

C A N A D A
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N^o: P-130-002

RÉGIE DE L'ÉNERGIE

NEWFOUNDLAND AND LABRADOR
HYDRO

Plaintiff/Appellant

-and-

HYDRO-QUÉBEC TRANSÉNERGIE

Respondent

APPLICATION FOR REVISION OF DECISION D-2010-053
(COMPLAINTS P-110-1565, P-110-1597 and P-110-1678)
DE LA RÉGIE DE L'ÉNERGIE
(Sections 34 and 37 of *An Act Respecting the Régie de l'énergie*, R.S.Q., c. R-6.01)

June 9, 2010

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IN SUPPORT OF ITS APPLICATION FOR REVISION, THE APPELLANT, NEWFOUNDLAND AND LABRADOR HYDRO (“NLH”), SETS FORTH THE FOLLOWING:

I. PURPOSE OF THE APPLICATION

1. NLH requests the revision of the decision D-2010-053, rendered May 11, 2010 by the Régie de l'énergie (hereafter the “**Régie**”), regarding complaints P-110-1565, P-110-1597 and P-110-1678 (hereafter the “**Decision**”); a copy of Decision D-2010-053 in French with the English Régie’s translation are filed in support of the present pleading as exhibit **NLH-1**.
2. This Decision sets forth the grounds on which the Régie rejected NLH’s complaints, which stemmed from a request filed for a 30-year term, firm point-to-point transmission service with HQT to import into Québec, and export from Quebec into Ontario, New Brunswick, New England and New York electricity generated by the planned new generation stations at Gull Island and Muskrat Falls referred to as the “Lower Churchill project” (hereafter “**Request 101**”); a copy of Request 101 was filed in support of complaint P-110-1565 as exhibit **NLH-1**.
3. On January 19, 2006, NLH applied for transmission service from HQT for the Lower Churchill Project, a planned 2,824 MW hydroelectric development in Labrador.
4. As a result of disagreements on matters of significance in the system impact study relating to discriminatory treatment and unfair application of the OATT, NLH availed of the complaint procedures provided for under the OATT in 2007 and 2008. These complaints culminated in a hearing before the Régie held January 19, 2010 to February 12, 2010.
5. As a result of the Régie’s rulings on the complaints, NLH’s transmission service application has been unfairly and illegally terminated from the HQT transmission service request queue. Given the significant substantive and procedural defects underlying the Régie’s decision, NLH is seeking a revision of the decisions that will result in the legitimate reinstatement of its service request in the HQT queue.
6. Based on the evidence presented in this application, it is clear that from a correct interpretation of the evidence and a correct application of the HQT OATT, the following conclusions must be drawn:
 - a) NLH’s service request must be reinstated in the HQT service request queue because the 45 day deadline was incorrectly triggered and the Régie’s subsequent denial of a stay of the deadline was erroneous.
 - b) The ATC used in the SIS 101 must be corrected to reflect a correct assessment of existing transmission commitments (ETC) in accordance with the HQT OATT. If ETC is deemed to be zero then the full

transmission capacity of 5,200 MW is available, or at a minimum the ATC must be calculated from HQ's firm entitlements in the HQ/CF(L)Co contract.

- c) HQT must be required to complete SIS 101, and in doing so including the study of all viable options to provide NLH with service into Ontario.
- d) NLH should be permitted to enter into service agreements for capacity available on interconnections into New England, New York, and New Brunswick, in accordance with the provisions for partial service in the HQT OATT.
- e) Consistent with the principle of non-discrimination, NLH should be permitted to use the HQT point as a point of delivery, in a manner consistent with HQ's use of the HQT point. The Régie refused to rule on this point as they had decided that NLH's application was no longer a completed application. However, a reinstatement of NLH's request does require Régie direction on this issue.

7. This application for revision is of fundamental importance to NLH in terms of permitting it to avail of transmission service in accordance with the principles of open, non-discriminatory access. This matter is of commercial significance, in terms of the nature of the issues disputed and the delay implications of losing a position in the transmission service request queue.
8. The Régie ruling in favor of HQT's biased and restricted interpretation of OATT prohibits NLH from wheeling 2824 MW of power through Québec to Ontario and US markets, in addition it causes NLH to lose its rank in OATT's queue, subsequent to having filed its request four years ago. In addition to the negative commercial implications for NLH, this also has negative implications for markets in the northeast by depriving them of access to a new, clean electricity supply. The ruling also deprives Québec of the benefits associated with significant transmission service revenues, upgrades to the HQT grid and the business opportunities resulting from this transmission service request and the Lower Churchill development.

II. THE PARTIES

9. NLH is a corporation wholly owned by Nalcor Energy, which is held by the Government of Newfoundland and Labrador.
10. NLH's operations include the transmission, generation and distribution of electricity throughout Newfoundland and Labrador, as well as the re-sale of a portion of power available from the Churchill Falls generating facility, referred to as "recall power". NLH is a customer of Hydro-Québec TransÉnergie (hereafter "**HQT**") for point-to-point transmission service in relation to the recall power and transmission service requests relating to the Lower Churchill project. In this capacity NLH uses the interconnections linking the North-East grid to the one in Québec.

11. Hydro-Québec is a public utility constituted under section 3 of the *Hydro-Québec Act*¹. It is a public joint stock company, meaning a company whose shares are held entirely by the Government of Québec and allotted to the Minister of Finance.
12. HQT is an administrative division of Hydro-Québec, whose mandate is to manage the transmission of energy throughout the territory of Québec and commercialize the transmission capacity of the grid.
13. According to the Open Access Transmission Tariff (hereafter the “OATT”), this division, HQT, must ensure transparent and non-discriminatory access to the transmission system in Québec for all customers of the wholesale electricity market. It must also make its interconnections available to its customers both within and outside of Québec.

III. THE FACTS

14. For the purposes of the present application, NLH relies on its written and oral evidence presented at the hearing.
15. NLH relies in part on the general description of the facts set forth by the Régie in paragraphs 23 to 48 of the Decision, with the exception of the following.
16. The Régie neglected to mention the letter dated January 20, 2006, filed as evidence in the complaint P-110-1565 as Exhibit **NLH-3**, a letter in which HQT informed NLH that it considered Request 101 to be a completed request under section 17.2 of the OATT.
17. In paragraph 42 of its Decision, the Régie characterized the letter from NLH, dated January 24, 2008 filed in complaint P-110-1678 as exhibit **NLH-11**, as being an export request. However, in NLH’s view, this characterization is erroneous. This letter actually consists of a request for partial interim service, as found in section 19.7 of the OATT. The decision presented HQT’s argument on this point as being uncontested, when in fact contrary evidence was presented by NLH.

IV. GROUND FOR REVISION

18. The present application for revision is based on section 37 of *An Act respecting the Régie de l’énergie*² (hereafter “**LRÉ**”):

“37. The Régie, on its own initiative or on application, may revise or revoke any decision it has made

(1) where a new fact is discovered which, had it been known in time, could have justified a different decision;

(2) where an interested person was unable, for sufficient cause, to present observations; or

(3) where a substantive or procedural defect is likely to invalidate the decision.

¹ *Hydro-Québec Act*, R.S.Q. c. H-5, section 3: “There shall be a legal person called the “Commission hydroélectrique du Québec” or, in abbreviated form, “HYDRO-QUÉBEC”.”

² R.S.Q. c. R-6.01.

Observations.

Before revising or revoking a decision, the Régie must give the persons concerned an opportunity to present observations.

Prohibition.

In the case set out in subparagraph 3 of the first paragraph, the decision may not be revised or revoked by the commissioners having made the decision.”

[Emphasis added]

19. The present application is based on paragraph 3 of section 37 of the LRÉ.
20. In *TAQ v. Godin* [2003] R.J.Q. 2490 (C.A.), the Québec Court of Appeal stated that provisions of that kind should be interpreted broadly::

“[para. 140] Our court has recognized that this notion [of substantive procedural defect] must be interpreted **broadly**. It is sufficiently large to permit the revocation of a decision that would be ultra vires or which, simply put, could not be justified in the given context or literally. **It can consist of, non exhaustively, an absence of grounds, a manifest error in the interpretation of facts when this same error plays a determining role, the setting aside of a rule of law or a failure to rule on an important element of evidence or on a pertinent question of law.**”

[Translation, emphasis added]

21. NLH submits that the Decision is replete with substantive and procedural defects that have the effect of invalidating it within the meaning of paragraph 3 of section 37 of the LRÉ.
22. The Régie rendered a decision that contains several manifest errors in the interpretation of facts that play a determining role and that set aside several rules of law when it ruled in favor that the Churchill Falls station was a designated station under the OATT:
 - a) by erroneously giving priority to the legislative provisions pertaining to the heritage pool electricity, adopted in June 2000, to the detriment of the OATT, which was adopted in May 1997, and putting aside the Power Contract executed May 1969;
 - b) by erroneously finding that CF station was an on-system resource and by failing to recognize that the CF station was an off-system resource under the OATT;
 - c) by finding erroneously that there was no evidence establishing that the electricity generated at the Churchill Falls station had been sold to a third party;
 - d) by finding erroneously that the Churchill Falls station was a resource under the control of HQT;

- e) by finding erroneously that Hydro-Québec was not aware of the CF(L)Co/HQ contract of 1969 at the time of the presentation of the request that resulted in SIS 101 in 2006; and
 - f) by erroneously dismissing the relevance of its own decision D-2002-286, which approved, along with decision D-2002-95, the adoption of Part IV “Native Load Service” of the OATT. This hearing addressed the issue of designation of plants and contracts to serve native load.
23. The Régie rendered a decision that contains several manifest errors in the interpretation of facts that play a determining role and that set aside several rules of law when it decided that the point of interconnection between the HQT system and the Labrador system was an internal path:
- a) finding erroneously that the Churchill Falls lines were not a “path” with a commercial value under the OATT, but an internal connection and that as a result HQT was not obligated to post available transmission capacity on the OASIS as per the OATT;
24. The Régie rendered a decision that contains several manifest errors in the interpretation of facts that play a determining role and that set aside several rules of law when it decided that HQT’s basis of calculating the ATC of the Churchill Falls lines was in conformity with the OATT:
- a) by finding erroneously that HQ did not have to be aware of the terms of the contracts between Hydro-Québec and CF(L)Co, but did need to know the capacity and energy transferred on the Churchill Falls transmission lines;
 - b) by finding erroneously that the distinction between firm and non firm deliveries from the Churchill Falls station, foreseen in the 1969 CF(L)Co/HQ contract to supply Québec’s native load, was not pertinent when calculating the ATC;
 - c) by ruling that the use of historical flows was acceptable to determine capacity allocation for native load service for an off-system import.
25. The Régie rendered a decision that contains several manifest errors in the interpretation of facts that play a determining role and that set aside rules of law and procedure established by the LRÉ and the OATT, as well as relevant principles of civil and administrative law, when it erroneously ruled that the 45-day deadline, stipulated in section 19.3 of the OATT, had passed and therefore NLH’s service request was no longer a “Completed Application” in accordance with the OATT, as shown by the following:
- a) in rendering a decision that contravened section 19.3 and Attachment D of the OATT and in wrongly interpreting the content of the System Impact Study conducted by HQT when it concluded that it was complete and satisfactory for the purposes of proceeding to the following step, namely the execution of a Facilities Study Agreement, despite the absence of key

elements which would have permitted NLH to make an informed decision regarding the content of the facilities study;

- b) by incorrectly applying the 45 day deadline mentioned in section 19.3 of the OATT as NLH did signify on January 24, 2008 its intention to execute a Facility Study Agreement, thus wrongly terminating Request 101.
- c) in rendering useless the process by which a complaint is presented, as set forth by the LRÉ and its related regulation, the OATT and applicable administrative law. These rules and regulations provide for the interruption of a deadline when a complaint procedure occurs before the expiration of a deadline; and
- d) in imposing an additional obligation on NLH beyond that stipulated in section 19.3 of the OATT, and in so doing adding to the provisions of the OATT. In adding these additional obligations the Régie exceeded its jurisdiction in this proceeding.

