual contracts due to commercial sensitivity. The disclosure of the final forecast cost for individual contracts under existing Authorization for Expenditures would allow particular contractors to gain precision on the remaining budget availability/contingency for active contracts. This type of disclosure has a high probability of commercial and financial harm for the Project and, by extension, the taxpayers and ratepayers of the Province.

The Province submits that the public release of this type of information may be achievable through alternative means. For example, the Commission may be able to disclose publically an aggregate total of the amount outstanding for active contracts or the aggregate total of specific contracts within expenditure categories. This would allow public disclosure of the full amount currently budgeted, without disclosing to any individual contractor the amount specifically allocated to their individual contracts. The Province submits this may achieve the public interest in disclosure and introduce relevant evidence, without unnecessary harm to the Project.

Regarding the remaining redactions under Category 1, the Province submits that the onus is upon Nalcor to demonstrate that the commercial and financial harm to the Project that would result from disclosure.

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

The Province submits that the Commissioner consider the arguments made by Nalcor in its Application regarding the bid contents and evaluations and the potential for commercial sensitivity, understanding the onus is upon Nalcor to demonstrate the commercial and financial harm to the Project resulting from disclosure.

***Category 3: Astaldi***

Nalcor has submitted that the release of the Construction Phase Report may disclose information to Astaldi Canada Inc. ("**Astaldi**") that Astaldi would not have otherwise received under the applicable Rules governing the Arbitration between Astaldi and Muskrat Falls Corporation. Nalcor further submits that Astaldi receiving this information through the Inquiry will offer procedural advantages compared to Astaldi receiving this information through the applicable arbitration process.

One of the primary objectives of the Inquiry is for the Commission to determine why there exists a significant difference between the estimated costs of the Muskrat Falls Project at the time of sanction and the costs by Nalcor during project execution. The Terms of Reference explicitly reference this as an objective of the Inquiry.

Similar to Category 1 and 2, the Province submits that the onus is upon Nalcor to demonstrate the commercial and financial harm to the Project.

***Summary***

In establishing the Terms of Reference, the Province understood that the Commissioner would make decisions on the disclosure of information if a dispute arose between the Commission and the Province and/or Nalcor. The subject matter outlined within the disputed portions of the Application falls within the anticipated jurisdiction of the Commission when the Terms of Reference were established.

The Province's priority is clear in the terms of reference; we wish to know what transpired, specifically why there are significant differences between the estimated costs of the Muskrat Falls Project at the time of sanction and the costs by Nalcor during project execution, to the time of this inquiry together with reliable estimates of the costs to the conclusion of the project. This is to be balanced against the priority to complete the project on the current schedule and on the present budget in the best interests of the ratepayers and taxpayers of the Province.

The intent for the Inquiry is to be public; however, where Nalcor satisfies the Commission there is a rational connection between potentially released commercially sensitive information and substantial harm to the Muskrat Falls Project schedule or budget, the Province supports redactions and/or in camera hearings where the necessity is demonstrated.

The province is comforted that the Commission shall have access to any material it deems relevant and thus has the means to be fully informed in their recommendations to the Province even where limited redaction for the purpose of public hearings may be necessary in the best interests of the ratepayers and taxpayers.

Yours truly,

A handwritten signature in black ink, appearing to read "Nick Leamon". The signature is fluid and cursive, with a long horizontal stroke at the end.

Nick Leamon  
Solicitor  
NL/rs