

**NALCOR'S REPLY TO THE GRANT THORNTON  
(BROCKWAY) FLG/PPA REPORT - OCTOBER 11, 2018**

**INTRODUCTION**

In May 2018, the Commission of Inquiry Respecting the Muskrat Falls Project ("Commission") advised parties with standing that it requested Grant Thornton LLP ("Grant Thornton") to report on certain matters with respect to the Muskrat Falls Project and specifically requested that Grant Thornton present a paper explaining the Federal Loan Guarantees and the Power Purchase Agreement ("PPA") and related legislative changes. The paper would also address the effect of the legislative monopoly and the PPA on Federal Energy Regulatory Commission (FERC) compliance.

A report was prepared by Grant Thornton, namely the *Review of the Federal Loan Guarantee and the Power purchase Agreement* ("FLG/PPA Report"), dated September 7, 2019. Nalcor has reviewed the FLG/PPA Report and provides the Commission with this Reply. All Capitalized Terms used in this Reply not otherwise defined herein shall take on the meaning ascribed to such terms in the FLG/PPA Report.

Nalcor has identified content requiring (i) clarification and context, (ii) factual corrections, and/or (iii) incorrect conclusions. Nalcor has not included all such observations in this Reply but has limited its remarks to those of a more substantive nature. They include:

**A. POWER PURCHASE AGREEMENT**

1. Page 32, Lines 17 to 19 – Grant Thornton states "The PPA does not provide any specific characteristics in describing the Base Block Energy for items such as required timing of delivery during peak hours or capacity required during specific time of day."

Response – The characteristics of the Base Block Energy are addressed in Section 3.2 of the PPA. It entitles NLH to all Energy and Capacity from the MF Plant that is forecasted or scheduled by NLH on a firm and priority basis when required, subject to committed contracts (eg. NS Block), capacity of the plant, availability of water and forgivable events.

2. Page 35, Line 7 – Grant Thornton suggests there may be changes in the Base Block Energy.

Response – Base Block Energy is the amount of energy expressly provided for at Schedule 2 of the PPA. The PPA, including Schedule 2, can only be changed if the PPA is amended by the parties and consented to by its lenders (which is not anticipated).

3. Page 39, Line 25 through to Page 40, Line 23 – Grant Thornton provides its review of 2018 legislation with respect to open access.

Response - Grant Thornton's assessment of FERC and whether the NL transmission regime complies with FERC principles is more extensively reviewed in the Report of Nalcor's US FERC counsel, Van Ness Feldman at Appendix "A". Further legislation, cabinet decisions and orders of the PUB relevant to open access and its

implementation in the Province that were not addressed by Grant Thornton in the FLG/PPA Report warrant consideration. These include:

- a. OC2017 – 380 – Direction (pursuant to s. 5.1 of the EPCA) to the PUB to adopt a policy relating to open access in the transmission of electricity over the Province's high-voltage transmission system including: (a) implementation of pro-forma Transmission Service Agreements, and rates and a rate methodology, approved on an interim basis under section 75 of the Public Utilities Act ("PUB Act") pending further PUB review; and (b) Transmission Policies and Procedures and a Code of Conduct for transmission system operations, to be implemented by the NLSO.
- b. PUB Application (February 2018) – Application of the NLSO seeking approval of pro-forma Transmission Service Agreement and interim transmission rates and rate methodology and Transmission Policies and Procedures. Approval of the application was provided by *P.U. Order 3 (2018)* on February 9, 2018.
- c. Amendments to EPCA and PUB Act (May 31, 2018) – Amendments to the EPCA and the PUB Act establishing NLH as the NLSO establishing amongst other things that it is the policy of NL that all sources and facilities for transmission and distribution of power in the province should be managed in a manner "that would result in open, non-discriminatory and non-preferential access to, interconnection with and service on the integrated electric system" and provides the PUB with dispute resolution authority to deal with such matters.
- d. Future PUB Process – Rates approved by the PUB in February 2018 did not include cost components of the LIL and LTA. When such assets go in service, updated rates including those assets will be submitted for approval to PUB.