26. The Régie rendered a decision that contains several manifest errors in the interpretation of facts that play a determining role and that set aside several rules of law when it concluded that HQT had the right to refuse to enter into discussions with NLH with the aim to execute a service agreement, for the following reasons:

- a) by erroneously interpreting the content of the letter dated January 24, 2008 and incorrectly finding that this letter constituted a new request for services resulting from a re-combination of options that were initially stated in Request 101; and the Régie erroneously decided that this was not a request for partial interim service, a service that furthermore was granted by HQT to another division of Hydro-Québec, HQP; and
- b) by contravening section 19.7 of the OATT which stipulates that the transmission provider is obliged to offer and provide partial interim service.

V. ERROR OF LAW AND FACT: THE DESIGNATION OF THE ENTIRE CHURCHILL FALLS STATION

27. The Régie erroneously found that the entire Churchill Falls station owned by CF(L)Co., situated in the province of Newfoundland and Labrador, governed by the laws and regulation of Newfoundland and Labrador, dispatched by CF(L)Co to multiple customers under multiple contracts, was a resource designated to supply all its production to consumers in Quebec, against the submission of NLH.

28. The question of the magnitude of the capacity associated with the designation of resources to serve native load is of importance with respect to the calculation of the Available Transmission Capacity (“ATC”).

The law applicable to the notion of the designation of a resource under the OATT

29. The Régie based its conclusion on the incorrect premise that the Churchill Falls station is to be considered an HQT “on-system” resource when in fact this resource is an “off-system resource”.
30. The pertinent sections of the OATT regarding the designation of a resource are the following: 1.40.1, 36.2, 37.1 and 38.1.
31. Section 1.40.1 provides for the following:

“[...] A Distributor Resource may be a contract, a generating station, a sales program, commitment or obligation, including those originating from an interconnection, or any other energy resource that can be used to meet native load requirements. Distributor Resources do not include any resource, or any portion thereof, that is committed for Third-Party Sale or otherwise cannot be called upon to meet the Distributor's Native Load requirements on a non-interruptible basis.”

[Emphasis added]

32. Section 36.2 of the OATT provides that HQD can designate resources that are under the control of HQT:

“The Distributor shall designate available resources, under the Transmission Provider's control, to supply its Native Load.”

[Emphasis added]

33. Section 37.1 provides for the inclusion of off-systems resources as designated resources to serve native load. Specifically, 37.1(iii) which requires the provision of the following information on an annual basis:

“description of the purchased power designated as a Distributor Resource, including source of supply, Control Area location, transmission arrangements and Point(s) of Reception the transmission Provider's Transmission System”³.

[Emphasis added]

34. Section 38.1 provides the following:

“Designation of Distributor Resources: Distributor Resources shall include all generation purchased by the Distributor and designated to supply Native Load under the provisions herein. Distributor Resources cannot include resources, or any portion thereof, that are committed for sale to third-party load other than the Native Load or otherwise cannot be called upon to supply the Distributor's Native Load on a non-interruptible basis. Generating stations able to supply the Distributor's Native Load in date of January 1, 2001 shall be included in Distributor Resources until

³ This requirement is consistent with network services section 30.7, but not supported by Native Load section 38.8.

such time as written notice to the contrary is given by the Distributor to the Transmission Provider.”

[Emphasis added]

35. Under these provisions HQD can only designate resources that:
- (i) are either on-system or if off-system have transmission arrangements for delivery to the HQT system;
 - (ii) can serve to supply the native load of the Distributor on a firm or non-interruptible basis;
 - (iii) are not committed for sales to a third-party;
 - (iv) are or will be under the control of HQT.
36. Therefore, if a station or contract serves in whole or in part to provide electricity to a third-party on a firm basis, this resource or a portion thereof, cannot be considered a designated resource of HQD within the meaning of the OATT.
37. The same reasoning applies if this resource or a portion thereof is used to supply native load on a non-firm or interruptible basis. The resource cannot be a designated resource if the purchase to supply native load is non-firm.
38. Finally, a resource or portion thereof which is not under the control of HQT cannot be considered a designated resource.

Errors by the Régie in the Designation of the Entire Churchill Falls station as a designated Resource.

(a) The Régie erroneously gave priority to the legislative provisions pertaining to the heritage pool electricity, adopted in June 2000, to the detriment of the OATT, which was adopted in May 1997, and put aside the CF(L)Co/HQ contract executed May 1969

39. In paragraphs 228 to 230 of its Decision, the Régie stated its position with respect to the application of the provisions pertaining to the obligation of Hydro-Québec in supplying the native load:

“[228] [...] If Hydro-Québec can choose to supply part of the native load from the CF Generating Station, it goes without saying that it must have the right to use the HQT transmission system to fulfill this statutory requirement.

[229] Accordingly, by interpreting the OATT which was passed after these legislative provisions came into force, we must avoid giving it a meaning which would make it incompatible with these provisions respecting the rights and obligations conferred on Hydro-Québec and Québec consumers with respect to the heritage pool.”

40. The obligation of Hydro-Québec to supply the heritage pool cannot override or add to the contractual parameters established in the CF(L)Co/HQ contract on May 12, 1969.

41. Contrary to the Régie’s finding, the statutory obligation of Hydro-Québec is to take into account the entitlements stipulated in the CF(L)Co/HQ contract and to meet OATT requirements.

(b) The Régie erred by erroneously finding that CF station was an on-system resource and by failing to recognize that the CF station was an off-system resource under the OATT

42. The Régie based its designation conclusion on the incorrect premise that the Churchill Falls station is an HQT “on system” resource. This incorrect assumption has substantial implications for the application of the OATT rules regarding Distributor Designated Resources in accordance with sections 1.40.1, 36.2, 37.1 and 38.1.
43. The Régie ignored the testimonial evidence made by both NLH witnesses, Rob Henderson and Peter Thomas, that Labrador is a distinct system from the HQT system.
44. Given that the HQT system ends at the Quebec/Labrador border, energy generated outside of Quebec and only received at the HQT system through this interface has to be considered an “off-system” source of supply.
45. In error the Régie incorrectly concluded that the fact that the Churchill Falls station was synchronized with the Québec system was a sufficient basis to determine that the station in question was “on-system”.
46. However, the definition of Control Area in section 1.51 of the OATT does not include the criteria of synchronicity between the systems:

“1.51 Control Area: An electric power system or combination of electric power systems to which a common automatic generation control scheme is applied in order to:

(1) match, at all times, the power output of generating units within the electric power system(s) and capacity and energy purchased from entities outside the electric power system(s), with the load within the electric power system(s);

(2) maintain scheduled interchanges with other Control Areas, within the limits of Good Utility Practice;

(3) maintain the frequency of the electric power system(s) within reasonable limits in accordance with Good Utility Practice; and

(4) provide sufficient generating capacity to maintain operating reserves in accordance with Good Utility Practice.”

47. The testimony that the Régie relied upon in its conclusions regarding the designation of the entire CF station from Mr. Rioux is flawed:

Paragraph 222 of the Decision - “The witness also explained that the CF Generating Station is synchronized with the HQT system and considered in HQT’s “on-system”.

48. From the rationale provided above, the fact that the CF station is synchronized with the Labrador system, which is synchronized with the HQT system, does not mean that the CF station is on the HQT system. The fact that the New England, New York and PJM systems are synchronized does not mean that generators in New England are considered on system resources for New York or PJM.
49. In addition, the criteria defining a Control Area, found in section 1.51 is to have a common automatic generation control (“AGC”) that is being used. Evidence during the hearing showed that no AGC service exists at the CF station.
50. The Régie ignored the fact that NLH’s existing transmission service agreements totaling 265 MW (commencing April 1st 2009) on the LAB-HQT-MASS path sourced at the CF station were for wheel through service.
51. If the Régie was legally correct in its contention that the CF station is an “on-system” plant this transmission service should have been a wheel-out reservation. This demonstrates that HQT considers Labrador to be a distinct system, thus CF station is “off-system”. This is evidence that generating sources in Labrador are off-system.
52. In paragraph 248 of the Decision, the Régie relied on HQT testimony that the CF station “*forms part of Quebec’s control area and is considered “on-system”*”. This evidence and its interpretation are flawed and should not have been relied upon for the following reasons:
- (i) This statement implies that a resource within a control area is also “on” a specific system. The definition of control area in 1.51 of the HQT OATT recognizes that a control area can be constituted from multiple systems. Hence participation in a control area does not define whether a plant is on or off a particular system.
 - (ii) The definition of transmission system within the HQT OATT differs from FERC order 888⁴ OATT, in that it does not explicitly address the attribute of “ownership of transmission facilities”. However, section 1.48.2 of the HQT OATT limits the jurisdiction of the OATT to the rates and conditions whereby HQT transmits electricity in Quebec. In addition the schedule of rates contained in the HQT OATT are not derived from a cost base that includes assets and equipment in Labrador.
53. The idea that CF(L)Co and the Labrador system are within HQT’s control area raises the question – under what contractual and regulatory arrangements is it alleged that this was established? The HQT argument in this case rests heavily on the concept of 'Control Area' in the Transmission Provider’s Responsibility for Native Load service under section 36.2 of the HQT OATT but not in the Network service section of either the HQT or the FERC OATTs.

⁴ FERC Order 888 Pro-forma OATT Section - 1.49 – Definition: Transmission System: The facilities owned, controlled or operated by the Transmission Provider that are used to provide transmission service under Part II and Part III of the Tariff.

For native Load Service: 36.2 Transmission Provider Responsibilities: “The Transmission Provider shall plan, construct, operate and maintain its Transmission System, **and control power flows in its Control Area** in accordance with Good Utility Practice in order to provide Transmission Service for the delivery of capacity and energy from Distributor Resources to supply the loads of Native- Load Customers over the Transmission Provider’s system”.

For Network service: 28.2 Transmission Provider Responsibilities: “The Transmission Provider shall plan, construct, operate and maintain its Transmission System in accordance with Good Utility Practice in order to provide the Network Customer with Network Integration Transmission Service over the Transmission Provider's system”.

54. In interpreting this section of the HQT OATT, it is relevant to note that the issue of control of power flows in a Control Area is not present in the Network Services section of either the HQT OATT or the FERC proforma OATTs. Clearly, this aspect of section 36.2 of the HQT OATT should not be applied in a discriminatory manner such that it gives preferential treatment to native load customer.
55. There is no evidence in the record to support any HQT claim or Régie finding that the Labrador system is contractually or legally within HQT’s control area. This was demonstrated by NLH’s witness Rob Henderson.
56. The Régie ignored the fact that the HQ/CF(L)Co contract provides for delivery of power and energy to the Labrador /Quebec border and that this evidence that the CF station is an off-system resource.
57. In addition, another factor demonstrating that the CF station is not an on-system resource is the existence of transmission service in the HQ/CF(L)Co contract which clearly stipulates that CF(L)Co is solely responsible for construction, operation and maintenance of transmission in Labrador to the delivery point at the Labrador/ Quebec border.
58. The need for the arrangement of transmission service for off-system resources is recognized in the HQT OATT and also consistent with FERC interpretation of CF(L)Co/HQ contract designation for “off-system” power purchases to serve native load.
59. As it was evidenced at the hearing from the following section of the HQ/CF(L)Co contract:

“7.1 Delivery Point

[...] the Delivery Point for each circuit shall be at the height of land, about opposite present mile 148.8 of the Quebec North Shore and Labrador Railway.”

