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February 23, 2010

Board of Commissioners of Public Utilities
120 Torbay Road
P.O. Box 21040
St. John's, NL
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Attention: Cheryl Blundon, Director – Corporate Services and Board Secretary

Dear Ms. Blundon:

Re: Application by Nalcor Energy pursuant to Section 5.5(1) of the *Electrical Power Control Act* (Water Management Agreement)

Enclosed please find an original and eight copies of Nalcor's Reply Submissions with respect to the above-noted application.

Sincerely,

Geoffrey P. Young
Senior Legal Counsel

GPU/jc

cc. Peter Hickman and Jamie Smith, Q.C., Counsel for Churchill Falls (Labrador) Corporation
Dan Simmons, Legal Counsel for Public Utilities Board
Jim Haynes, President, Twin Falls Power Corporation
David Schulze, DIONNE SCHULZE, Counsel for Innu of Ekuanitshit (Mingan)
Gary Carot, O'Reilly & Associates, Counsel for Innu of Uashat mak Mani-Utenam

IN THE MATTER OF the *Electrical Power Control Act, 1994,* SNL 1994, Chapter E-5.1, as amended (the "EPCA"); and

IN THE MATTER OF an application by Nalcor Energy to establish the terms of a water management agreement between Nalcor Energy and Churchill Falls (Labrador) Corporation Limited for the Churchill River, Labrador.

REPLY SUBMISSIONS
ON BEHALF OF NALCOR ENERGY

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REPLY SUBMISSIONS
ON BEHALF OF NALCOR ENERGY

1. These Submissions respond to the Submissions of the following parties:

   - Churchill Falls (Labrador) Corporation (CF(L)Co)
   - The Conseil des Innus de Ekuanitshit (CIE)
   - The Innu of Uashat mak Mani-Utenam (IUM)
   - Counsel for the Board of Commissioners of Public Utilities

Churchill Falls (Labrador) Corporation (CF(L)Co)

2. The written Submissions of CF(L)Co are broadly consistent with the Submissions of Nalcor.

The Conseil des Innus de Ekuanitshit (CIE)

3. Nalcor does not dispute that the Board has the power to consider all matters of fact and law that arise within the ambit of its jurisdiction, as stated in paragraph 10 of the CIE's

Submissions. However, with respect, the question is the existence and extent of any jurisdiction by the Board in relation to the consultation issue. The CIE rely upon the decision of the British Columbia Court of Appeal in *Carrier Sekani*. However, while *Carrier Sekani* may currently be the law in British Columbia, Newfoundland and Labrador Courts have not considered or adopted it. It is apparently at variance with the Supreme Court of Canada's decision in *Taku River* and the Federal Courts' decisions in *Standing Buffalo* and *Brokenhead Ojibway Nation*. Westlaw notations for the British Columbia Court of Appeal's decision in Carrier *Sekani* are followed by a notation of "Negative and Cautionary Citing References (Canada)" referring to the Federal Court of Appeal's decision in *Standing Buffalo*.

4. Nalcor has noted in its Submissions the difference in approach between the decisions of the Federal Courts in *Standing Buffalo* (FCA) and *Brokenhead Ojibway* Nation (FTD) and the decisions of the B.C. Court of Appeal in *Carrier Sekani* and *Kwikwetlem*. The Supreme Court of Canada has granted leave to appeal in the *Carrier Sekani* case. However, the Supreme Court of Canada has already decided in its decision in *Taku River* that, at least in some cases, any duty to consult can be fulfilled through existing regulatory procedures such as an environmental assessment process. The Supreme Court of Canada has therefore already accepted the proposition that consultation need not always occur separate from, or in advance of, a regulatory process, but may be fulfilled by the regulatory process itself.

5. As set forth in its Written Submissions, Nalcor submits that no duty to consult arises in relation to the establishment of the terms of the Water Management Agreement since the Water Management Agreement itself cannot possibly affect any Aboriginal interest. The Water Management Agreement does not contain any operating parameters, such as reservoir levels or flows, for the Lower Churchill Project. Consequently, the Water Management Agreement cannot possibly affect any Aboriginal interests.