## **B. THE EFFECT OF THE LEGISLATIVE MONOPOLY AND PPA ON FERC COMPLIANCE**

4. Page 5, Lines 7 to 10 - Grant Thornton was asked to explain the effect of the legislative monopoly and the PPA on FERC compliance and indicated they were not able to definitively conclude whether FERC compliance is met.

Response – Given the specialized nature of the subject matter, Nalcor engaged Washington based law firm Van Ness Feldman LLP in August 2011 to provide advice on the design and implementation of the transmission regime post-interconnection with the North American transmission grid. In addition, Van Ness Feldman has assisted Nalcor on relevant filings with FERC regarding market-based rate authorizations in support of exports sales into the U.S. wholesale markets. Nalcor has requested Van Ness Feldman to respond to such matters raised by Grant Thornton and the response is provided at Appendix A to this Reply.

**APPENDIX "A"**



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**TREATMENT OF OPEN ACCESS TRANSMISSION SERVICE  
WITHIN THE NL TRANSMISSION SYSTEM**

Van Ness Feldman LLP serves as U.S. energy regulatory counsel to Nalcor Energy. Joseph B. Nelson acts as lead counsel in the firm's representation of Nalcor and has been directly involved in analyzing options for ensuring open access transmission service is provided over the inter-provincial transmission system within the Province of Newfoundland and Labrador from the early part of this decade up to the date of this report. The report and analyses provided herein have been prepared by Mr. Nelson.

Van Ness Feldman LLP has reviewed the discussions of open access transmission requirements contained in the *Review of the Federal Loan Guarantees and the Power Purchase Agreement*, dated September 7, 2018 ("FLG/PPA Report") which was prepared by Grant Thornton LLP ("Grant Thornton"). The following supplemental information and clarifications on the treatment of open access transmission service, has been prepared for the purpose further informing the Commission of Inquiry Respecting the Muskrat Falls Project ("Commission") on such matters.

**I. Overview**

The FLG/PPA Report addressed "the effect of the legislative monopoly (which was developed through a combination of various pre-conditions required prior to executing the FLG) and the PPA on the United States of America Federal Energy Regulatory Commission ("FERC") compliance." We make two introductory comments with respect to this mandate:

- The offering of open access transmission service over the integrated transmission system within Newfoundland and Labrador is not related to the execution or implementation of the FLG or the PPA. Transmission service is the coordinated scheduling of energy, over bulk transmission facilities, from generation resources to load. The rates, terms and conditions governing the provision of transmission service are developed by the transmission provider (in this case the NL System Operator) and reviewed and approved by the applicable regulatory authority (in this case the Newfoundland and Labrador Board of Commissioners of Public Utilities).
- The *Electrical Power Control Act* ("EPCA") and the *Public Utilities Act* distinguish transmission facilities (i.e. integrated electric system) from sub-transmission facilities and distribution facilities. The 2012 Amendments to the *Electrical Power Control Act*, and in particular section 14.1, do not speak to Newfoundland and Labrador Hydro having exclusive right for the *transmission of* electrical power or energy on the island portion of NL. Accordingly, there is no monopoly, legislative or otherwise, on transmission ownership and operation within the Province. The interprovincial transmission system (i.e. integrated electric system) for Newfoundland and Labrador includes those transmission facilities that are rated at 230 kV and above. Other, lower voltage transmission facilities (i.e., below 230 kV) are classified as sub-transmission.



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To date, there are five entities that own transmission facilities within the Province: Newfoundland and Labrador Hydro, Churchill Falls (Labrador) Corporation Limited, NSP Maritime Link Incorporated, Labrador Transmission Corporation and the Labrador Island Limited Partnership. Further, Newfoundland and Labrador Hydro and Newfoundland Power own sub-transmission and distribution facilities.

At its core, “open access” means providing wholesale transmission service on a non-discriminatory basis to third parties on rates, terms and conditions that are comparable to a utility’s own use of its system. Open access and the underlying obligation to provide reciprocity does not extend to the generation, sale or distribution of power. As further detailed below, today, open access transmission service is being offered over the interprovincial transmission system within Newfoundland and Labrador.