“7.2 Transmission Facilities

The construction **operation** and maintenance of the necessary **transmission facilities up to the Delivery Point** will be the exclusive responsibility of, and at the sole cost of, CFLCo and onwards from the

Delivery Point will be the **exclusive responsibility** of, and at the sole cost of, Hydro-Québec.”

[our emphasis]

60. The HQT OATT recognizes the need for separate firm transmission arrangements as a necessary element for delivering off-system resources that may be used as designated resources to supply native load – HQT OATT section 38.7 – “ *the Distributor shall be responsible for any arrangements necessary to deliver capacity and energy from a resource not physically connected to the Transmission Provider’s system.*”
61. The off-system arrangements referred to include firm transmission to the interconnection from the neighboring system for the export, onto the HQT system where the import occurs.
62. Section 38.8 of the OATT, which addresses a restriction with regard to the designation of resources, provides that the Distributor must inform HQT of the supply that it had obtained to serve the native load.

“The Distributor shall obtain all necessary resources to supply electricity to its Native Load and so inform the Transmission Provider.”

63. For off-system resources the “necessary resources” referred to in section 38.8 of the OATT include both firm generation and firm transmission arrangements to ensure non-interruptability for the native load customer.
64. Thus the CF station is clearly an off-system resource, therefore, when the Régie concludes that CF station is an “on system resource”, it totally puts aside OATT rules.

(c) by finding erroneously that there was no evidence establishing that the electricity generated at the Churchill Falls station had been sold to a third party

65. With regard to a resource or a portion thereof that is committed for sale to a third-party, the Régie made the erroneous finding at paragraphs 240 to 242 of the Decision, that there was no evidence to the effect that electricity generated at the Churchill Falls station had been sold to a third party.
66. This erroneous finding resulted in the Régie failing to properly apply section 38.1 of the OATT.
67. The Régie erred in its determination of the quantity of the designated capacity, by ignoring the HQ/CF(L)Co contract and designating the entire station. Section 38.1 stipulates that “Distributor Resources cannot include resources, or any portion thereof, that are committed for sale to third party load other than native load or otherwise cannot be called upon to supply the Distributor’s Native Load on a non-interruptible basis.”
68. The amount of capacity and energy available on a firm basis to HQ from the CF station is governed by the HQ/CF(L)Co contract. CF(L)Co has existing firm obligations to serve third parties in Labrador from the station, therefore clearly the full capacity of the station cannot be designated to serve Quebec native load on a firm basis.

69. The Régie, in paragraph 240 of the Decision noted that “*there is no evidence that the electric power from the CF Generating station is sold to third parties.*” However, there was uncontradicted evidence to the contrary. In fact the Régie contradicted itself on this point in paragraph 273(c) in which they referenced the 225 MW for Twin Falls Power Corporation and the 300 MW sold to NLH designated for consumption outside Quebec, both of these firm third party commitments are established in the HQ/CF(L)Co contract.
70. Furthermore, NLH witness Henderson testified on the fact that these two firm obligations are in fact “*primary requirements of CF(L)Co, they’re supplied before any other power, which would be power to HQ through the power contract*”⁵. The Régie failed to recognize NLH witness Henderson’s evidence⁶:

Q: “From your general knowledge of the output and the usage of the transmission lines, who is being served in...first, is there a ranking coming out of the output from CF(L)Co? Is there any understanding that one client is being served, and the second being served in a second rank, or how does that work?”

A: “The recall arrangement is a primary reliable supply of power, that’s the first obligation. The two hundred and twenty-five (225) Twinco arrangement, and three hundred megawatt (330 MW) arrangement are the primary requirements of CF(L)Co, they’re supplied before any other power, which would be the power to Hydro-Quebec through the power contract.”

71. The evidence of firm third party commitments was also presented in the hearing by NLH witness Bennett as follows:

"Another important consideration of this contract is the way in which the contractual obligations to CFLCO were set out, so I'd like to go back and look at the priority or the stacking in this contract.So I previously stated that there are three customers at CFLCO; the first one is Twin Falls Power Corporation; second one is availability of recapture or recall for use in, by NLH; and the third is deliveries under the power contract."⁷

72. Maintaining that there was no evidence to support NLH’s claim that electricity generated at the Churchill Falls station was committed for sale to a third party is a significant error of fact and ultimately led to a misapplication of law in the Régie’s application of Section 38.1 of the OATT.

(d) The Régie erred by finding erroneously that the Churchill Falls station is under the control of HQT

73. With regard to the control of the resource by HQT, the Régie stated in paragraphs 248 and 249 of the Decision, that evidence proved that the Churchill Falls station is a resource

⁵ Régie Hearing Jan 26, 2010, vol 6, pg 61.

⁶ Régie Hearing Transcript, Jan 26,2010 Vol 6, Pg 61

⁷ Régie Hearing Transcript, Jan 20,2010 Vol 6, Pg 25-26

under the control of HQT within the meaning of section 36.2 of the OATT owing to the fact that HQT controls the flow of energy from this station.

74. In fact, HQT's relation to the energy and capacity imported to the HQT system is limited to the obligations set forth in the HQ/CF(L)Co. contract. There is no direct physical control of the station granted to HQT.
75. In paragraph 249 of the Decision the Régie incorrectly attributed HQT's control to be extended to the CF station and indicated that this was uncontested. However, NLH did dispute this point during the hearing with testimony from NLH witness Henderson⁸. Mr. Henderson testified as follows:

Q – “According to your...to your experience, what kind of control, if any, HQT may have or does have over Churchill...over Churchill Falls power plant?”

A – “HQT would not have any control over the Churchill Falls power plant. The control is by CF(L)Co. HQT would provide communications for Churchill Falls to let them know of things that they may require for the... I'll say for their needs in terms of operation of the... the grid in Quebec”.

76. In paragraph 248 of the Decision, the Régie relied on the following four erroneous submissions to find that the Churchill Falls station is under the control of HQT:

(i) paragraph 248 of the Decision: The station is considered to be a designated resource and is treated as such by HQT on a daily basis”.

- According to the Régie, the Churchill Fall station is a designated resource owing to the fact that it is under the control of HQT and HQT controls the Churchill Falls station because it is a designated resource. This argument is circular with neither underlying point being substantiated.

(ii) paragraph 248 of the Decision: “This generating station forms part of Québec's Control Area and is considered “on system”.

- The CF station is not in the Quebec control system. The system is located on a separate system in Labrador. The HQT witness Hanser provided the following evidence:

“Which part of the Churchill Falls lines are located outside of the Hydro-Québec control area?”

A. I believe the lines are at the border.

Q. [260] Yes?

A. Once it crosses the political border between Labrador and Québec, those lines are no longer Hydro-Québec lines.

⁸ Régie hearing transcript, Jan 26, 2010, volume 6, pg 68.

Q. [261] Is Churchill Fall outside of the Hydro-Québec TransEnergie control area?

A. That's my understanding, that it's not part of the Hydro-Québec control area.”⁹

- Evidence presented by NLH at the hearing demonstrated that there was no automatic generation control (hereafter “AGC”) in place, contrary to the requirement of section 1.51 of the OATT; on the contrary, the parties had to enter into an agreement specifically to manage the interconnection;

(iii) paragraph 248 of the Decision: “HQT has access to the electric power from the CF generating station to supply its native load at all times up to the capacity required”.

- Contrary to the Régie’s position, Article 1 – 1.1 (definitions) – III (concerning capacity) “Firm Capacity” and Schedule III (Renewed Power Contract), Article 1- 1.1 (definitions) II “Firm Capacity” of the HQ/CF(L)Co contract explicitly limits HQ’s access to maximum quantities of firm capacity in winter and in summer. Hydro-Québec can request a greater quantity, but CF(L)Co can refuse to supply this quantity, should it be of the opinion that it is unavailable:

“[...]

(i) at any time in the months of October, November, December, January, February, March, April and May : 4,382,600 kilowatts at the Delivery Point;

(ii) at any time in the months of June, July, August and September : 4,163,500 kilowatts at the Delivery Point.”

These amounts have to adjusted down by 300 MW in accordance with section 6.6 of the HQ/CF(L)Co contract to reflect the “Recapture” or Recall block, ad CF(L)Co has exercised the recapture rights as set out in this provision. Therefore HQ’s firm entitlements are as follows:

Winter: 4,382,600 kW – 300,000 kW = 4,082,600 kW

Summer: 4,163,500 kW – 300,000 kW = 3,863,500 kW.

- HQ’s purchase of a portion of its plant’s production does not confer the right of control over an entire generating station.

(iv) paragraph 248 of the Decision: “In terms of operations, it had been agreed upon between the parties that the direction, scheduling, security control and balancing authority were all functions assumed by HQT”.

- The Régie accepted HQT’s mischaracterization of a document introduced as evidence entitled “Common System Operation Instruction for HQT and CF(L)Co. 735 kV Interconnection Lines” (filed by HQT at the hearing) as relating to control

⁹ Régie hearing transcript, Feb 4, 2010, volume 13, pg 173.

over the CF station. The Régie totally disregarded NLH witness Rob Henderson's testimony in relation to this document in which he stated the following:

“I wouldn't agree that it has responsibility over the Churchill Falls Power House. The way I read and understand this document is the...first, the system Dispatcher Transmission, which is a HQT function is responsible for “service, security and equipment of the Provincial Transmission System”, which is the Provincial Transmission System in Quebec, and the interconnections, which would be from the border into the Quebec system. It's nothing to do with the plant, it's interconnections”.¹⁰

77. Furthermore, in response to a question regarding the fact that Hydro-Quebec specifies the power deliveries from the Churchill Falls station, witness Henderson responded affirmatively that it was a question of scheduling, as follows:

“[...] it's deliveries over those lines. They originate in the Churchill Falls power house, but it does not indicate control over the Churchill Falls power house in any way. ...this is an agreement indicating that the Hydro Quebec System dispatcher for generation is responsible for providing those schedules to the CF(L)Co operator to control the output of the Churchill Falls plant to deliver the scheduled power at the border”.¹¹

78. Thus the Régie erred in its application of section 36.2 of the OATT in stating that the Churchill Falls station is a resource under the control of HQT. To arrive at this conclusion the Régie wrongly accepted submissions of HQT that have no factual basis and no merit in law.

(e) by finding erroneously that Hydro-Québec was not aware of the CF(L)Co/HQ contract of 1969 at the time of the presentation of the request that resulted in SIS 101 in 2006

79. Ignorance of the contract is not an acceptable basis for designating the CF station in its entirety and designating the station in its entirety is not required to ensure grandfathered rights to native load customers in Québec.
80. HQT had knowledge of the HQ/CF(L)Co contract which HQ signed in 1969, however the Régie ruled to the contrary. To have reached this finding one would have to accept that, prior to 1997, Hydro-Québec had knowledge of the CF(L)Co/HQ contract yet upon adopting of functional separation of Hydro-Québec, the HQT division expelled from its corporate memory the existence of the CF(L)Co/HQ contract.
81. The Régie erred by finding erroneously that HQT had no knowledge of the HQ/CF(L)Co contract at the time of the filing of NLH's service request.
82. The obligations that must be met by the customers of the Native load service are necessarily equivalent to those that must be met by the customers of the network Load service in terms of the information to be provided with regard to supply in order to respect the non discrimination principle

¹⁰ Régie Hearing Transcript, Jan 26,2010 Vol 6, pg 91.

¹¹ Régie Hearing Transcript, Jan 26,2010 Vol 6, pg 92.