6. The issue of the role of the Board in relation to the duty to consult is largely academic. A duty of consultation only arises if there can be an adverse affect on Aboriginal interests. Since there can be no adverse affect, there is no duty to consult. The Board proceeds to address the Water Management Agreement in accordance with the requirements of the EPCA and the Water Management Regulations.

7. As noted in paragraph 23 of the CIE's Submissions, the Crown in right of Newfoundland and Labrador and the Crown in right of Canada have indicated that Aboriginal interests are important issues to be considered by Nalcor in its Environmental Impact Statement (EIS). The environmental assessment process and the public hearing by the Joint Review Panel are the proper process and the proper forum for consideration of the environmental issues raised by the CIE. The CIE's concerns about fish species, large ungulates, water fowl and other wildlife species, the quality and diversity of natural environments, transportation and navigation, and conservation and respect for cultural

heritage are all matters that are, and have been recognized to be, proper subjects for the environmental assessment process.

8. Water management under the Water Management Agreement will operate within the parameters that will be considered in the context of the environmental assessment process. That process, including its consultation mechanisms, public hearings, and report to and decision by the Ministers, ensures consultation and, if appropriate, accommodation, with respect to Aboriginal interests.

9. If, during that process, the Aboriginal groups are able to demonstrate that some particular flow or some particular reservoir level, at some particular point in time, is necessary or desirable and that such a limitation, condition or restriction should be accommodated in the establishment of the operating parameters for the Lower Churchill Project, the Water Management Agreement will simply function within whatever limitation, restriction or condition is established. Consequently, the appropriate place to consider these environmental factors, including the preservation of Aboriginal interests and cultural heritage, is through the environmental assessment process.

10. With respect to paragraph 39 of the CIE Submissions, Nalcor is not a public utility as defined in the *Public Utilities Act*. Section 16 of the *Public Utilities Act* does not apply. Section 17(2) of the *Energy Corporation Act,* c. E-11.01 provides as follows:

> 17.(2) The corporation is not a utility as defined by the *Public Utilities Act* and that Act does not apply to the corporation.

11. With respect to paragraphs 36 to 41 of the CIE Submissions, Nalcor acknowledges that good utility practice includes environmental protection and that environmental protection in turn involves consideration of the inter-relationships between land and water or plant and animal life, on the one hand, and the social, cultural and economic life of humans, on the other. Nalcor also acknowledges that the Canadian Electricity Association is committed to, *inter alia*, informing and consulting Aboriginal communities at an early stage with respect to planned activities and projects that will have an impact on them.

12. Nalcor is complying with that commitment in relation to the Lower Churchill Project. The Lower Churchill Project is proceeding through an environmental assessment. There has been and will be consultation with respect to the Lower Churchill Project in conjunction with the environmental assessment.

13. However, it does not follow that Nalcor must consult with Aboriginal groups over matters that can have no impact on them. The Water Management Agreement, being a commercial agreement between Nalcor and CF(L)Co, is one example. There will undoubtedly be other examples of commercial arrangements or agreements that similarly will have no impact on Aboriginal groups.

14. The CIE's reference to the National Energy Board's policy at paragraph 43 of the CIE Submissions is taken out of context. The National Energy Board has an obligation under its governing statutory provisions to examine projects in relation to the issuance of a Certificate of Public Convenience and Necessity. That is a project authorization process and regulatory function performed by the National Energy Board. No similar jurisdiction or function exists for this Board in relation to the Lower Churchill Project.

