April 1, 2019

Dear [Redacted]:

Re: Your request for access to information under Part II of the Access to Information and Protection of Privacy Act (File # NR-28-2019)

On March 4, 2019, the Department of Natural Resources received your request for access to the following records/information:

Muskrat Falls Inquiry Public Release Information Note from January 2019.

I am pleased to inform you that a decision has been made by the Department of Natural Resources, confirmed by the Deputy Minister, to provide access to the requested records. The records are attached.

Please be advised that you may ask the Information and Privacy Commissioner to review the processing of your access request, as set out in section 42 of the Access to Information and Protection of Privacy Act (the Act). A request to the Commissioner must be made in writing within 15 business days of the date of this letter or within a longer period that may be allowed by the Commissioner.

The address and contact information of the Information and Privacy Commissioner is as follows:

Office of the Information and Privacy Commissioner
2 Canada Drive
P. O. Box 13004, Stn. A
St. John’s, NL A1B 3V8
Telephone: (709) 729-6309
Toll-Free: 1-877-729-6309
Facsimile: (709) 729-6500
You may also appeal directly to the Supreme Court Trial Division within 15 business days after you receive the decision of the public body, pursuant to section 52 of the Act.

Please be advised that this letter will be published following a 72 hour period after it is sent electronically to you or five business days in the case where records are mailed to you. It is the goal to have the letter posted to the Office of Public Engagement's website within one business day following the applicable period of time.

If you have any questions, please feel free to contact me at 709-729-0463 or rhynes@gov.nl.ca.

Sincerely,

Rod Hynes

Rod Hynes
ATIPP Coordinator
Title: Muskrat Falls Inquiry Public Release

Issue: To provide a summary of issues surrounding the public release of commercially sensitive material by Nalcor during Phase II of the Muskrat Falls Public Inquiry.

Background and Current Status:
- The Government of Newfoundland and Labrador (GNL) established the Commission of Inquiry Respecting the Muskrat Falls Project (the 'Inquiry') on November 20, 2017 with Justice Richard LeBlanc appointed as Commissioner. Phase I of the Inquiry focused on sanction of the project and concluded in December 2018. Phase II hearings will commence on February 18, 2019 focusing on cost over-runs.
- Astaldi Canada, a subsidiary of Italian company Astaldi SpA, was the main contractor for building the intake and powerhouse, spillway, and transition dams. The companies ran into financial difficulty and ultimately, Nalcor terminated the Astaldi contract.
- In November 2018 the Telegram newspaper reported that Nalcor had filed a submission with the Inquiry on the protection of commercially sensitive information during Phase I hearings. The Telegram also reported that in a subsequent special session of the Inquiry, Commissioner LeBlanc discussed the challenges associated with conducting Phase II of the Inquiry, including the handling of commercially sensitive information.

Analysis
- On January 17, 2019, Nalcor’s counsel wrote to Commissioner LeBlanc concerning its review of the Grant Thornton Forensic Construction Phase Audit Report (the Report) for commercial sensitivity. In that letter, Nalcor’s counsel advises that it has been unable to reach agreement with Commission Co-Counsel on redactions to be made to the report and is therefore, to resolve the matter, making an application to the Commissioner. The letter represents the first part of the application and a confidential submission will follow.
- Nalcor’s January 17 submission to the Commissioner identified passages in the Report that it feels are commercially sensitive. These fall into three broad categories:
  1. **Estimated and forecast costs of individual work packages** – Some of the work packages identified in the Report are incomplete and/or there are outstanding claims and disputes with the contractors.
  2. **Bid contents and evaluations** – Disclosure of bid evaluations may encourage claims for extra payment or for perceived unfairness. The Report includes disclosure of unsuccessful bids for one work package and the bid evaluation process for another package.
  3. **Astaldi** - In September 2018, Astaldi filed a significant claim against Nalcor. Subsequently, Astaldi defaulted and Nalcor later issued a stop work order in October 2018. The parties are currently in arbitration and procedural disputes concerning the Notice of Arbitration have been before the courts of Newfoundland and Labrador as well as Ontario. As such, in its application to Commissioner LeBlanc, Nalcor specifically argues that all matters related to Contract CH0007 (for powerhouse and spillway, awarded to Astaldi) are commercially sensitive.
• The Commissioner has pointed out that the Terms of Reference requires the Commission to consider documents that are commercially sensitive that Nalcor may wish to protect through *in camera* hearings. However the Commissioner has stated publicly in media reports (e.g. the Telegram of November 17, 2018) his unwillingness to conduct large portions of the Phase II hearings *in camera*.

• On December 21, 2018, the Minister of Natural Resources wrote to the Chair of Nalcor Energy Board of Directors requesting that Nalcor specifically identify items of a commercially sensitive nature. The letter also reiterated GNL's commitment to timely and transparent progress of the Inquiry and expressed a desire to work together with Nalcor to find a way to meet that commitment while respecting the commercially sensitive nature of the project.

• The Nalcor Chair wrote to the Minister on January 17, 2019 in response highlighting a broad range of documents Nalcor considers to be commercially sensitive including such items as budgets and forecasts, projected project schedules, contractor performance assessments, negotiation strategies, and bid evaluations/recommendations.

• On January 22, 2019, GNL provided a submission to the Commission outlining GNL's position on the question of public release of Nalcor information, which is provided in Annex A. On the same day, the Minister wrote to the Chair of the Nalcor Energy Board of Directors, providing a copy of GNL's submission.

• On January 22, 2019, upon hearing arguments from counsel pertaining to the application, the Commissioner issued a ruling on public disclosure of commercially sensitive material in the Report. In summary, the Commissioner ruled in favour of Nalcor’s first category of exemptions but not in favour of the second and third categories.

**Action Being Taken:**
• NR will continue to engage with JPS and Nalcor to determine the number and nature of commercially sensitive documents as well as the associated risks of disclosure.

Prepared by/Reviewed by: R.Bates / C. Snook  
Ministerial Approval: NOT APPROVED  
February 8, 2019
Annex A – January 22, 2019 GNL Submission

January 22, 2019

Commission of Inquiry in Respect
Of the Muskrat Falls Inquiry
3rd 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:

4th Floor, Confederation Building East Block, P.O. Box 8700, St. John's, NL, Canada A1B 4J6
Telephone: (709) 724-6000, 1-800-461-4886
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.

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 publicly. 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 commercially 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,

Nick Leamon
Solicitor
NL/rs