83. In 1997 Hydro-Québec had to designate its “system resources” in accordance with section 30.7 of the OATT (there was no Part IV of the OATT at the time). Section 30.7 provides among other things, that in such a case the customer of HQT must provide proof of purchase in order to be able to designate a resource.
84. Therefore one must assume that HQT did make the verifications warranted in the circumstances as well as those verifications imposed by the OATT. The Régie could not make the improbable finding that HQT had no knowledge of the CF(L)Co/HQ contract.
85. Section 38.8 of the OATT (Part IV), which addresses a restriction with regard to the designation of resources, provides that the Distributor must inform HQT of the supply that it had obtained to serve the native load.

“The Distributor shall obtain all necessary resources to supply electricity to its Native Load and so inform the Transmission Provider.”

86. Thus, the duty to inform the transmission provider is also found in Part IV and for a reason. Clearly to meet non-discriminatory and reciprocity requirements the transmission provider cannot offer service under Part IV, if it had not made the necessary verifications before offering the service.
87. As presented by NLH’s expert witness Sinclair citing Régie case law (case R-3401-98 which led to decision D-2002-95 and D-2002-286), HQT’s witness Mr. Roberge made it very clear in 2002 that knowledge of a contract held by HQD for an off-system resource is required by HQT in order assign capacity at an interface under part IV of the OATT:

“All interconnections are left one hundred percent open to everyone, unless the Distributor very clearly shows us that it absolutely needs a very specific door because there’s a contract coming in through that door. Then that’s right, we will close that door, that door will be reserved for the Distributor. But, no, the door is open one hundred percent to everyone at all times.”

[Emphasis added]

88. Furthermore, section 37.1 (iv) indicates that HQD is required to provide the following information on an annual basis:
- “Planned use for each of the interconnections between the Transmission Provider’ system and neighboring systems (present and 10 year projection), in MW and MWh for on-peak and off-peak periods for each year.”
89. Thus, the duty to inform the transmission provider is also found in Part IV. In order to offer an equitable and non-discriminatory service it is essential that the necessary verifications be made before offering the service.
90. In terms of the designation, in all the neighboring markets, when a customer requires that a resource be designated, this customer must demonstrate that it is the owner of the resource or that it is party to a purchase agreement and transmission arrangements to the market.

91. In accordance with the accepted principle of nondiscrimination the Régie erred in not recognizing HQT's requirement to demonstrate HQD's use of the transmission system in a manner similar to that required by its network customers.
92. FERC has recognized nondiscriminatory disclosure requirement for both Network and Native load customers in its pro forma OATT section 28.2, when it states;
- “The Transmission Provider, on behalf of its Native Load Customers, shall be required to designate resources and loads in the same manner as any Network Customer under Part III of this Tariff.”
93. While the text in section 30.7 of the HQT OATT that outlines the obligations placed on the Network customer to validate its use of the HQT system states
- “The Network Customer shall demonstrate that it owns or has committed to purchase generation pursuant to an executed contract in order to designate a generating resource as a Network Resource”.
94. And while the text in section 38.7 of the HQT OATT outlining the obligations of the Native load customer to support its use of the HQT system states:
- “The Distributor shall obtain all necessary resources to supply electricity to its Native Load and so inform the Transmission Provider.”
95. It was expected that the native load customer requirements would not be interpreted without consideration of the network customer requirements, because to do so places a more onerous requirement on the network customer to “demonstrate” or justify its need to use the transmission system to service its customers. As a result HQT was required to ask HQD to provide the CF(L)Co/HQ contract to validate its need for transmission capability
96. Reciprocity requires a comparable, non-discriminatory, non-preferential treatment of these two classes of customer since network, native load and firm point-to-point service have all the same priority.
97. To consider that HQT had no knowledge of the CF(L)Co/HQ contract amounts to imposing an additional obligation on network service customers contrary to native load customer (HQD), which is discriminatory.
98. By finding erroneously that HQT had no knowledge of the CF(L)Co/HQ contract when Request 101 was submitted, the Régie committed an egregious error of fact and law in its interpretation of the facts, which had a significant impact on the Decision. In effect, this amounts to ignoring facts which were not contested by HQT, even when they are useful and relevant for the Régie to make its decision.
- (f) by erroneously dismissing the relevance of its own decision D-2002-286, which approved, along with decision D-2002-95, the adoption of Part IV “Native Load Service” of the OATT. This hearing addressed the issue of designation of plants and contracts to serve native load.***
99. The Régie stated in paragraphs 236 and 237 of the Decision, decision D-2002-286, quoted by NLH in support of its interpretation of the notion of designation, cannot be

used as a precedent because, the Régie simply indicated its understanding of the testimony of the representative of HQT and did not retain it in the ruling.

100. The Régie made an error of fact and law in dismissing the relevance of its decision D-2002-286 as well as the testimony of the representative of HQT regarding the designation. The decision rendered in that particular file did not set aside the reasoning presented by HQT at the time of adopting Part IV in the OATT.
101. The effect of decision D-2002-286 was that the wording proposed by HQT for section 1.40.1 of the OATT, which defines the concept of “distributor resource”, was accepted.
102. In the decision D-2002-286, the Régie stated the following, relating to HQT’s position:

“The transmission provider makes a distinction between the contract for heritage pool electricity which is a designated resource and the stations that comprise the equipment necessary to supply the energy contract.

For the interconnections, capacity is designated in function of the contract concerning the interconnection.

The transmission provider also proposes the following definition for the term “distributor resource” at section 1.40.1 (...)”¹²

103. Subsequently, in the section of the decision D-2002-286 called “The Opinion of the Régie”, which established the rules of law to be followed, the Régie adopted the wording of section 1.40.1 and declared the following:

“The Régie understands from the testimony of the transmission provider that the production purchased by the distributor under the order-in-council respecting the heritage pool is the designated resource, as opposed to the generating stations which may provide such electricity.

The Régie acknowledges that, to operate its system in real time, a transmission provider must be aware of the generating stations and the import contracts which meet the demand of the distributor and the needs of its other customers, including export contracts, but that does not necessarily imply that such generating stations must be designated as distributor resources.”¹³

[Translation – emphasis added]

104. In refusing to take into account the interpretation of the representative of HQT, as well as its own D-2002-286, the Régie committed an error of law that is of the utmost significance and is of such of nature as to invalidate the Decision.
105. From this excerpt of the Régie’s opinion, it is evident that the Régie is recognizing the designation of the heritage pool and that the transmission provider must be aware of both the generating stations and import contracts which the Distributor used to meet native load. This can be interpreted to mean that the CF plant is not a designated resource and

¹² Régie’s decision D-2002-286, pg. 13.

¹³ Régie’s decision D-2002-286, pg. 15-16.

therefore ATC of 5,200 MW is available, or alternatively the import HQ/CF(L)Co contract is the designated resource in which case the ATC must reflect only the firm entitlements under the HQ/CF(L)Co contract.

Conclusion for section V

106. The Régie erred in finding that the entire plant is a designated resource of the Distributor since:
107. The creation by the Québec government imposing a legal obligation to Hydro-Québec to supply a Heritage Pool does not authorize the transmission provider to discriminate against its clients at large by granting a preferential treatment to a client that serves load in Québec;
108. The Régie erred in finding that the Churchill Falls station is an “on system” resource, not recognizing that the equipment linking the two Provinces is an “interconnection” in application of the definition provided by the OATT, since these lines link two distinct systems;
109. The Régie erred in not recognizing that third party sales originate from the Churchill Falls station, contrary to what was brought in evidence;
110. The Régie erred in stating that the Churchill Falls station was controlled by HQT, since no AGC exists to control the said station contrary to what the OATT requires, and furthermore ignoring evidence presented by NLH witness Henderson.;
111. The Régie erred in stating that HQT had no knowledge of the HQ/CF(L)Co contract given that HQT was party to this contract and had knowledge of this contract pre-dating 1997. Also, this contract had to be given to them in 1997 when Hydro-Québec requested Network Service and again in 2002 when HQD had to inform HQT of all existing supply contracts;
112. The Régie erred when it disregarded its rule making decision D-2002-286 accepting HQT proposal that the sole designation in 2000 was to be the Heritage Pool and that in order to reserve an interconnection for the service of the native load a contract had to be provided to the transmission provider.

VI. ERROR OF LAW AND FACT: CF LINES ARE AN INTERNAL QUEBEC GRID LINE AND DID NOT CONSTITUTE A PATH UNDER OATT AND HQT DID NOT HAVE OBLIGATION TO POST ATC PRIOR TO APRIL 1, 2009.

113. The Régie erred when it decided to consider the lines to the generating station owned by CF(L)Co in Labrador, an internal Québec path since this fails to take into consideration: (i) evidence that Labrador is a distinct system than that of Québec, (ii) that the transmission equipment considered is a “interconnection” in light of the definitions of the OATT, (iii) that the direction of flow and the synchronous nature of the equipment are not criteria that enable to assert that a line is an internal path to a transmission system, (iv) that the LAB-HQT path has a commercial value since it enables to increase competition to HQT in Québec by enabling a new market participant to access the HQT grid.

114. In paragraph 278 of the Decision, the Régie stated that the “*Churchill Falls lines are an internal line they could not be a path for which a customer could request to have ATC or TTC posted.*” This is a failure to apply the OASIS standards referenced in section 4 of the HQT OATT and a failure to apply a correct definition of system to system “interconnection”.

The law applicable to the notion of internal path under the OATT

115. The Régie failed to correctly interpret and apply the OASIS rules which apply in Quebec as presented in paragraph 277 of the Decision when they stated that:

“The OASIS Rules provide that the requirement to post an ATC is only for “posted paths”, not for physical transmission facilities (internal connection or interconnections) which do not constitute paths.”

“The OASIS Rules 37.6 [...] however provide that:

(b) Posting transfer capability. The available transfer capability on the Transmission Provider's system (ATC) and the total transfer capability (TTC) of that system shall be calculated and posted for each Posted Path as set out in this section.

(1) Definitions. For purposes of this section the terms listed below have the following meanings:

(i) Posted path means any control area to control area interconnection;

[...]

(iv) The word interconnection, as used in the definition of “posted path” means all facilities connecting two adjacent systems or control areas¹⁴.

[emphasis added]

116. The correct interpretation of these rules is that transmission facilities connecting adjacent systems are “Interconnections” and an “Interconnection” is a “Posted Path” and therefore the transfer capability must be calculated and posted.

Errors by the Régie in considering that the lines to the generating station owned by CF(L)Co in Labrador is an internal Québec path.

(a) by finding erroneously that the Churchill Falls lines were not a “path” with a commercial value under the OATT, but an internal connection and that as a result HQT was not obligated to post available transmission capacity on the OASIS as per the OATT

117. An error of fact and law led the Régie to declare that the LAB-HQT path was not a path with commercial value under the OATT. As evidenced at the hearing, sales were made to HQ post 1997 by NLH.

118. The Régie relied on the following erroneous evidence:

¹⁴ HQT Statement of Position and Argument, Matter No. P-110-1565, pages 25 and 26, paragraph 115.

Paragraph 273(b) of the Decision: “the power flows on the lines are one-way and are used exclusively for the injection of the capacity and energy produced by the CF Generating Station in the HQT system, in the absence of any other supply.”

119. NLH has generation on the Labrador system that could be used to export as it was evidenced at the hearing by NLH witness Henderson:

“In Labrador, the remaining part of the grid, there is only one (1) generating plant outside the Churchill Falls plant, and that is a gas turbine plant in Happy Valley, Goose Bay.”

120. In addition, the Recapture Block was available for use outside Quebec in accordance with the HQ/CF(L)Co contract.
121. Evidence presented by NLH established that the Labrador system is distinct from Québec’s.
122. In addition, the testimony of the HQT expert witness Hanser states that Churchill Falls station is situated outside of the HQT Control Area:

“Which part of the Churchill Falls lines are located outside of the Hydro-Québec control area?”