#### **A. Open Access Reciprocity Requirement for Canadian Utilities**

Open access over the interprovincial transmission system within Newfoundland and Labrador arises from the fact that each of the transmission owners within the province (CFLCo, LTC, LIL LP, Hydro and NSP Maritime) have affiliates that take transmission service over other utility systems under open access regimes and also have affiliates holding market-based rate authorizations from FERC.

The extension of open access transmission service into Canada was primarily driven by FERC’s adoption of a “reciprocity” requirement as part of its Order No. 888<sup>1</sup> open access rulemaking in 1996. The reciprocity requirement provides that:

A Transmission Customer receiving transmission service under [an open access transmission regime] agrees to provide comparable transmission service that it is capable of providing to the Transmission Provider on similar terms and conditions over facilities used for the transmission of electric energy owned, controlled, or operated by the Transmission Customer and over facilities used for the transmission of electric energy owned, controlled, or operated by the Transmission Customer's corporate Affiliates.<sup>2</sup>

FERC has held that “foreign utilities...[taking] transmission service under a U.S. public utility’s [OATT] must comply with the reciprocity provision in the tariff.”<sup>3</sup> Further, FERC also has

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<sup>1</sup> *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002) (“Order No. 888”).

<sup>2</sup> FERC Pro Forma Open Access Transmission Tariff, Section 6.

<sup>3</sup> See *Order Clarifying Order No. 888 Reciprocity Condition*, 79 FERC ¶ 61,182 at p. 61,867 (1997).



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clarified that reciprocity for the provision of transmission service applies “not only to the Transmission Customer that obtains transmission service under the Tariff, but also to all parties to a transaction that involves the use of transmission service under the Tariff, including the power seller, buyer and any intermediary, such as a power marketer.”<sup>4</sup> By way of example, a party who sells power involved with the use of transmission service under the Tariff must itself provide reciprocity *with respect to transmission service* to the extent it owns, controls, or operates facilities capable of providing such transmission service. This reciprocity principle does not extend to the provision of generation, sale or distribution of power.

FERC has articulated three alternatives for satisfying the reciprocity condition. These options are: (1) satisfying the reciprocity obligation under a bilateral agreement; (2) adopting an open access transmission tariff (OATT), or (3) seeking a waiver of the OATT reciprocity condition.<sup>5</sup> On subsequent occasions, FERC has affirmed that each of these options is available and the means by which compliance occurs remains the choice of the transmission provider.<sup>6</sup> Thus, a provider is not required to use an OATT to provide open access transmission service.

FERC also considers open access within its review and approval of market-based rate (“MBR”) authorizations that are granted to entities selling energy, capacity and ancillary services into U.S. wholesale energy markets. FERC grants MBR authority upon a demonstration that, among other factors, the applicant and its affiliates refrain from erecting any barriers to entry into U.S. wholesale markets. In the context of an MBR applicant with foreign affiliates, the “barrier to entry” inquiry focuses on whether a foreign affiliate has control over a direct interconnection with the U.S. electric grid, i.e., cross-border transmission facilities. While Newfoundland and Labrador has inter-provincial transmission facilities, it does not have cross-border transmission facilities. Thus, for purposes of FERC’s MBR evaluation, Newfoundland and Labrador is not considered “directly interconnected” with the U.S. wholesale energy markets.

## **B. Providing Open Access**

The measure of open access transmission service is ultimately a case-specific inquiry. In particular, there is no requirement for identical terms of service or the use of the same method (i.e., OATT, bilateral or other) for compliance.<sup>7</sup> Furthermore, where a utility chooses to provide comparable service through bilateral agreements, the terms and conditions that may be necessary to provide reciprocal service . . . in a bilateral agreement is necessarily a fact-specific

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<sup>4</sup> *Id.*

<sup>5</sup> See Order No. 888-A at 30,285-86. The waiver process requires an explicit request by a transmission customer and an affirmative waiver by the transmission provider. This option has been rarely used.

<sup>6</sup> Order No. 890, *Preventing Undue Discrimination and Preference in Transmission Service*, FERC Stats. & Regs. ¶ 31,241, P 191 (2007) .

