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BY E-MAIL TO <cblundon@pub.nl.ca>

Ms. Cheryl Blundon
Secretary, Board of Commissioners of Public Utilities
P.O. Box 21040
St. John's, NL A1A 5B2

Re: Application by Nalcor Energy pursuant to Section 5.5(1) of the *Electrical Power Control Act*; our file no. 7550/004

Dear Ms. Blundon,

This is further both to the Board's "Rules of Procedure – January 2010" in the above-mentioned application issued on January 29, 2010 and to its earlier directions with respect to the intervention by the Conseil des Innus de Ekuanitshit.

Introduction

The Conseil des Innus de Ekuanishit represents a population of just over 500 individuals, whose first language is Innu and whose second language is French. The council has received no funding from any source for its intervention in this application and its budget has no surplus with which to do so. Nevertheless, its intervention in this application requires that it deal with complex legal, technical and scientific issues, as well as articulating the Water Management Agreement's effects on its members' traditional use and occupation of their territory.

These circumstances would make the intervention a difficult undertaking at the best of times. But any meaningful intervention is rendered impossible when the Board establishes an *ad hoc* procedure under which it reserves to itself the right to demand evidence or argument with little or no notice, regardless of Ekuanitshit's constraints.

Looking to the future, we cannot allow our client's outstanding request that the Board address the issues of consultation and accommodation to be the subject of the same *ad hoc* procedure as our request for advance costs. It would be a fundamental error of law for the Board to purport to rule on the duty to consult and accommodate the Innu of Ekuanishit under the current confused state of procedure concerning this application.

The unacceptable procedure on the request for advance costs which cannot be repeated

On Friday, January 22nd, the Board sent us information requests amounting to a demand that by noon on January 28th (that is, within three and one-half working days), we adduce evidence approaching the test for engaging the duty to consult and accommodate Aboriginal peoples set out in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.

We explained that counsel was unavailable to work on this file before January 28, 2010, that Ekuanitshit had an outstanding request for advance costs and that we also had an outstanding request for a suspension pursuant to s. 27(1)(g) of the *Electrical Power Control Act, 1994*.

The request for advance costs was not a new matter but, instead, dated from Ekuanitshit's intervention of December 15, 2009. The Board had never before indicated how it intended to deal with the matter but upon being reminded of the issue on January 25th, responded by asking the other parties for submissions on the request for advance costs the next day, with our reply to follow by January 27, 2010.

When Ekuanitshit asked whether and when the Board would hear evidence on the matter, the Board did not respond clearly. Instead, your January 26th letter stated that we could, as part of our reply, address any evidentiary issue we thought necessary and include evidence.

In other words, the Board's direction was that we could decide whether on a day's notice and by way of reply – thereby splitting our case – we would adduce evidence to meet the test set out in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, but without the benefit of any further directions from the Board as to the evidence it wished to hear.

The Board should note that at first instance, the British Columbia Supreme Court had four days of oral hearings and four more days of written submissions before ruling on the Okanagan Indian Band's application for advance costs: [2007] 4 C.N.L.R. 22 (B.C.S.C.), 2007 BCSC 1014.

In the event, we were only able even to provide a reply on the issue of jurisdiction. In point of fact, the Board's direction on evidence was phrased in a manner sufficiently vague, provided on such short notice, at a time when (as the Board knew) counsel was occupied with other matters, and was so extraordinary in its intention, that we did not appreciate until we read P.U. 5 (2010) that the Board had actually expected Ekuanitshit to prove its case within a 24-hour period during which the Board knew the undersigned was away from the office.

On January 29, 2010, we received Order P.U. 5 (2010) in which the Board states that Ekuanitshit had not adduced the evidence required to make an order for advance costs, but without

explaining that the Board itself had established an *ad hoc* procedure which gave Ekuanitshit only one day to do so.

We believe the Board's procedure and directions effectively deprived Ekuanitshit of the right to be heard on is request for advance costs in any meaningful way, though we are not in a position to pursue the matter at this time by way of appeal or an application for reconsideration. We request that the Board issue an immediate *corrigendum* to Order P.U. 5 (2010), explaining the procedural history of the matter.

The outstanding requests for information to Ekuanitshit

As stated above, the Board's information requests of January 22nd amount to a demand for much of the evidence needed to meet the test for engaging the duty to consult and accommodate Aboriginal peoples, to be produced on less than a week's notice. The time allowed was so clearly disproportionate to the issues at stake that it would amount to a breach of the *audi alteram partem* rule to apply the direction.

The Board should note that at first instance in *Haida*, the British Columbia Supreme Court first received "voluminous" evidence in affidavit form and then heard five days of oral argument before rendering judgment: *Council of the Haida Nation et al v. Minister of Forests et al*, [2001] 2 C.N.L.R. 83 (B.C.S.C.), 2000 BCSC 1280, para. 25.

Ekuanitshit reserves the right to answer the Board's past and future information requests as time and capacity allow, including after February 16th, pursuant to s.15(2)(b) of the *Board of Commissioners of Public Utilities Regulations, 1996*, and subject to the arguments it intends to make concerning a suspension. Moreover, our answers to the information requests will be without prejudice to our position that more time and a different process are necessary to adduce the evidence required under *Haida*.

Schedule for the future

We require further and better directions from the Board on when it will address our request for a suspension, a request pending since our intervention was filed on December 15, 2009.

The very purpose for our outstanding request for a suspension was to allow Ekuanitshit the time required to adduce evidence and make its legal argument on the issue of consultation and accommodation, as well as to give the Board the time required to consider them. Similarly, the very purpose of our request for advance costs was to give Ekuanitshit the means to make its case. The Board ignored this request for over five weeks and then decided to deal with it in three days.

Your counsel indicated to us by telephone that our request for a suspension could be considered by way of a motion. If it is the Board's view that relief sought by intervenors should be sought by way of a motion and that such a motion can be the subject of a hearing, we would point out such a view is not only a useful change, but an admission that the Board's manner of considering our request for advance costs was both inadequate and irregular.

During our telephone conversation, counsel for the Board also indicated that some issues could be heard orally between February 24th and 26th. If these issues include suspension, we are unclear as to the utility of the earlier deadlines which would require us to prove the same case we believe requires a suspension to be properly heard.

We also require further and better directions from the Board on how it intends to deal with the issue of Aboriginal consultation and accommodation.

Does the Board take the view that answers to its Information Requests of January 22nd would complete the evidentiary record? If not, when and how will it allow obtain the relevant evidence? As you know, Ekuanitshit's position is that an unfunded one-month process is by definition inadequate which is the reason it has sought a suspension.

When does the Board intend to consider legal argument on either Nalcor's or the Crown's duty to consult and accommodate the Innu? If it is by the February 19th deadline for "submissions", the deadline is entirely impractical because Ekuanitshit cannot be expected both to participate fully in the evidence-gathering aspect of this application and submit complex legal and constitutional arguments, all in a period of less than three weeks.

Moreover, a February 19th deadline for submitting information and legal argument on consultation would render pointless the period reserved to hear certain issues orally between February 24th and 26th.

Conclusion

We understand that Ekuanitshit's intervention has raised new and challenging issues for the Board. We also understand that these are not easily reconciled with 120-day schedule provided for in the regulation, but that is precisely why our intervention immediately requested the suspension allowed for under statute, an issue the Board had not yet seen fit to address.

We now look forward to the Board's establishment of directions and a schedule which will allow the Conseil des Innus de Ekuanitshit to be heard and allow the Board to render a full and fair decision and we offer our continued cooperation to that end.

Yours,

DIONNE SCHULZE

David Schulze

cc:

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