15. At paragraphs 48 and 49 of its Submissions, the CIE essentially suggests that the Water Management Agreement cannot be dealt with until the environmental assessment has run its course. This is not in accordance with the legislative structure. Nor is it in accordance with a sound approach to environmental assessment and consultation in relation to the Lower Churchill Project. The EPCA requires a Water Management Agreement at the proposal stage. This is highly desirable since it ensures that the Panel performing the environmental assessment will have before it the actual Water Management Agreement for the project. The assessment includes consideration of the social, economic, recreational, cultural and aesthetic conditions and factors that influence, *inter alia*, the lives of these Aboriginal groups. It is appropriate that the Panel, the various Aboriginal groups, and the other participants in the environmental assessment process have the actual Water Management Agreement available to them so that they can discuss and consider the operating parameters in the context of the actual agreement. It is not in accordance with either the legislative requirements or a

purposive approach to environmental assessment to have the Water Management Agreement established after the environmental assessment and consultation processes are complete. Indeed, it would potentially be prejudicial to all participants, and the environmental assessment process itself, if the Water Management Agreement was not established prior to the environmental assessment hearings.

16. Establishing the terms of the Water Management Agreement in advance of the environmental assessment hearings ensures that the Panel has all of the elements of the Project before it. As noted in the response to PUB-NE-29 and Section 4.5.1.1 of the EIS attached to the response to PUB-NE-23, flow and reservoir drawdown predictions in the EIS are predicated on a Water Management Agreement in place. The Panel will not only be able to consider environmental effects and mitigation strategies, but it will also be better able to understand how its recommendations will operate within the context of the Water Management Agreement to fulfill the desired objectives.

17. In relation to the CIE's Submissions with respect to the *Environmental Protection Act*, Nalcor acknowledges and respects the importance of environmental assessment. Consequently, the Lower Churchill Project will go through an extensive environmental assessment process. That process will be enhanced by having the Water Management Agreement established prior to the hearing by the Joint Review Panel. That is in accordance with both the EPCA and the *Environmental Protection Act* for the reasons already set forth in Nalcor's Written Submissions.

18. Paragraph 70 of the CIE Submissions refers to Sections 25(g) and Section 118 of the *Public Utilities Act* and Section 27 of the *Board of Commissioners of Public Utilities Regulations, 1996*. Section 25(g) of the *Public Utilities Act* authorizes the Board to do those things "...incidental to the exercise of the powers, functions and duties of the board.". Subsection 118(1) requires a liberal interpretation in order to accomplish its purposes. Subsection 118(2) gives the Board all additional implied and incidental powers which may be appropriate or necessary to carry out all the powers specified in this Act.

19. Section 5.5 of the EPCA provides that the Board shall establish the terms of a Water Management Agreement. The Board has all necessary powers to accomplish those purposes, but it does not have any power or authority, express, implied or otherwise, to refuse to fulfill the statutory obligation to establish the terms of the Water Management Agreement.

20. Nor does the Board have the power or authority to refuse to establish the terms of the Water Management Agreement within 120 days as required by Section 7 of the Water Management Regulations.

21. A statutory provision which permits, but does not require, the Board to act in a certain fashion may be limited or circumscribed by regulation. This point is discussed in greater

detail in reply to the Submissions of the Board's Counsel below. Regulation 7, which provides that the Board shall establish a Water Management Agreement within 120 days, overrides or circumscribes any permissive power granted to the Board by the *Public Utilities* Act.

22. Section 5 of the Water Management Regulations expressly provides that the *Board of Commissioners of Public Utilities Regulations, 1996* apply "except to the extent these regulations deviate from it, or the board believes the process under those regulations are not necessary or useful, or would unnecessarily delay, the establishment of a water management agreement.". Regulation 7 therefore expressly overrides any provision of the *Board of Commissioners of Public Utilities Regulations, 1996.*

The Innu of Uashat mak Mani-Utenam (IUM)

23. The Submissions of the IUM are similar to those of the CIE. Nalcor therefore adopts the reply previously set forth with respect to the Submissions of the CIE in relation to the Submissions of the IUM, with the additional limited comments set forth below.

24. At paragraphs 52, 53 and 108-113 of the IUM Submissions, the IUM purports to set forth the adverse impacts of the establishment of the Water Management Agreement and the management of water thereunder. However, all of these alleged impacts derive not from the Water Management Agreement, but from the potential construction of the Lower Churchill Project itself. Indeed, the IUM refer to Nalcor's Environmental Impact

Statement as the source of most of these alleged impacts. These are potential impacts from the Project, not from the establishment of the Water Management Agreement.