A. I believe the lines are at the border.

Q. [260] Yes?

A. Once it crosses the political border between Labrador and Québec, those lines are no longer Hydro-Québec lines.

Q. [261] Is Churchill Fall outside of the Hydro-Québec TransEnergie control area?

A. That's my understanding, that it's not part of the Hydro-Québec control area.”¹⁵

123. Furthermore, the applicable rules in Québec governing posting on the OASIS provide that any facility linking two systems must be considered an interconnection. The Régie even quoted the applicable provision of the OATT in paragraph 286 of the Decision.
124. However, when taking into consideration the evidence, the Régie failed to draw the conclusion that the point at which CF(L)Co lines from the Labrador system terminate at the HQT system is a system to system interconnection, as previously noted in paragraph 44 of this document.
125. In paragraph 273(e) of the Decision, the Régie did acknowledge the CF station was located outside Quebec, but still assumed it to be on the Quebec system by failing to correctly apply the definition of a system to system interconnection.

¹⁵ Régie hearing transcript, Feb 4, 2010, volume 13, pg 173.

126. Furthermore, in paragraph 274 of the Decision, the Régie erred in its acceptance of HQT's position that uni-directional flows were relevant in classifying the system to system interconnection as an internal path. Bi-directional flow is not a criteria for the designation of a system to system interconnection. Furthermore, unidirectional does not necessarily imply uni-purpose, it could be firm or non-firm, and serving multiple customers. The fact that flows are uni-directional does not classify the system to system interconnection as an internal path.
127. In addition, in paragraph 273(e) of the Decision, the Régie incorrectly incorporated synchronicity in its determination that the transmission interconnection was an internal path. As noted previously in paragraph 47 of this document, synchronicity is not relevant in defining an internal path versus a system to system interconnection.
128. In paragraph 187, the Régie cited its decision D-2006-66 “[...] *the same applies to the THT lines from the **interconnection** with Churchill Falls*” – thus acknowledging the Labrador interconnection.
129. In Paragraph 185 of the Decision, the Régie referenced a FERC quote related to the posting of ATC on internal paths. The Régie stated that “*FERC does not require posting about paths which have little commercial value*”.
130. The Régie erred by misinterpreting FERC's holding regarding when posting of ATC is required. The quoted language from FERC Order No. 889-A in paragraph 185 of the Régie's order refers to FERC's guidance regarding when to post ATC and TTC on transmission lines “across”, i.e., “within” a control area. It does not address the situation posed here with respect to posting of ATC and TTC on transmission lines “between” adjoining systems. Accordingly, HQT and the Régie erroneously applied the “little commercial value” language to inter-system ties like CF's line.
131. To the contrary, FERC unequivocally upheld the need for posting of ATC and TTC between transmission systems stating that “[a utility seeking waiver of ATC posting requirements would] still be required to post ATC and TTC for control area to control area paths that connect its member systems with neighboring transmission systems.” FERC Order 889-A, 30,564.
132. Regardless of the Régie's erroneous interpretation of the FERC posting requirements, it is also erroneous to conclude that a 5,200 MW interconnection has “little commercial value” since it gives access to a competitor of HQP to the Quebec grid.
133. Since the interconnection is a “Posted Path” according to the rules concerning posting, HQT was obligated to post this information as of 1997.

Conclusion for section VI

134. The lines crossing the Labrador-Québec border link two electrical systems and therefore must be considered a “path” under the rules of the OATT. This in turn obligates HQT to post the transmission capability of this path, as a “posted path” under the OATT/OASIS rules in order to preserve reciprocity and non discrimination through transparency.

135. The path has a commercial value since competition would be enhanced by enabling a new market participant access to the Québec transmission network.

VII. ERROR OF LAW AND FACT: THE USE OF CHURCHILL FALLS HISTORICAL FLOWS IN THE CALCULATION OF THE AVAILABLE TRANSMISSION CAPACITY (ATC)

136. The Régie erred in ruling that it was appropriate to use historical flows in the determination of ATC on lines from the CF station feeding into the HQT system.
137. While historical flows can be used to appropriately assign network capacity to serve native load in certain circumstances, it is not appropriate to do so in the context of the imports from the CF station to serve native load.
138. In accordance with section 38.1 of the OATT, ETC for serving native load must be based on firm deliveries, in the case of CF(L)Co these are stipulated in the HQ/CF(L)Co contract. HQT submitted that the ATC should be based on historical energy flows, whereas NLH submitted in addition of other arguments that it should be calculated based on Attachment C of the OATT, which requires the use of existing transmission commitments “ETC”.
139. According to evidence adduced by HQT, the average transmission calculated based on data recorded from 1983 to 2007 is 5,156 MW with a maximum transmission of 5,224 MW.
140. HQT submitted to the Régie that it was impossible for it to use the firm commitments under the CF(L)Co/HQ contract, as opposed to historical point transmission measurements, to calculate the ATC as it allegedly was not aware of the contractual obligations set forth under the HQ/CF(L)Co. contract.
141. It is imperative in applying Attachment C of the OATT that the terms of existing transmission service for the delivery of resources to native load customers be considered in the evaluation of the amount of transmission capability available.
142. If, in accordance with the Régie’s decision, one ignores the very existence of the contract, one infers that post 2041 HQT would continue to designate the Churchill Falls station in its entirety and use historical flows to calculate ATC on the LAB-HQT path. However, post 2041 HQ has no contractual rights to power from the CF station.
143. The Régie erred when it accepted HQT’s basis for determining Existing Transmission Commitments “ETC”, as provided in Attachment C of the OATT. However this was erroneous because HQT did not use firm contractual rights to determine the existing native load obligations in accordance with section 38.1 of the OATT.
144. By doing so, the Régie rendered a decision that did not comply with the OATT’s rules respecting the basis for calculating the ATC, namely:
- a) by ruling that use of historical flows was acceptable to determine capacity allocation for native load service for an off-system designated resource.

- b) by ruling that HQT was not required to be aware of the contractual obligations between Hydro-Québec and CF(L)Co yet was required to know the capacity and the energy transferred on the Churchill Falls lines for the purposes of supplying the native load from a designated generation station;
- c) by refusing to consider that solely firm commitments can be used in the determination of native load transmission entitlements in the calculation of the ATC;

The provisions of the OATT respecting the calculation of the ATC

145. The methodology used to calculate the ATC is described in Attachment C of the OATT:

“1. Available Transmission Capability (ATC) is the amount of unused transfer capability after consideration of the system reliability margin and requirements to:

(a) meet obligations of existing Transmission Service for the delivery of resources to Native-Load Customers;

(b) meet obligations of existing contracts under which Transmission Service is provided; and

(c) meet obligations of existing accepted or queued valid Applications for Transmission Service.

(...)”

Errors by the Régie in its acceptance of the basis used by HQT in its calculation of ATC and grounds for revision

(a) by finding erroneously that HQ did not have to be aware of the terms of the contracts between Hydro-Québec and CF(L)Co, but did need to know the capacity and energy transferred on the Churchill Falls transmission lines

146. In paragraph 289 of the Decision, the Régie stated that HQT does not have any information other than the actual historical flows measured on the CF Lines to determine ETC.

147. If one was to accept the decision of the Régie on that point it would follow that prior to 1997 Hydro-Québec had knowledge of the CF(L)Co/HQ contract which it had signed in 1969 yet at the entry into force of the functional separation of Hydro-Québec, the HQT division expelled from its corporate memory the existence of the CF(L)Co/HQ contract.

148. Evidence adduced at the hearing indicated that HQT was aware of the existence of the CF(L)Co/HQ contract. HQ signed this agreement on May 12, 1969. Therefore, in confirming at paragraph 289 of the Decision that HQT possessed no information other than historic electricity flow, the Régie committed an error of fact. It is illogical for a party to a contract to suggest that it has to be informed of the fact that it is a party to a contract.

149. Furthermore, in 1997 HQ having requested network service, had to comply with section 30.7 of the OATT and provide the HQ/CF(L)Co contract to HQT.
150. To assume that HQT has no knowledge of the HQ/CF(L)Co contract, it would mean that HQT violated the OATT by allowing the designation of an off-system resource without receiving adequate information from its affiliate about the extent of the firmness of the energy being delivered.
151. Similarly, the correct interpretation of sections 37.1 (iii), 38.1 and 38.7 of the OATT would require HQD to provide HQT with the generation and transmission entitlements under the HQ/CF(L)Co. contract. It is therefore incorrect for the Régie to rely on the statement that HQT does not have knowledge of the contents of this document in order to support the use of historical flows in the ATC calculation.
152. The Régie stated that HQT need not be aware of the terms of the contract between Hydro-Québec and CF(L)Co, but did need to be aware of the capacity and energy transferred on the Churchill Falls lines for the purposes of supplying the native load from a designated generating station (paragraph 260).
153. However, in testimony by witness Roberge in hearing R-3401-98, filed as evidence in the complaint, it was clear that knowledge of a contract is required for imports by the Distributor to serve native load, as follows:

“[...] No we leave the interconnections 100% open to everyone, unless the Distributor can very clearly demonstrate that he absolutely needs a very specific door because there is a contract coming via that door. You are right, we will close this door and reserve it for him”¹⁶.

[Translation]

154. The Régie also erred in its interpretation of the OATT because section 38.1 provides that a designated resource must be “non-interruptible”. It follows from this requirement that HQT has the obligation to verify the nature of the purchase made by the Distributor before recognizing the designation. Based on the fundamental principle of providing equitable service to network and native load customers. Native load and network customers must demonstrate their purchase commitments to avail of transmission service under part IV and part III, respectively.
155. FERC has recognized the requirement for both Network and Native load customers to be treated equally in 28.2 of its *pro forma* OATT, under the heading of 'Transmission Provider Responsibilities' it states:

“The Transmission Provider, on behalf of its Native Load Customers, shall be required to designate resources and loads in the same manner as any Network Customer under Part III of this Tariff.”

¹⁶ R-3401-98, November 14, 2002, pg 168.

156. Consistent with FERC's intentions of reciprocity, the clauses related to the limitation on designated resources in the HQT OATT for network and native customers should be consistent. We note that for the Network customers the following applies:

30.7 Limitation on Designation of Network Resources: "The Network Customer shall demonstrate that it owns or has committed to purchase generation pursuant to an executed contract in order to designate a generating resource as a Network Resource".

157. For the Native load customer the following applies:

38.8 Limitation on Designation of Resources: "The Distributor shall obtain all necessary resources to supply electricity to its Native Load and so inform the Transmission Provider."

158. Section 28.2 of the HQT OATT also is worded differently than the FERC pro forma OATT, in that it does not stipulate equivalency in the designation requirement:

"[...] The Transmission Provider shall plan, construct, operate and maintain its Transmission System in accordance with Good Utility Practice in order to provide the Network Customer with Network Integration Transmission Service over the Transmission Provider's system".

159. To comply with the fundamental principle of reciprocity HQT must apply the designation requirements to HQD, its own affiliate, distributor division as it applies to a network customer. The absence of comparable, non-discriminatory, non-preferential treatment of these two classes of customer would have profound implications for HQ's compliance with US reciprocity obligations.

160. Furthermore, the Régie contradicted its decision D-2002-286 and the submissions made by HQT at the time which were accepted by the Régie as the guiding principles regarding the management of the ATC on the interconnections: the Distributor must justify its transmission demand with an energy supply contract.

161. In decision D-2002-286, the Régie made reference to the stenographic notes of November 14, 2002, in which it is explained that the Distributor must produce evidence of a signed contract in order to set aside a portion of an interconnection:

"[...] in our interpretation of the designation of the interconnections, it's that they are a function of the contract that will pertain to the interconnection..."

"[...] we'll leave 100% of the interconnections open to everyone, unless the Distributor clearly demonstrates that he absolutely needs a precise point because there is a contract that involves that point [...]"