<sup>7</sup> Order No. 1000-A, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 139 FERC ¶ 61,132 at P 773 (2011) (explaining that the transmission provider has the right to choose whether to provide reciprocal service via a bilateral agreement or an OATT, and that another transmission provider to whom reciprocity is owed cannot require the adoption of an OATT.)



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matter not susceptible to resolution in a generic rulemaking proceeding.”<sup>8</sup> Thus, the fact that certain Canadian utilities have chosen to adopt an OATT is not indicative that an OATT for transmission service over the NL Transmission system must be adopted as the means for providing open access.

The evaluation of open access remains one of function, i.e., comparability in the provision of transmission service, not one of mere form. In particular, comparability is measured by assuring that a third-party customer takes and receives transmission service under rates, terms and conditions that are comparable to the rates, terms and conditions of service that applies to the use of the system by transmission provider, itself, and its affiliates.

There are core elements to any open access transmission regime, including:

- Provision of network transmission service and point-to-point transmission service;
- Treatment of all users of the transmission system as customers, regardless of affiliate or third party status vis a vis the transmission provider;
- Treatment of all customers (affiliates and third parties) on an equal, non-discriminatory and non-preferential basis;
- Application of common terms of services, including comparable rates for services;
- Independence of the transmission system operations from affiliate operations, including clear independence of authority in the transmission provider's management, scheduling and provision of transmission service;
- Functional separation between transmission service operations and other utility operations (such as generation, energy marketing and distribution activities); which involves independence in decisionmaking as a unit, supported by physical separation of employees within an office, protection of electronic files and communications, and other similar actions to have the “functions” undertaken by the transmission system employees independent of other operations;
- Equal access to information, through a website, by customers regarding the availability of transmission capacity and terms and conditions of available transmission service;
- Protections against disclosure of non-public transmission system information and confidential transmission customer information by the transmission provider;
- Ability to segregate and account for transmission system costs for purposes of establishing an applicable transmission rate; and
- Independent regulatory oversight and a process for resolution of disputes between a transmission provider and transmission customers.

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<sup>8</sup> *Id.* quoting Order No. 888-A at 30,289.





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### **C. The Provision of Open Access Transmission Service Within NL**

A framework for open access transmission service within Newfoundland and Labrador has been developed and is now being implemented through the NL System Operator (“NLSO”). This framework follows the core open access principles noted above and includes:

- Execution of a Multi-Party Pooling Agreement by which NSP Maritime, LIL LP, LTC and Hydro<sup>9</sup> have agreed to transfer operational control of their separately owned transmission facilities to the NLSO—under the condition that the NLSO coordinates the provision of open access and non-discriminatory transmission service over their respective transmission facilities.
- Establishment of the NLSO, as a separate and independent division of Hydro, which is responsible for:
  - managing applications for transmission service;
  - providing transmission service over the NL Transmission System on an open, comparable and non-discriminatory basis;
  - maintaining and operating the transmission control center for the NL Transmission System;
  - monitoring security and maintaining reliability of the NL Transmission System;
  - coordinating maintenance of all transmission facilities;
  - establishing and implementing operating requirements applicable to all transmission elements; and
  - invoicing and collecting transmission service payments from transmission customers, and returning associated revenues, along with appropriate reports, to participating transmission owners.

Notably, the NLSO acts as the transmission provider for the granting and scheduling of transmission service over the pooled, NL Transmission System.

- Initiation of an Open Access Same-Time Information System (“OASIS”) portal through which third parties seeking transmission service can obtain necessary information, applications, forms of agreement and other relevant data necessary for the registering to become a transmission customer and, therefore, eligible transmission service over the NL Transmission System;
- Offering firm and non-firm transmission service as well as network transmission service on terms and conditions of service that are universally applied to all transmission customers, including Hydro;

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<sup>9</sup> CFLCo is considering execution of the MPPA and integration of its facilities into the broader NL transmission regime. The ability to meet FERC reciprocity requirements in support of NEM's ongoing export activities would be enhanced, but is not dependent upon, CFLCo's participation in the pooling arrangements established under the MPPA.