25. At paragraphs 59 through 69 of the IUM Submissions, the IUM set forth a series of meetings, information exchanges, commentaries, suggestions and correspondence which have taken place between Nalcor and the IUM to date. Clearly, consultation has occurred, and is occurring, with respect to the Lower Churchill Project. In paragraphs 67 and 68, the IUM confirm discussion of a community consultation agreement to facilitate consultation on the environmental affects of the Lower Churchill Project. Consultation has occurred and will continue with respect to the Lower Churchill Project.

26. With respect to paragraphs 136 through 138 of the IUM Submissions, the Public Utilities Board does not have any statutory jurisdiction to order the Provincial Crown, the Federal Crown or Nalcor to consult and accommodate the Intervenors. There is no statutory basis for such jurisdiction in the Board.

27. At paragraphs 170 and following of the IUM Submissions, the IUM refer to various statutory provisions, including Section 118 of the *Public Utilities Act*, Section 27(1)(b) of the EPCA and Section 27 of the *Board of Commissioners of Public Utilities Regulations, 1996*. These provisions, with the exception of Section 27(1)(b) of the EPCA have been considered in relation to the Submissions of the CIE. Section 27(1)(b) of the EPCA is considered in relation to the Submissions of Board Counsel.

Counsel for the Board of Commissioners of Public Utilities

28. The Submissions of Counsel for the Board of Commissioners of Public Utilities are generally a balanced analysis of the legal principles and issues that the Board must consider, both derived from legislative requirements (statutes and regulations) and case law.

29. At paragraphs 29 through 31 of Counsel's Submissions, Board's counsel discusses the scope of the Board's powers, and in particular, the general principles set forth by Mr. Justice Green in *Re Newfoundland (Board of Commissioners of Public Utilities)*, sometimes referred to as the Stated Case decision. In considering the statutory provisions and comments of Mr. Justice Green, it should be noted that the Board's broad discretion, large jurisdiction and any implied powers are "to be adopted to achieve the purposes of the legislation and to implement provincial power policy" or "to carry out an identified statutory power". As noted previously, Section 5.5 of the EPCA requires that the Board shall establish the terms of a Water Management Agreement. Regulation 7 requires that the Board shall do so within 120 days. The Board's broad discretion, large jurisdiction and any implied powers must therefore be interpreted to achieve those statutory and regulatory purposes.

30. With respect to the discussion of the *Carrier Sekani*, *Kwikwetlem*, *Standing Buffalo* and *Brokenhead Ojibway Nation* cases at paragraphs 75-95 of Counsel's Submissions, Nalcor notes its earlier comments contained herein in relation to the Submissions of the CIE.

31. With respect to the discussion of the effect of Section 68 of the EPA at paragraphs 111 and following, the important principle of interpretation is set forth at paragraph 119 of Counsel's Submissions. There is a presumptive rule of coherence; i.e., that the Legislature did not intend to enact inconsistent provisions. Statutes should be interpreted so that inconsistency or conflict is avoided. That principle dictates the proper interpretation of the EPCA and Section 68 of the EPA. The EPCA effectively requires the Board to establish a Water Management Agreement at the proposal stage. The Board does not issue any licence, permit, approval or other document of authorization in relation to the Lower Churchill Project. No conflict therefore exists between Section 5.5 of the EPCA and Section 68 of the EPA. It is not necessary to resort to the conflict resolution provisions contained in the EPA or the EPCA, though it should be noted that the EPCA, as special legislation should, in the event of conflict, be given precedence over the EPA as general legislation.

