

SUMMARY OF ARGUMENTS

Régie de l'énergie Ruling

Régie de l'énergie Decision D-2010-053

On May 11, 2010, the Régie de l'énergie (**the Régie**) rendered decision D-2010-053, regarding complaints P-110-1565, P-110-1597 and P-110-1678.

In its decision, the Régie considered complaints filed by the plaintiff Newfoundland and Labrador Hydro (**NLH**), a subsidiary of Nalcor Energy, against the defendant Hydro-Québec TransÉnergie (**HQT**).

1. Complaint P-110-1565

The first complaint, Complaint P-110-1565, concerns a dispute between NLH and HQT over the Available Transfer Capability (**ATC**) of existing Churchill Falls lines 7051, 7052 and 7053 (**the Churchill Falls Lines**) for transmitting power to be generated by the planned Lower Churchill Hydroelectric Project in Labrador.

NLH submitted that HQT improperly determined the ATC on the Churchill Falls Lines in connection with the System Impact Study that HQT conducted for the purposes of a request made on January 19, 2006. The ATC affects the extent and cost of system upgrades in Québec, as well as potentially the sequencing of the lower Churchill generation facilities – Gull Island and Muskrat Falls.

(a) Designation of Churchill Falls Generation Station;

According to the Régie, the Churchill Falls Generating Station was determined to be a designated resource of the Distributor, pursuant to sections 36.2, 37.1 and 38.1 of the OATT and the Distributor was therefore able to designate the entire generating station as a resource fully dedicated to serve the Québec native load.

The Régie recognized tacitly that Hydro-Québec benefits from an acquired right to use Churchill Falls Lines in order to serve native load and its heritage pool even if there is no legal justification to support such a statement.

In addition, the Régie states that there is no evidence to the effect that the production from the Churchill Falls Generating Station is sold to third parties. By doing so, the Régie



ignores sales to TWINCO since the 1970's and to NLH since 1998, even though these facts were clearly presented in NLH evidence.

The Régie also sided with HQT's argument that HQT controls *de facto* the Churchill Falls Generating Station in accordance with section 36.2 of the OATT and that the Churchill Falls Generating Station is on the HQT system. The Régie based its finding on the fact that the Churchill Falls Generating Station is synchronous with the Québec system, and that it is considered by HQT to be within the control area of HQT. These conclusions are not supported by:

- Provisions of the OATT;
- Terms of the Power Contract;
- The Churchill Falls Generating Station being controlled and dispatched by CF(L)Co;
- Nalcor Energy being the majority shareholder in CF(L)Co; and
- The Churchill Falls Generating Station's location within the Province of Newfoundland and Labrador and as a result CF(L)Co being subject to Newfoundland and Labrador legislation and regulation.

(b) Reservation on Churchill Falls Lines;

According to NLH, a reservation or a service agreement by Hydro-Québec Production or Hydro-Québec Distribution was required for service on the Churchill Falls Lines, because the Churchill Falls Generating Station is not a designated resource in accordance with sections 1.51 and 38.1 of the OATT. Such a reservation or service agreement would provide relevant information for the calculation of ATC, and would be consistent with previous bookings made by Hydro-Québec Production into other jurisdictions.

Considering the Régie decided that the Churchill Falls Generating Station was a designated resource within the HQT system, it stated that Hydro-Québec Distribution had transmission priority without a reservation when it supplies its native load from designated resources such as the Churchill Falls Generating Station. Therefore, Hydro-Québec Production and Hydro-Québec Distribution did not have to reserve transmission service on the Churchill Falls Lines to supply the native load.

(c) **Calculation of the ATC on the Churchill Falls Lines on the basis of the historic flows and not on the rights of Hydro-Québec for firm deliveries in the Power Contract**

According to NLH, the ATC on the Churchill Falls Lines should have been determined based on the firm contract commitments in the 1969 Power Contract, which has both firm and non-firm obligations, and not on the historical flows, which makes no distinction between firm and non-firm obligations as argued by HQT.

According to the Régie, HQT complied with the OATT by calculating the ATC based on historical electricity flows from the Churchill Falls Generating Station rather than on Hydro-Québec's rights to firm deliveries in the 1969 Power Contract.

The Régie stated that HQT does not have any information other than the actual historical flows measured on the Churchill Falls Lines to determine the ATC. In addition, according to the Régie, HQT does not have access to the 1969 Power Contract, a contract that pre-dates the divisional separation of Hydro-Québec.