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- Submission of an application to the PUB for review and approval rates for the firm, non-firm and network transmission service—with the proposed rates having been approved, on an interim basis, pending further review by the PUB;
- Adoption and posting of a Code of Conduct for the NLSO and each of the NL Transmission Owners;
- Adoption of the NL Transmission Policies and Procedures which includes the process for application of service, credit requirements, transmission scheduling procedures, billing terms and a dispute resolution process.
- Adoption of pro forma bilateral transmission service agreements for short-term and long-term agreements for firm, non-firm and network transmission service that have terms comparable to the transmission service agreements that Hydro has executed with the NLSO.

Through these steps, the NLSO has initiated open access transmission service for the NL Transmission System using the “bilateral agreement” option allowed under FERC’s reciprocity rules and augmented by the parallel adoption of common terms of service within the NL Transmission Policies and Procedures.

#### **D. Specific Comments on the FLG/PPA Report:**

As a supplement to the above explanation of how open access transmission service is being provided over the NL Transmission System, the following specific comments and clarifications are provided to the FERC-related discussions within the FLG/PPA Report:

1. Page 3, Lines 14-16 – Grant Thornton states that a 2012 amendment to EPCA provided Hydro the exclusive right to supply, *transmit*, distribute and sell electrical power or energy to the island portion of Newfoundland and Labrador.

Response – The legislation does not require, nor does Hydro or Nalcor hold, an exclusive right to *transmit* electricity within Newfoundland and Labrador. Section 14.1(1)(a) of the EPCA states:

“Newfoundland and Labrador Hydro shall have the exclusive right to supply, distribute and sell electrical power or energy to a retailer or an industrial customer in respect of the business or operations of that retailer or industrial customer on the island portion of the province”

As explained above, there are multiple transmission owners within Newfoundland and Labrador and transmission service is independently scheduled and overseen by the NLSO.



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2. Page 4, Lines 20-21 – Grant Thornton indicates that one of the mandates of FERC is to ensure that transmission providers have on file pro forma OATTs.

Response – For non-jurisdictional entities, such as Canadian utilities, FERC does not mandate the adoption of an OATT. The provision of open access transmission service also may occur through the use of bilateral transmission service agreements that provide comparable, open access service. The open access transmission framework for the NL Transmission System employs the use of bilateral transmission service agreements, augmented by common terms of service included within the NL Transmission Policies and Procedures. The rates, terms and conditions of transmission service for the NL Transmission System have been submitted to the PUB and have been approved, on an interim basis, by PUB Order P.U. 3 (2018) pending further review of the overall application.

3. Page 4, Lines 23-26 / Page 24, Line 11-12 / Page 26, Lines 25-26 – Grant Thornton indicates that there is a legislative monopoly over transmission service that has implications for FERC compliance.

Response – As indicated in D (1) above, the legislation does not mandate a monopoly on ownership and operation of transmission service within the Province. An open access transmission service regime has been adopted and implemented for the NL Transmission System.

4. Page 5, Lines 1-8 – Grant Thornton references legislation passed in May 2018 that included treatment of an open access transmission framework and an observation that it is unclear whether compliance with reciprocity is now met.

Response – Open access transmission service is being offered to third-party users over the NL Transmission System under common terms, conditions and rates at the present day. Further, Hydro has executed a network transmission service agreement and external point-to-point transmission service agreement through which its scheduling of transmission service over the NL Transmission System is subject to the same rates, terms and conditions for transmission service as being offered to third-parties. The framework that has been established and implemented fully meets open access reciprocity requirements.

5. Page 5, Lines 9-10 - Grant Thornton states that “Assuming that NLH implements the framework in a manner similar to other Canadian transmission-owning utilities with OATTs and related open access requirements that have been found by FERC to be in compliance, FERC will likely make a similar determination with respect to NLH.”

Response – For the reasons indicated in D (2) above, OATTs are not mandated and not all Canadian transmission-owning utilities have adopted OATTs. In Ontario, the



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Ontario Energy Board has approved “Uniform Transmission Rate Schedules” which set rates for the provision of transmission service and certain minimal criteria regarding the provision of transmission service. In lieu of an OATT, the OEB has approved a set of base terms and conditions of service and apply the Transmission System Code and Ontario Market Rules to transmitting utilities and customers using transmission facilities within the province. Similarly, the Alberta Electric System Operator has a posted series of rates, riders and terms and conditions of service—but not adopted an OATT. In fact, the AESO tariff does not provide for the categories of firm/non-firm point-to-point transmission service and service arrangements that are normally obtained in an open access system.