32. At paragraphs 131 through 135 of Counsel's Submissions, Board's counsel considers the relationship between Section 68 of the EPA and the 120 day requirement contained in Section 7 of the Regulations. With respect, the issue is not really the effect of Section 7 of the Regulations. Rather, Sections 5.4 and 5.5 of the EPCA effectively require the

Board to establish a Water Management Agreement at the proposal stage. That precludes the Board from waiting until the project is released from environmental assessment. It is also the interpretation that best fulfills the combined legislative purposes of both statutes in that it ensures that the Joint Review Panel under the *Environmental Assessment Act* will have before it the actual Water Management Agreement for consideration, not simply the regulatory requirements for a water management agreement contained in Section 3(1) and 3(2) of the Regulations. Regulation 7 is a specific time requirement in relation to the establishment of the terms of the Water Management Agreement. It further ensures that the Water Management Agreement will be established prior to the environmental assessment hearings so that the purposes of the EPCA and the EPA are fulfilled.

33. At paragraph 136 and following, Board's counsel considers the effect of Section 27(1)(b) of the EPCA which is repeated here for ease of reference:

Powers of board

27. (1) The public utilities board may

...

(b) set aside for future examination an issue that in its opinion requires a more prolonged examination; and

34. Board's counsel refers to Regulation 7 and the 120 day time limit. He then suggests at paragraph 138 that "...in this case the conflict is between a statute and a regulation made under the authority of that statute."

35. With respect, Board's counsel is in error. There is no conflict between Section 27(1)(b) and Regulation 7. Section 27(1) of the EPCA is merely permissive. It does not require the Board to do something. In enacting the EPCA, the Legislature did three things:

1) it provided that the Board shall do certain things; e.g. it shall establish a Water Management Agreement;

2) it gave the Board permission to do certain things; and

3) it gave the Lieutenant Governor-in-Council the power to enact regulations.

36. Section 32(2)(b.1) and (e) of the EPCA provide as follows:

> 32.(2) The Lieutenant-Governor in Council may make regulations
>
> ...
>
> (b.1) respecting the criteria and required terms and conditions for an agreement under section 5.4 or 5.5, and another matter required to carry out the intent and purpose of an agreement under section 5.4 or 5.5;
>
> ...
>
> (e) respecting any matter that in the opinion of the Lieutenant-Governor in Council is necessary or advisable to carry out effectively the intent and purpose of this Act.

The Legislature gave a permissive power to the Board under Section 27(1)(b). However, the Legislature also authorized the Lieutenant Governor-in-Council to make regulations

in relation to water management and in relation to any matter than in the opinion of the Lieutenant Governor-in-Council is necessary or advisable to carry out the intent and purpose of this Act.

37. In these circumstances, the principles of interpretation are clear. A regulation, properly made under statutory authority, may limit or circumscribe a permissive power to make a particular Order. An express statutory provision that requires the Board to do a specific thing would have priority over a regulation which is in conflict with the statutory requirement. However a regulation may limit the powers of the Board to act under a permissive statutory provision. In those circumstances, no conflict exists between the statutory provision and the regulation.

38. The Board must act within the provisions of the EPCA and the Regulations. For example, the Board cannot simply act under Section 5.5 of the EPCA to establish the terms of the Water Management Agreement and ignore the regulatory requirements of Section 3(1) and 3(2) of the Water Management Regulations. Nor can the Board ignore the requirements of Regulation 7 in considering whether it can exercise a general permissive power under Section 27(1)(b) of the EPCA. The Board may not make an Order under Section 27(1)(b) which is contrary to Regulation 7.

39. The Board's counsel is incorrect at paragraph 142 when he suggests: "If the positions cannot be reconciled, then the EPCA would take priority over the Regulations and the

power to defer the issue would take priority over the obligation to establish the agreement within 120 days." The issue is not between the priority of the EPCA and the Regulations. The issue is between the priority of the Regulations and a Board Order. The regulatory requirement to render the decision within 120 days limits the Board's permissive power to make an Order setting aside an issue for future examination.

Concluding Comments

40. Nalcor respectfully submits that the EPCA requires the Board to establish the terms of the Water Management Agreement in accordance with the EPCA and the Water Management Regulations. Regulation 7 requires the Board to do so within 120 days of the filing of the Application. There is no basis for the Board to refuse to fulfill the obligation imposed upon it by the Legislature of the Province of Newfoundland and Labrador to establish the terms of the Water Management Agreement.

DATED at St. John's, NL this 23rd day of February, 2010.

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