

Failure to issue an OATT or follow the standardized access rules will result in sanctions being imposed by FERC. It is worthy to note that, FERC only has full regulatory authority over U.S. markets and companies. Canada does not have any similar type of open access requirements. However, as most Canadian provinces engage in electricity trade in the U.S., almost all provincial utilities have adopted an OATT and open access rules to ensure their ability to export electricity to the larger U.S. markets.

Armed with the understanding that open access provisions would apply and with a plan to develop Gull Island, Newfoundland and Labrador Hydro made two transmission access applications in 2006 for access through Quebec to Ontario, New York, New England and New Brunswick. To date, these applications have not received the treatment required under the open access rules, and Quebec continues to obstruct Newfoundland and Labrador's attempts to develop the Lower Churchill.

Hydro-Quebec TransÉnergie (HQT) is the division of Hydro-Quebec (HQ) responsible for the operation of HQ's transmission system and management of power flows on the system in accordance with HQ's OATT and North American reliability standards. In order to participate in U.S. competitive wholesale markets, the government of Quebec adopted an OATT in 1997 to govern HQT actions.

In accordance with the OATT, a Transmission Provider is obligated to provide long term transmission service for a complete, accepted application. The OATT provides a complaint procedure in the event that a transmission customer disputes the application of the OATT by the transmission provider. In accordance with this process, issues in dispute are brought to the Régie de l'énergie for a hearing.

The Régie de l'énergie is an economic regulatory agency established by the National Assembly of Quebec (Quebec Provincial legislature) to establish and modify the rates and conditions for the transmission and distribution of electricity in Quebec. The Régie is the equivalent of Newfoundland and Labrador's Board of Commissioners of Public Utilities (PUB). The Régie is also responsible for examining complaints by transmission customers.

Since January 19, 2006, Newfoundland and Labrador Hydro (NLH) has made two transmission service applications to Hydro-Québec TransÉnergie (HQT) in accordance with its OATT for capacity for the Lower Churchill Project.⁸ The application was for a maximum of 2824 MW, the combined capacity of Gull Island and Muskrat Falls.⁹ These applications with HQT have led to 2 hearings before the Regie, both of which have been unsuccessful.

Application 1

On January 19, 2006, NLH made an application for transmission service to HQT for up to 2,824 MW of capacity into Québec and to the Ontario, New Brunswick, New England and New York markets for deliveries from the Lower Churchill project for 30 years starting in 2015. This application was accepted and HQT undertook a systems impact study - the first study phase for a service request. NLH disagreed with HQT's interpretation and application of its OATT in the preparation of this study and subsequently filed three complaints with the Régie.

The Régie rendered its decision on May 25, 2010 and ruled against Nalcor on all issues.

Application 2

On February 5, 2007, NLH made a second application for 724 MW of transmission capacity relating to deliveries from the Lower Churchill to complement the first application and to increase deliveries into New Brunswick and New England. This application was initially accepted, but subsequently HQT unilaterally decided that NLH had made a "substantial change" to the request and therefore processed it as a new request resulting in a loss of priority. NLH protested HQT's action and HQT reinstated the priority, but NLH proceeded with a complaint to the Régie for regulatory interpretation because HQT refused to acknowledge its misapplication of the OATT that led to the loss of priority. The application to the Regie was dismissed.

NLH Application for Judicial Review of Regie Decision on Application 1

On May 6, 2011, NLH filed an application for judicial review with the Superior Court of Quebec for a review of decisions made by the Regie de l'énergie against NLH on complaints filed by NLH against Hydro-Quebec Transenergie (HQT). A decision of the Regie cannot be appealed. However, an application for judicial review can be made on limited grounds.

The parties have made procedural filings and a judge has been assigned to the case. A court date has been set for January 2013. The hearing is expected to last a few days. There will be no witnesses and no new evidence. NLH is seeking to quash the Regie decisions.

The complaints by Nalcor/NLH to the Regie boil down to one very simple question: Does Hydro-Quebec provide fair and reasonable access to its transmission lines as it is supposed to do under its own rules which they adopted from the U.S?

Summary

The availability of open access markets and transparent regulatory frameworks in the United States for the transmission of electricity should provide an opportunity for Nalcor to access export markets. These regulatory frameworks are not enforceable within Canada and, while Hydro-Quebec must adhere to these rules as they apply to its electricity trade in the United States, the same degree of transparency is not required for electricity trade within Canada. Nalcor has attempted to gain access through the transmission system for the Lower Churchill Project. These efforts have not proved successful, resulting in regulatory rulings, appeals and ultimately a court challenge.

5. Conclusion

The province of Newfoundland and Labrador has taken numerous legal actions in relation to the unfairness and inequity of the Upper Churchill contract, none of which has been successful to date. Also, as outlined earlier, the province has explored the use of section 92A to recall Upper Churchill power but the risk inherent in the process would not allow for the use of section 92A to meet Newfoundland and Labrador's present energy needs.

Also, contrary to the suggestion of some, the "good faith" action, even if ultimately successful, would not likely result in the ability to recall, or the return of, Upper Churchill power.

Finally, since 2006, Nalcor/NLH has attempted to gain access for Lower Churchill power through Quebec's regulatory process but has had no success.

It is clear that there has been no political will in Quebec to work with Newfoundland and Labrador and allow the province to break the geographical stranglehold that Quebec has on the province. Former Federal and Provincial Cabinet Minister John Crosbie stated in a speech in 2003 that Muskrat Falls and Gull Island had not been developed due to the lack of a national energy strategy "and the unshakably self-centered position taken by Quebec where Newfoundland remains in a vise with little bargaining power."¹⁰ The events of the last 40 years support the truth of Mr. Crosbie's statements.

Footnotes

- 1 Re Labrador Boundary [1927] 2 DLR 401 (J.C.P.C).
- 2 Henri Dorion – “The Quebec-Newfoundland Boundary” 1963.
- 3 Jason Churchill – “Pragmatic Federalism: The Politics Behind the 1969 Churchill Falls Contract.” Newfoundland Studies 13 and 15, no.2.
- 4 [1988] 1 S.C.R. 1085.
- 5 (1985), 20 Admin. L.R. 269 (QCCA).
- 6 [1984] 1 S.C.R. 297.
- 7 Newfoundland and Labrador Board of Commissioners of Public Utilities, Review of Two Generation Expansion Options for the Least-Cost Supply of Power to Island Interconnected Customers for the Period 2011-2067 (St. John’s, 30 March 2012) at pages 23 and 24.
- 8 The applications were made by NLH prior to the creation of Nalcor Energy. Any transmission rights potentially obtained could have been transferred to Nalcor Energy or a future Nalcor subsidiary operating Lower Churchill. The complaints process is managed by Nalcor Energy.
- 9 The capacity of Gull Island was increased from 2000 MW to 2250 MW subsequent to the application.
- 10 Speech of the Honourable John C. Crosbie, delivered in St. John’s on January 31, 2003.

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