FERC recognizes the independent regulatory authorities governing the provision of transmission service within foreign jurisdictions. In this case, the PUB has been granted jurisdiction over the provision of open access transmission service within Newfoundland and Labrador and has the authority to entertain and resolve disputes regarding whether open, non-discriminatory transmission service is being provided.

6. Page 37, Line 11 through Page 38, Line 14 - Grant Thornton provides an overview of FERC and open access reciprocity requirements.

Response – See Section C above.

7. Page 38, Line 15 through to Page 39, Line 12 – Grant Thornton discusses the market based rate (MBR) authorization held by Nalcor Energy Marketing and implications for continuation of its MBR authorization through maintenance of an open access transmission system.

Response – An open access transmission system has been developed and implemented for the NL Transmission System. Nalcor Energy Marketing Corporation (“NEM”) continues to be authorized to sell energy into the U.S. under its FERC MBR authorization and also is receiving open access transmission service within ISO-NE, NYISO, Quebec, New Brunswick and Nova Scotia—reflecting its continued compliance with its open access obligations.

8. Page 39, Lines 9-12 – Grant Thornton suggests that a determination must be made as to “whether Nalcor will be in compliance with FERC’s open access requirements” upon commissioning of the Projects.

Response - The PUB has the jurisdiction and responsibility to review compliance with open access transmission requirements within Newfoundland and Labrador. FERC does not require non-jurisdictional utilities to seek its review and approval of the established open access regime. Instead, compliance with open access occurs



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through the exercise of the “reciprocity” term. Specifically, a transmission provider may deny a request for transmission service when it determines that a transmission-owning affiliate of the requesting transmission customer is not providing comparable, open access transmission service to third party customers. The granting of transmission service to NEM (as well as NSP Maritime affiliates) by transmission providers such as ISO New England, the New York Independent System Operator, Hydro Quebec TransEnergie and New Brunswick System Operator acts as confirmation that the relevant transmission provider has determined that its reciprocity term has been met.

9. Page 39, Lines 17-24 – Grant Thornton states that recent EPCA amendments have “appeared to restrict the ability of third parties to secure open, non-discriminatory service over the Projects into the United States.”

Response – The recent EPCA amendments do not restrict third-party access to transmission service over the NL Transmission System. Section 3(b)(iv.1) of the EPCA declares it to be the policy of NL that all sources and facilities for transmission and distribution of power in the province should be managed in a manner “that would result in open, non-discriminatory and non-preferential access to, interconnection with and service on the integrated electric system”. Section 14.5(1) of the EPCA provides that the system operator shall ensure that the transmission customers are provided with simultaneous, open, non-discriminatory and non-preferential access to current information with respect to the availability of transmission service, transmission tariff, etc. As described above, open access transmission service over the NL Transmission System is currently being offered to third parties on an open, non-discriminatory basis under rates, terms and conditions that have been filed with the PUB and are applied, on a comparable basis, to Hydro’s own use of the transmission system. Further, NEM continues to be authorized to sell energy into the U.S. under its FERC MBR authorization and is receiving open access transmission service within ISO-NE, NYISO, Quebec, New Brunswick and Nova Scotia—reflecting its continued compliance with open access obligations.

10. Page 39, Line 25 through to Page 40, Line 23 - Discussion of open access requirements and ability to confirm compliance for the provincial transmission system.

Response – See Section C and Responses, above, for a discussion of the open access transmission service regime that has been developed and implemented for the NL Transmission System, the PUB’s jurisdiction over open access transmission service within Newfoundland and Labrador and the means by which reciprocity requirements are met.



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Prepared by:

A handwritten signature in dark ink, appearing to read "Joseph B. Nelson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Joseph B. Nelson  
Van Ness Feldman, LLP

Dated : October, 11 2018