This is a major misinterpretation of Attachment C of the OATT. The Régie ignores the fact that FERC has ruled such contracts must be considered when wholesale electricity markets are first opened. The Régie does not explain why it did not consider the distinction between firm and non-firm commitments, as put in evidence by NLH's market expert Robert Sinclair, to be irrelevant.

2. **Complaint P-110-1597**

Complaint P-110-1597 contemplates whether the System Impact Study conducted by HQT was carried out in accordance with the OATT, and whether the 45-day period set forth in section 19.3 of the OATT was applied in accordance with that same section.

(a) **Status of the System Impact Study on December 11, 2007**

NLH asserted that the System Impact Study, paid for by NLH and conducted by HQT, was not carried out in strict compliance with the OATT. The Régie again sided with HQT.

The Régie did not accept NLH's argument that the System Impact Study did not contain the essential elements as stipulated in the OATT. The Régie stated that HQT has a certain amount of discretion as an expert, and therefore afforded latitude to HQT, even though this concept cannot be supported by the OATT.

The Régie was therefore of the view that the System Impact Study, completed with the issuance of the report in December 2007, was conducted in conformity with the provisions of the OATT, even if HQT did not consider alternative paths to Ontario.

Finally, the Régie did not decide on the fact that HQT did not meet its OATT obligation to provide, along with the System Impact Study Report, the working papers in due time to enable NLH to have a complete assessment of the content of the System Impact Study.

(b) Interruption of the 45-day time limit stipulated in section 19.3 of the OATT

The second issue under this complaint was whether NLH replied to HQT's requests within the 45-day time limit, thus interrupting the time limit stipulated in section 19.3 of the OATT.

NLH issued a letter on January 24, 2008 to HQT clearly stating its intention to enter into a Facilities Study Agreement in compliance with the provisions of section 19.3 of the OATT. The Régie concluded that the NLH letter did not satisfy the requirements of section 19.3 of the OATT and that therefore NLH's request could not remain a Completed Application within the meaning of the OATT.

The Régie stated that instead of defining the framework of the Facilities Study with HQT within 45 days, NLH elected to contest the System Impact Study and file a complaint. In fact, NLH, as noted above, had clearly stated its intention to enter into a Facilities Study. This is a major misinterpretation of section 19.3 and creates a new obligation that does not exist in the OATT. Secondly, the Régie decided that there was no stay of proceedings while the case was under complaint before the Régie to interpret provisions of the OATT, both on the ATC assumption and on the content of the System Impact Study.

The Régie stated that doing so would modify the terms and conditions of 19.3 of the OATT even if there is no legal ground in civil, administrative and common law to support such a statement. This decision renders the complaint process ineffective, as timelines are important steps required to obtain transmission service. If timelines are not suspended, the complaint process, which in this case ultimately took two years, will inevitably lead to termination of a service request long before a complaint could be heard.

3. **Complaint P-110-1678**

The Complaint P-110-1678 related to two major issues:

(a) **HQT's refusal to provide NLH with services requested for partial transmission service**

NLH contested HQT's March 20, 2008 decision to refuse to provide NLH with services requested for partial transmission service to be made available to New Brunswick, New England and New York. HQT indicated that this transmission capability was available in its System Impact Study of December 2007.

Pursuant to section 19.7 of the OATT, HQT had an obligation to provide NLH with partial transmission service as requested in its January 24, 2008 letter because the transmission capability was considered available in HQT's System Impact Study of December 2007.

The Régie stated that the January letter was a new request and therefore partial service to New Brunswick, New England and New York could not be granted. NLH strongly disagrees with this interpretation of facts and application of section 19.7 of the OATT, since HQT was able to offer such service to Hydro-Québec Production for its transmission service requests.

(b) **NLH's right to use the HQT point as a point of delivery and a point of receipt**

The question addressed by the Régie was whether the Régie could render an order obligating HQT to recognize that NLH is in its right to use the HQT point as a point of delivery and a point of receipt.

According to NLH, it should be able to use point HQT as a point of delivery, as is done by Hydro-Québec Production.

In response, the Régie stated that this question had become theoretical, due to its previous decisions regarding Complaint P-110-1597 and under Complaint P-110-1678.

In conclusion, for the reasons stated above, the Régie dismissed complaints P-110-1565, P-110-1597 and P-110-1678.