162. The same principles were applied when Part IV was added to the OATT. This was confirmed by the ruling at page 13 of decision D-2002-286:

"For the interconnections, the designated capacity is a function of the contract pertaining to the interconnection."

163. Pleading a lack of knowledge is not consistent with the effective administration of an OATT. The Régie committed a serious error of fact and law when it considered that such a methodology was acceptable, as it therefore condoned discrimination and impeded access to the system.

(b) by finding erroneously that the distinction between firm and non firm deliveries from the Churchill Falls station, foreseen in the 1969 CF(L)Co/HQ contract to supply Québec's native load, was not pertinent when calculating the ATC

164. With regard to the firm or non firm characteristic of the electricity from the Churchill Falls station, the Régie stated in paragraph 285 of the Decision that the fact that Hydro-Québec had received, for the past 40 years, electricity generated at the Churchill Falls station, as per firm or additional non firm obligations undertaken by CF(L)Co, does not change the historic reality of the electricity flow on the Hydro-Québec transmission lines originating from the Churchill Falls station to supply the native load.

165. According to the facts, the historic reality to which the Régie made reference consists of an aggregate figure that contains both annual firm and non firm deliveries.

166. The Régie ignored or set aside the rule enshrined in section 38.1 of the OATT when it stated that the distinction between the firm and non firm deliveries originating from the Churchill Falls was not relevant.

167. The proper interpretation of section 38.1 of the OATT is that it imposes on HQT the obligation to verify the nature of the purchase made by the Distributor before it is permitted to designate the resource.

168. The evidence presented at the hearing has demonstrated that a portion of the purchases made by HQ from the Churchill Falls station consisted of non firm deliveries. As specified in section 38.1 of the OATT, Distributor resources cannot include the resources, or any portion thereof, that cannot otherwise supply the native load of the distributor on an uninterrupted basis.

169. The distinction between the firm and non firm deliveries is a key element in assessing the ETC for the calculation of the ATC.

170. The Régie made an error of law when it refused to recognize that only firm deliveries can be used in the calculation of the ATC.

(c) by ruling that the use of historical flows was acceptable to determine capacity allocation for native load service for an off-system import

171. In order to measure the ATC of the LAB-HQT interconnection, HQT used the maximum value of the capacity and energy that was delivered to the Quebec/Labrador border.

172. As demonstrated in Section V of this document, the CF station is an off-system resource. In accordance with section 37.1 (iii) purchased power from an off-system resource

requires the identification of firm transmission arrangements to import into the HQT system.

173. In accordance with 38.1 the resource must be available to the native load customer on a non-interruptible basis and this must be achieved from both firm generation and transmission capacity entitlements. The firmness of these entitlements is a contractual issue; therefore historic flows are not an appropriate basis for determining native load service. Particularly given that historical flows may include both firm and non-firm flows – of which only the non-interruptible, firm flows are appropriately related to serve load.

Conclusion for section VII

174. The Régie accepts the idea that HQT cannot have knowledge of the terms of the contract under which HQ purchases a certain output from CF(L)Co, produced in Labrador, at the Churchill Falls station. This finding is in contravention of sections 30.7 and 38.8 of the OATT. In the case of section 30.7, HQ had to comply with this requirement when it requested Network service under part III of the OATT in 1997, and the same is true for 38.8 that require HQD to provide the information about its supply to HQT.
175. In order to be able to apply section 38.1 of the OATT which stipulates that designated resources must be available on a firm, non-interruptible basis to serve native load, the transmission provider needs to know the characteristics of the supply, and insure that the native load is being supplied with both firm generation and transmission when sourced in another system. These characteristics are what the transmission provider can use to adjust the ATC on its network when the import is done according to the rules of the OATT.

VIII. ERROR OF LAW AND FACT: THE SYSTEM IMPACT STUDY IS COMPLETE ACCORDING TO SECTION 19.3 OF THE OATT

176. The System Impact Study that has to be done, according to HQT, was a complex one given its magnitude. HQT, as a transmission provider, serving a client willing to buy transmission service, showed reluctance and had an unnecessary, illegal and narrow reading of its OATT obligations.
177. NLH submitted to the Régie at the hearing that the System Impact Study associated with SIS 101 as prepared by HQT was not complete within the meaning of section 19.3 of the OATT.
178. In paragraph 391 of the Decision, the Régie erroneously stated that it considered the System Impact Study to be completed by way of the issuance of the last report on December 11, 2007, and therefore, the study had been completed in conformity with the provisions of the OATT.
179. In paragraph 404, the Régie erroneously concluded that NLH did not satisfy the requirements of section 19.3 of the OATT in its letter dated January 24, 2008 and therefore because the 45 day deadline expired on January 24, 2008, NLH's request was no longer considered a completed application under the OATT.

Law applicable to the procedure of the system impact study

180. The procedure regarding undertaking a System Impact Study is presented at section 19.3 and in Attachment D of the OATT.

181. Section 19.3 of the OATT reads as follows:

“Upon receipt of an executed System Impact Study Agreement and the required technical data, the Transmission Provider shall use due diligence to complete the System Impact Study within one hundred and twenty (120) days, except for instances where the study requires more time, which shall be specified to the customer. The System Impact Study shall identify any system constraints and redispatch options or Network Upgrades required to provide the required service, and the estimated cost and time for Network Upgrades. In the event that the Transmission Provider is unable to complete the System Impact Study within such time period, it shall so notify the Eligible Customer and provide an estimated completion date along with an explanation of the reasons why additional time is required to complete the required studies. A copy of the completed System Impact Study and related work papers shall be made available to the Eligible Customer. The Transmission Provider shall use the same due diligence in completing the System Impact Study for an Eligible Customer as it uses when completing studies for itself. The Transmission Provider shall inform the Eligible Customer immediately upon completion of the System Impact Study of whether the Transmission System will be adequate to accommodate all or part of the service request, or whether costs are likely to be incurred for Network Upgrades. In order for a request to remain a Completed Application, within forty-five (45) days of receipt of the System Impact Study, the Eligible Customer must either execute a Service Agreement or confirm its intention to execute a Facilities Study Agreement in a timely manner or, for connection of a generating station, indicate which commitment under Section 12A applies to its project and, where appropriate, confirm in writing its intention to execute in a timely manner a Facilities Study Agreement or a Connection Agreement, failing which the Application shall be deemed terminated and withdrawn. Within the aforementioned forty-five (45) days, the Eligible Customer may, however, request that the period be extended up to a maximum of three hundred and sixty-five (365) days if it is unable to meet the deadline of forty-five (45) days due to deadlines in obtaining a government approval needed to complete its project and if it has demonstrated in writing to the Transmission Provider that it has taken all reasonable steps needed to obtain such approval. The extension so obtained shall be taken into account in establishing the planned service date.”

[emphasis added]

182. Attachment D sets forth the following:

“Methodology for Completing a System Impact Study

[...]

(4) If the System Impact Study indicates that Network Upgrades are needed to supply the applicant’s Application for service, the procedures

shall be the same as those used by the Transmission Provider for its own system expansion. The least-cost transmission expansion plan, considering but not limited to such factors as present value cost, losses, environmental aspects and reliability, shall be developed for review by the Transmission Provider. Based on the study results, the Transmission Customer can decide whether to proceed, modify or cancel its Application.”

[Emphasis added]

183. HQT must therefore complete the System Impact Study by using the same procedures and providing the same level of detail as the one it would have provided to another division of Hydro-Québec requesting a similar service. The System Impact Study must include the following elements:
- (i) any limitations of the system;
 - (ii) any options concerning the new redispatch; and
 - (iii) all the options concerning the additions to the system.
184. Finally, a copy of the working documents pertaining to the System Impact Study must be made available for the client of the transmission service.
185. Also, according to section 19.3 of the OATT, the transmission service customer must, within a 45-day period after receiving the system impact study, undertake one of the following two actions:
- (i) either execute a service agreement, or;
 - (ii) confirm its intention to execute a facilities study agreement in a timely manner.

Errors by the Régie in interpreting section 19.3 and Attachment D of the OATT

(a) in rendering a decision that contravened section 19.3 and Attachment D of the OATT and in wrongly interpreting the content of the System Impact Study conducted by HQT when it concluded that it was complete and satisfactory for the purposes of proceeding to the following step, namely the execution of a Facilities Study Agreement, despite the absence of key elements which would have permitted NLH to make an informed decision regarding the content of the facilities study

186. The Régie rendered a decision in contravention of section 19.3 and Attachment D of the OATT and erroneously interpreted the content of HQT’s System Impact Study in concluding that the latter was complete.
187. The study was lacking certain key elements and therefore did not provide NLH with sufficient information to make an informed decision.
188. The Régie committed an error of law and failed to rule on an important factual element by ruling that:

(i) the System Impact Study was complete even though HQT had limited it to the study of a new DC corridor and did not consider conversion of existing AC corridors to DC, or expansion of the 1250 MW corridor;

(ii) the System Impact Study was complete even though HQT had not studied the possibility of using the HQT-LAW path to go towards Ontario regardless of the long term ATC posted;

(iii) the System Impact Study was complete even though HQT had not provided NLH with the working documents at the time the reports were provided; and

(iv) the ATC assumption was subject to a formal complaint process.

All these considerations which were identified in NLH's letter to HQT dated January 24, 2008 as reasons for NLH's complaint against the application of the 45 day deadline.

(i) The System Impact Study was complete even though HQT had limited it to the study of a new DC intertie

189. In paragraph 383 of the Decision, the Régie did not accept the submission of NLH that the System Impact Study was incomplete because HQT limited its study to DC interties.

190. To arrive at this conclusion, the Régie omitted to rule on an important element of evidence, i.e. the interpretation that one must give to the commitment undertaken by HQT in the letter dated June 2, 2006.

191. The letter dated June 2, 2006, of HQT states the following:

« Your request for a maximum 1,422 MW HVDC transmission service to Ontario can be potentially served through a number of possible paths, existing or future. Hydro-Québec TransÉnergie will study with the party that NLH will identify (Hydro-One) all direct paths between Québec and Ontario [...] »

[Emphasis added]

192. Basing itself on this undertaking and the principle of non-discriminatory treatment of the OATT, NLH submitted to the Régie that it expected HQT to study the direct paths towards Ontario as a whole, and that the results of this analysis be presented in the System Impact Study. NLH, being conscious of the importance for HQ to remain asynchronous, had stated a preference for the use of a DC intertie, but in no way did NLH indicate any desire to limit the study of options into Ontario.

193. In paragraph 380 of the Decision, the Régie cited the letter dated June 2, 2006, which as noted above clearly indicated that all direct paths would be studied. However, the Régie completely omitted to mention this point in its interpretation leading to the conclusion stated at paragraph 383 of the Decision that they rejected NLH's claim that the study was incomplete.

194. This omission constitutes a substantive defect that invalidates the decision because on the one hand, section 19.3 of the OATT provides for the obligation of HQT to present all the system expansion options and, on the other hand, NLH expected, based on the letter of June 2, 2006, that HQT study the direct paths towards Ontario as a whole.
195. HQT failed to consider conversion of the existing AC interconnections to DC or expansion of the 1250 MW HVDC interconnection into Ontario.

(ii) The System Impact Study was complete even though HQT had not studied the possibility of using the HQT-LAW path between Quebec and Ontario.

