

February 21, 2019

**VIA EMAIL AND COURIER**

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

5th Floor, Suite 502  
20 Crosbie Place  
St. John's, NL A1B 3Y8

Dear Commission:

**Re: Commission of Inquiry Respecting the Muskrat Falls Project  
Request for Standing of Barnard Pennecon LP**

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Pursuant to section 4(b) of the Terms of Reference of the Commission of Inquiry Respecting the Muskrat Falls Project (the "**Inquiry**"), Barnard Pennecon LP ("**BPLP**") seeks limited standing as relates to its interests. BPLP requests that its counsel be permitted to attend and participate in Phase Two of the public hearings where its interests are implicated, and to make submissions at the conclusion of the Inquiry related to its interests.

BPLP is a limited partnership of: Barnard Muskrat Limited Partnership incorporated pursuant to the laws of the Province of British Columbia, Pennecon Heavy Civil Ltd. incorporated pursuant to the laws of Newfoundland and Labrador, and Barnard Pennecon GP Ltd incorporated pursuant to the laws of the Province of British Columbia. BPLP is headquartered in Vancouver, British Columbia. Effective August 20, 2015, Muskrat Falls Corporation (the "**Company**") and BPLP entered into Agreement No. CH0009 for construction of the north and south dams for the Muskrat Falls Project ("**CH0009**"). CH0009 has been variously amended in accordance with its terms and conditions and, while nearing completion, its performance is ongoing.

Phase Two of the Inquiry investigates the differences between the estimated costs at the time of sanction and the actual costs during project execution in construction of the Muskrat Falls Project. This will include an evaluation of the contractual arrangements between the project owner and its contractors, such as BPLP and reasons for escalating costs of construction of the

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February 21, 2019

Project over initial estimates made. Specific reference has been made to CH0009 and the process followed for its award in the Grant Thornton report "Forensic Audit Report to the Commission of Inquiry Respecting the Muskrat Falls Project Construction Phase - December 7, 2018" (the "Grant Thornton Report") and in the course of testimony of its author, Scott Shaffer, to the Inquiry on February 19, 2019, it was confirmed that further evidence on CH0009 would be presented. BPLP has been served and has complied with a Summons to Produce, its representative Aaron Rietveld has been issued a Summons to Witness and has been interviewed by Commission Co-Counsel and its representative Derek Tisdel has been requested and is working with Commission Co-Counsel to schedule an interview.

Rule 10 of the Inquiry's *Rules of Procedure* cites section 5(2) of the *Public Inquiries Act, 2006*, and so confirms that an entity may be granted standing by the Commissioner after considering whether:

- (a) its participation would further the conduct of the Inquiry;
- (b) its interests may be adversely affected by the findings of the Commission; and
- (c) its participation would contribute to the openness and fairness of the Inquiry.

BPLP's request for limited standing accords with each of these elements.

- 1) BPLP's participation would further the conduct of the Inquiry, as has already been acknowledged by the Commission in issuing the aforementioned Summons to Produce, Summons to Witness and requests for interviews to BPLP, Mr. Rietveld and Mr. Tisdel. In collaborating with the Commission, it is apparent that BPLP will be engaged in the Inquiry's review of CH0009, both as regards its performance and the competition relating to its award. Granting limited standing to BPLP will facilitate and ensure a more comprehensive review and so enhance the evidence obtained during Phase Two of the Inquiry.
- 2) The investigation and scrutiny of CH0009 reflects on both parties thereto but, unlike the Company, BPLP is unable to influence how the evidence of other witnesses is adduced and tested. While expressing no negative finding in reference to BPLP or its partners, the Grant Thornton Report casts a shadow over the process for its award to BPLP. The Commissioner's findings relating to project procurement, management and execution could impact the reputation and business prospects of BPLP and its partners going forward. It is also anticipated that certain witnesses that will be heard by the Commission may provide evidence with respect to the impact of CH0009 on the Muskrat Falls Project and accordingly, there should be opportunity for their examination from the perspective of both parties to that agreement.
- 3) BPLP's participation in Phase Two would contribute to the openness and fairness of the Inquiry. Granting limited standing to BPLP would, where appropriate, enable it to elicit and challenge evidence regarding the central questions of construction and cost escalation for a key contract, with the goal of ensuring that the complete factual matrix is available to assist the Commission in developing a final report.

February 21, 2019

By way of example, Nalcor, as a party with standing, will have the opportunity to cross examine on BPLP's evidence. Procedural fairness requires that BPLP similarly be granted the opportunity to cross-examine Nalcor representatives on CH0009, as put in issue in Phase Two. This would be the best method of ensuring that the evidence in respect of CH0009 is fully and fairly tested. In addition, it is possible that representatives of other Contractors or other parties with standing may also give evidence at the public hearings that references or implicates BPLP's interests, and fairness requires that BPLP enjoy the opportunity to challenge that testimony through cross examination.

Direct participation by BPLP would complement the critical role of Commission Counsel in ensuring that the complete factual context emerges during the public hearings, thereby ensuring that its perspective and interests are promoted and protected, particularly where they may be contrary or different from other parties with standing. In addition, in light of the potential that BPLP could be adversely affected by the findings of the Inquiry, particularly with regards to reputation, procedural fairness requires it the opportunity to make submissions at the close of the public hearings in regards to its interests.

While recognizing that Phase Two is already underway, the potential that BPLP's interests may be adversely affected was not confirmed until release of the Grant Thornton Report and recent collaboration with the Commission. BPLP notes that the Commissioner has accepted late applications as recently as February 11, 2019. The concern that BPLP's interests may be adversely affected by findings of the Inquiry, and that its participation would further the conduct of the Inquiry, has only recently crystalized. Accordingly BPLP now believes that its limited participation in the Inquiry is warranted and would further the goals of openness and fairness of the process, by ensuring complete context and perspective are elicited.

Counsel for BPLP would be pleased to make further submissions to the Commissioner in support of its application for standing should that be requested. BPLP looks forward to continuing its contribution to the Commission's mandate through further participation as a party with limited standing in the Inquiry.

We trust all to be in order.

Yours very truly,



F. Richard Gosse