196. In paragraph 391 of the Decision, the Régie concluded that the System Impact Study was complete upon the submission of the last report dated December 11, 2007, and that this study was carried out in conformity with the OATT.
197. However, it is obvious that the Régie failed to rule on the important factual element that use of the HQT-LAW interconnection was not considered in the SIS even though long term ATC was posted on OASIS.
198. However, NLH presented at the hearing a complete argument supported by evidence pertaining to the inclusion of the HQT-LAW interconnection. The Régie omitted to address this issue in the Decision.
199. HQT had justified its refusal to study the HQT-LAW interconnection by the fact that such utilization would imply the use of a resource, namely the Beauharnois substation. According to HQT, Beauharnois is a designated resource under section 38.1 of the HQT OATT and it is necessary to ensure the reliability of the system.
200. HQT should have considered modification to this interconnection that would maintain Beauharnois' designated status, while still meeting NLH's service requirement. By not considering this possibility, HQT was preventing access to NLH at this point of delivery to Ontario, and simultaneously protected HQT's exclusive access to this point on the Ontario system.
201. The Régie completely omitted to address and pronounce itself on this element of evidence when it concluded at paragraph 391 of the Decision that the system impact study was complete, without drawing a conclusion regarding the HQT-LAW interconnection or the Beauharnois substation.
202. This omission constitutes a substantive defect that leads to the invalidation of the Decision. HQT should have studied the possibility of the use of this path toward Ontario since it is available.

(iii) The system impact study was complete even though HQT had not provided NLH with the working papers at the time the study reports were provided.

203. NLH submitted to the Régie at the hearing that HQT was late in providing the work papers that served as the basis for the system impact study, and this was in contravention of section 19.3 of the OATT.

204. NLH received the system impact studies from December 4, 2006 to December 11, 2007. However, HQT did not provide the working documents to NLH until January 18, 2008.
205. Furthermore, in addition to the incompleteness of the study analysis and the ATC being in dispute, the working papers, a required component of a completed SIS were not provided. It is logical to conclude that the SIS was NOT officially completed in accordance with the OATT as of December 11, 2007 because these working papers had not been provided to NLH regardless of the reason why.
206. Working papers are important for the transmission services customer, as these documents enable the customer to better understand the SIS and evaluate the conclusions found in the impact study.
207. Upon reading the Decision, it is apparent that the Régie once again omitted to pronounce itself on an important element of evidence in the sense that it is completely silent with regard to the evidence put forward by NLH regarding the working papers.
208. This omission constitutes a procedural defect which invalidates the Decision as the Régie neglected to address an obligation of HQT under section 19.3 of the OATT. This issue has repercussions on the outcome of the entire impact study and therefore the conclusion of the Régie in this respect.

(iv) The ATC assumption was subject to a formal complaint process

209. On October 12, 2007, NLH filed a formal complaint with HQT with respect to ATC assumptions used in the preliminary System Impact Study.
210. In its December 11, 2007's letter, HQT rejected NLH's contention. This refusal led NLH to file a complaint at the Régie on January 11, 2008 with respect to the same assumptions.
211. Therefore, since ATC is a key element of the System Impact Study, NLH considers that SIS could not have been declared complete by HQT while this matter was subject to the complaint process. .

(b) by wrongly interpreting the 45 days deadline mentioned in section 19.3 of the OATT as NLH did signified on January 24, 2008 its intention to execute a Facility Study Agreement, thus wrongly terminating Request 101.

212. As evidenced at the hearing, NLH "confirmed its intention to execute a Facilities Study Agreement" on January 24, 2008 and thus met the test even if HQT created a new deadline by unilaterally imposing a new 45 day for "Pre-Conditions".
213. In the eventuality where the SIS is effectively completed, NLH does not need for the Régie to extend or suspend the 45 days delay since it has met the requirement of signifying its intention to proceed with a Facilities Study Agreement on January 24, 2008.

(c) in rendering useless the process by which a complaint is presented, set forth by the LRÉ and its related regulation, the OATT and applicable administrative law, which provides for the

interruption of a deadline when a complaint procedure occurs before the expiration of the deadline

214. At paragraph 402 of its Decision, the Régie stated that NLH requested that the Régie consider that the presentation of the complaint on January 24, 2008 should suspend the deadline of 45 days specified in section 19.3 of the OATT. In fact, NLH contested the fact that the 45 day deadline had been triggered because the SIS was incomplete.
215. The Régie ruled that it could not suspend the 45 day deadline, as extending the deadline would amount to changing the terms of section 19.3, which it is unable to do in a matter regarding a complaint.
216. In its decision on this point, the Régie committed an error of law for two reasons:
- (i) It did not take into consideration the rule of article 2892 CCQ according to which the filing of a judicial demand constitutes an interruption of the prescriptive period; and
 - (ii) It did not take into consideration the rule according to which the deadline is extended when it is in fact impossible for the creditor to act within the time limit.

(i) The Régie did not take into consideration the rule of article 2892 CCQ according to which the filing of a judicial demand constitutes an interruption of the prescriptive period

217. According to article 2892 CCQ,

“2892. The filing of a judicial demand before the expiry of the prescriptive period constitutes a civil interruption, provided the demand is served on the person to be prevented from prescribing not later than 60 days following the expiry of the prescriptive period.

Cross demands, interventions, seizures and oppositions are considered to be judicial demands. The notice expressing the intention by one party to submit a dispute to arbitration is also considered to be a judicial demand, provided it describes the object of the dispute to be submitted and is served in accordance with the rules and time limits applicable to judicial demands.”

218. According to the facts, NLH filed two quasi-judicial demands pertaining to its Request 101 between December 11, 2007 and January 24, 2008: first, on January 11, 2008, NLH filed complaint P-110-1565 with the Régie (prior to the complaint filed with HQT October 12, 2007); then, on January 24, 2008, NLH filed a complaint with HQT in conformity with the procedure of examination of complaints approved by the Régie.
219. Furthermore, the complaint filed before HQT, on October 12, 2007, with regard to the calculation of the ATC, illustrates that at the beginning of the 45-day deadline a disagreement already existed involving HQT, which could have had important repercussions on the content of the system impact study.
220. Although HQT is not in a “tribunal”, the complaint dated January 24, 2008 nonetheless constitutes a “judicial demand” as it represents an obligatory preliminary step before the

filing of a complaint before the Régie; it is the first step of the dispute resolution process provided by the legislator in Part VII of the LRÉ.

221. Each one of these judicial demands was sufficient to interrupt the deadline set forth at section 19.3 of the OATT.
222. At paragraph 402, the Régie refuses however to consider the logic of this argument: in fact, it does not consider the stay of the deadline as an “interruption” but rather an extension. The Régie indicates that the fact of granting the request of NLH and “extending the deadline would amount to changing the terms of section 19.3 of the OATT”.
223. Nowhere in the pleadings of NLH and HQT, did the issue of the extension of the deadline arise. NLH recognized that the deadline in question consists of 45 days and does not attempt to modify this duration but simply to recognize that a stay can be applied.
224. In fact, the interruption is not a concept that relates to the duration of a deadline. This concept is the subject of a distinct chapter in the CCQ in which the duration of deadlines is not considered. It is therefore a concept that is complementary to that of duration and that also has an effect on the date on which a right is extinguished.
225. It is because it is a complementary concept that one must take it into consideration here: the OATT, which does not provide for specific mechanisms of interruption or stay of deadlines, refers by its section 5 to the subsidiary law found in the CCQ.
226. Therefore, while NLH is disputing the triggering of the 45 day deadline, even if it had been triggered on December 11, 2007, which is denied, it was interrupted. It was clearly interrupted as a result of a compliant process that was initiated on October 12, 2007, and this process continued with actions on January 11, 2007 and January 24, 2008.
227. The deadline has been respected by NLH.

(ii) The Régie did not take into consideration the rule according to which the deadline is stayed when it is in fact impossible for the creditor to act within the time limit

228. The stay of a deadline can also be caused by impossibility to act.
229. In this case, the impossibility to act flows from the obligation that HQT is seeking to impose on NLH pursuant to its interpretation of section 19.3, that is the obligation to provide information that NLH is not in a position to provide as long as the dispute pertaining to the method of calculation of ATC and to the cost of the necessary additions to the system (which are the subject matter of the impact study) are not resolved.
230. According to this strict interpretation, the alternative thus offered to NLH consisted in it accepting the position of HQT in a dispute that is not yet resolved, in choosing an option and being bound in the future by this choice, or in losing its place in the reservation queue.
231. In these circumstances, the Régie’s Decision constitutes a procedural defect as it would cause NLH to illegally lose an important right, namely its rank as 101 in the list of impact

studies and priority access to available transmission. It would be unfair and inequitable to not permit the interruption or the stay of the deadline.

(d) in imposing an additional obligation on NLH beyond that stipulated in section 19.3 of the OATT, and in so doing adding to the provisions of the OATT. In adding these additional obligations the Régie exceeded its jurisdiction in this proceeding.

232. The Régie imposed upon NLH obligations that were not provided for in section 19.3 of the OATT and in doing so modified the conditions of the OATT and rendered a decision that exceeded its field of competence, which is limited to the application of the OATT.
233. On December 11, 2007, HQT transmitted to NLH the last report consisting of the impact study on the network associated with SIS 101. This report was accompanied by a letter in which HQT informed NLH that according to section 19.3 of the OATT, NLH was obligated, within a 45-day deadline beginning December 11, 2007, to confirm its intention to execute a facilities study agreement.
234. In this letter, HQT also requested that NLH provide it with additional information in order to permit it to proceed to the next step, namely undertaking a facilities study agreement. According to HQT, “it requires as a condition precedent to the Facilities Study Agreement that the above information be provided as part of NLH’s confirmation of intention to execute a Facilities Study Agreement”.
235. The information requested by HQT pertained to the following elements:
- (i) The choice selected from among five options that were examined under the system impact study, to be retained for the facilities study agreement;
 - (ii) Additional information regarding the Québec-Ontario interconnection; and
 - (iii) Confirmation of the location of the delivery point(s) of delivery and the identities of the receiving parties as well as the location of the load ultimately served by the capacity and energy transmitted for the chosen option.
236. Finally, HQT informed NLH that failure to provide such information within the 45-day deadline would lead to the consequences set forth in 19.3, which is that service request would be deemed terminated and withdrawn.
237. On January 24, 2008, within the 45-day deadline and in conformity with section 19.3 of the OATT, NLH indicated in a letter to HQT its intention to enter into a facilities study agreement.
238. During the hearing of complaint P-110-1597, HQT alleged that passing to the stage of the facility study agreement would require that NLH provide the required information, and should NLH be in default of this obligation, the facility study agreement could not be undertaken.
239. At paragraph 397 of the Decision, the Régie accepted the assertion of HQT and confirmed that to be able to sign a facilities study agreement, the parties had to be able to

prepare the agreement, and to do so, NLH should have first responded to the requests of HQT set forth in exhibit NLH-6.

240. On the basis of this affirmation, the Régie concluded that by its letter dated January 24, 2008, NLH had not complied with the obligations of section 19.3 of the OATT and as a consequence of this non-compliance, Request 101 could not be considered a completed request for the purposes of section 17.2 of the OATT.
241. NLH requests that the Régie review the Decision. By imposing upon NLH obligations that are not foreseen under section 19.3 of the OATT namely “Pre-Conditions”, and in doing so the Régie modified the text of the OATT and rendered a decision that exceeded its jurisdiction.
242. According to section 101 of the LRÉ, in the context of a procedural complaint, the Régie is limited to the interpretation and the application of the OATT. This competency does not allow it to modify the wording of the OATT.
243. The wording of section 19.3 is unambiguous and the obligations that are imposed on a transmission service customer are clearly identified especially in light of a complete and accepted request under section 17.2 of the OATT.
244. Within a 45-day deadline, beginning upon receipt of the completed system impact study, the customer must signify its intention to execute a facility services agreement in a timely manner. Section 19.3 does not impose any further obligations on the customer within the deadline.
245. By criticizing NLH for not having provided HQT with the requested information within this 45 day period, the Régie imposed upon a transmission service customer a supplementary obligation that was not contemplated by the OATT.
246. Section 19.3 foresees that the step following the system impact study is either the execution of a services agreement when service is available or notification of the customer intent to execute a facility services agreement.
247. As it was the case with the system impact study executed with HQT, NLH expected that there would be a discussion process leading up to the signature of a facility study agreement. In the context of such a discussion which timeframe is define under the OATT as a “timely manner”, the parties could have evaluated and decided upon the extent of the facility study agreement to be undertaken.
248. According to NLH, the receipt of the additional information requested by HQT could have taken place in the context of the negotiation of the facility services agreement without compromising the service agreement, as alleged by HQT and confirmed by the Régie in its Decision.
249. It is important to remember that at the moment of the filing of the request for additional information, a complaint had already been filed with regards to the applicable basis used to calculate the ATC, which would have had a direct impact on the content of the system impact study.

250. By obligating NLH to provide the additional information requested by HQT within the OATT 45-day deadline, the Régie committed an error of law which, as a consequence, invalidated the Decision which is limited to the application of the OATT.

Conclusion for section VIII

251. The System Impact Study was a complex one given its magnitude. HQT refused to serve NLH and showed reluctance and had an illegal and narrow reading of its OATT obligations.
252. The Régie rendered a decision that contravened section 19.3 and Attachment D of the OATT and wrongly interpreted the content of the System Impact Study conducted by HQT.
253. By confirming its intention to execute a Facilities Study Agreement on January 24, 2008, NLH met the test of section 19.3 of the OATT.

IX. ERROR OF LAW AND FACT : NLH MADE A NEW DEMAND OF SERVICE AND NOT A PROVISIONAL OR PARTIAL DEMAND OF SERVICE

254. The system impact study revealed that the service required on three of these interconnections (HQT-NY, HQT-NE and HQT-NB) could be offered for 20 years without having to make additions.
255. At paragraph 495 of the Decision, the Régie concluded that HQT was justified in refusing to engage in negotiations with NLH in view of concluding a firm point-to-point transmission service agreement for export towards New-Brunswick, New-England and New York, and considered the first conclusion of this complaint not founded in fact and in law.
256. This conclusion is based on incorrect analysis of section 19.7 of the OATT and the failure to correctly apply the notion of partial interim service.

The law applicable to partial interim service

257. Article 19.7 of the OATT provides the following :

“Partial Interim Service: If the Transmission Provider determines that it will not have adequate transmission capability to satisfy the full amount of a Completed Application for Point-to-Point Transmission Service, the Transmission Provider nonetheless shall be **obligated** to offer and provide the portion of the requested Point-to-Point Transmission Service that it can accommodate by redispach without Network Upgrades. However, the Transmission Provider shall not be obligated to provide the required incremental amount of Point-to-Point Transmission Service that requires Network Upgrades until such upgrades have been commissioned.”

[Emphasis added]

258. Pursuant to section 19.7 of the OATT, the transmission provider has the obligation to offer and to supply the portion of the point to point transmission service requested that it can accept without additions to the system and by a new redispatch. The section does not determine any limit for the partial service that the transmission provider must offer.

(a) by erroneously interpreting the content of the letter dated January 24, 2008 and incorrectly finding that this letter constituted a new request for services resulting from a re-combination of options that were initially stated in Request 101; and the Régie erroneously decided that this was not a request for partial interim service, a service that furthermore was granted by HQT to another division of Hydro-Québec, HQP

259. At paragraph 491 of the Decision, the Régie concluded that the request of January 24, 2008, is not a partial service demand pursuant to section 19.7 of the OATT, i.e. a portion of the point to point transmission service requested, but rather a new request for service.

260. In support of this conclusion, the Régie relied primarily on the following facts stated by HQT in its pleading and reiterated by the Régie at paragraph 490 of the Decision:

(i) “This new wheel-out request (the January 24, 2008 request) recombines the delivery segments of the wheel-through transactions contemplated in Option 2 (**95 MW** – over path HQT NE), in Option 3 (**95 MW** – HQT NE path and **190 MW** – over path HQT MASS) and in Option 4 (**95 MW** – over path HQT NE and **284 MW** –over path HQT NB)” ;

(ii) “This new wheel-out request does not specify the source of power to be transferred or the service period. Whereas under Request 101, the power came from the Lower Churchill generating stations and the service requested was for 30 years, HQT does not know the source of the power to be wheeled out under new request or the service period, which could be for 20 or 30 years”.

261. The letter dated January 24, 2008 does not constitute a new request for service. In order to demonstrate the error committed by the Régie, one can refer directly to the wording of the supplementary impact study report filed by HQT on December 11, 2007:

“On the basis of the service agreements valid for the period of service requested and the renewal rights associated to the conventions in existence on this present date, the deliveries requested by NLH towards New England, New York State and New Brunswick can be transmitted by the current interconnections for the period between the beginning of the requested service and the end of the useful life of these interconnections without supplementary additions to the system.”

[Emphasis added]

262. In actual fact, the object of NLH’s service request was transmission service on five interconnections (LAB-HQT, HQT-ON, HQT-NY, HQT-NE and HQT-NB) and deliveries to Quebec for 30 years. The system impact study revealed that the service required on three of these interconnections (HQT-NY, HQT-NE and HQT-NB) could be offered for 20 years without having to make additions.

263. When enquiring as to the transmission that was available on those three paths, NLH was not asking for a modification to its service request under study 101: it still wanted to obtain the service requested under this application. If the transmission provider informed NLH that it was not able to provide all that was requested, section 19.7 of the OATT obligated the transmission provider to provide, nevertheless, the level of service that it was able to provide.
264. Therefore, the request made in the letter dated January 24, 2008 was not a modification of Request 101 or a new request; it was simply a clear application of section 19.7 of the OATT. The service customer has the right to obtain the available service and the transmission provider has the obligation to offer it and to supply it when it is available.
265. The Régie committed a manifest error in the interpretation of the facts when it considered that the letter dated January 24, 2008 constituted a new service request, as this letter in no way modified its service request under SIS 101 and NLH did nothing other than exercise its right under section 19.7 of the OATT.

(b) by contravening section 19.7 of the OATT which stipulates that the transmission provider is obliged to offer and provide partial interim service.

266. In concluding that the letter dated January 24, 2008 constituted a new request for service and not a request for partial interim service, the Régie set aside a rule of law, namely section 19.7 of the OATT.
267. Effectively, as the supplementary impact study report demonstrated that a portion of the point to point transmission service could have been accepted without additions to the system, HQT had an obligation to offer and to supply this service to NLH.
268. In accordance with the first come first served principle, failure to offer this service to NLH would compromise NLH's rights associated with its queued position. This could also potentially increase the cost of the upgrades for NLH if this capacity is provided to a competitor who requested service after NLH.
269. Furthermore, NLH requested to receive the same treatment as HQP had received regarding the same interconnections: in effect, HQT had offered to HQP a service agreement for 35 years on the paths HQT-NY and HQT-NE, up to 1,200 MW on each path, following HQP's Requests 102 and 103 (requests filed 24 hours after the one made by NLH) which are immediately subsequent to NLH Request 101, effectively, in contravention of the first come first served principle.
270. Finally, the simple act of requesting from a Transmission provider to examine the possibility of modifying a request should not invalidate a pending request. A client can modify a request under the Attachment D, paragraph 4 of the HQT OATT.
271. NLH reiterates its arguments with respect to the use of the HQT point as a point of delivery and a point of receipt, given that Régie did not decide on this issue.

Conclusion for section IX

272. The system impact study revealed that the service required on three of these interconnections (HQT-NY, HQT-NE and HQT-NB) could be offered for 20 years without having to make additions.
273. The Régie committed a manifest error in the interpretation of the facts when it considered that the letter dated January 24, 2008 constituted a new service request and when it refused to order HQT to offer NLH interim partial service on HQT-NY, HQT-NE and HQT-NB paths, while offering such partial service to its affiliate HQP.

X. CONCLUSION

274. NLH urges the Régie to review, in a diligent manner, Decision D-2010-053 provided that this decision is affected by several substantive and procedural defects.
275. Based on the evidence presented in this application, it is clear that a correct interpretation of the evidence and a correct application of the HQT OATT, the following conclusions must be drawn
- a) NLH's service request must be reinstated in the HQT service request queue because the 45 day deadline was incorrectly triggered and the Régie's subsequent denial of a stay of the deadline was erroneous.
 - b) The ATC used in the SIS 101 must be corrected to reflect a correct assessment of existing transmission commitments (ETC) in accordance with the HQT OATT. If ETC is deemed to be zero then the full transmission capacity of 5,200 MW is available, or at a minimum the ATC must be calculated from HQ's firm entitlements in the HQ/CF(L)Co contract.
 - c) HQT must be required to complete SIS 101, and in doing so including the study of all viable options to provide NLH with service into Ontario.
 - d) NLH should be permitted to enter into service agreements for capacity available on interconnections into New England, New York, and New Brunswick, in accordance with the provisions for partial service in the HQT OATT.
 - e) Consistent with the principle of non-discrimination, NLH should be permitted to use the HQT point as a point of delivery, in a manner consistent with HQ's use of the HQT point. The Régie refused to rule on this point as they had decided that NLH's application was no longer a completed application. However, a reinstatement of NLH's request does require Régie direction on this issue.

ON THESE GROUNDS, NLH REQUESTS THAT THE RÉGIE DE L'ÉNERGIE:

- **GRANT** the present request for revision of Decision D-2010-053 rendered May 11, 2010, regarding complaints P-110-1565, P-110-1597 and P-110-1678;

With respect to complaint P-110-1565

- **GRANT** the present complaint of NLH;
- **ORDER** to HQT to consider¹⁷ that NLH has a priority reservation for firm point-to-point transmission service for capacity and energy for the proposed Lower Churchill Falls hydroelectric development under the HQT's OATT;
- **ORDER** HQT to post on its OASIS site the transmission service requests made on the LAB-HQT path by NLH in the chronological order received and correct any inadequacies in light of this posting and the applicable OATT rules;
- **ORDER** HQT to provide NLH with a transmission service agreement from the Labrador interconnection to the HQT point;
- **ORDER** HQT to fully disclose on OASIS the available transmission capability between the proposed Lower Churchill Falls hydroelectric development and the HQT system and any bookings for transmission service (in any form) from the Churchill Falls facility;
- **ORDER** HQT to revise the base case underlying the SIS 101 analysis and conclusions in light of the revised ATC from the Churchill Falls substation to the HQT point; and
- **ORDER** that this revision should be undertaken at no additional cost to NLH;

With respect to complaint P-110-1597

- **GRANT** the present complaint of NLH;
- **ORDER** HQT to consider that the System Impact Study for Reservation for firm long-term point-to-point transmission service number 101 is not completed and that consequently, the 45 days deadline was not in effect on December 11, 2007;
- **ORDER** HQT to modify the status as “pending” instead of “completed” on the “Table of Impact Studies” found on HQT's website under the heading “Impact studies” referring to the System Impact Study No. 101T until the Régie de l'énergie resolves the present complaint;

¹⁷ NLH's written argument, p. 18, para. 62.

- **ORDER** HQT to provide complete information on redispach or reconfiguration scenarios, system constraints and network upgrades regarding interconnection into Ontario in order to enable NLH to make an informed decision;

With respect to complaint P-110-1678:

- **GRANT** the present complaint of NLH;
- **ORDER** HQT to offer a Service Agreement to NLH for the following transactions posted on the HQT OASIS under number:

501235: 284 MW (New Brunswick)

501233: 95 MW (New England)

501231: 190 MW (New York)

- **ORDER** HQT to recognize that NLH is in its right to use the HQT point as a delivery and a point of receipt;

RENDER any order which may be appropriate in the circumstances.

Montréal, June 9, 2010

(s) Fasken Martineau DuMoulin

FASKEN MARTINEAU DuMOULIN LLP
Counsel to NLH

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