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Delivered by E-mail

Crystal Henwood
Regulatory Affairs Officer/Clerk
Nova Scotia Energy Board
3rd Floor, 1601 Lower Water Street
PO Box 1692, Unit "M"
Halifax NS B3J 3S3

Dear Ms. Henwood:

Re: M12696 – NSPML – Application to Review Holdback Mechanism

These submissions are filed on behalf of the Industrial Group with respect to NSPML's Application seeking discretionary relief and the termination of the monthly holdback mechanism (the "Holdback").

NSPML requests termination of the Holdback, back-dated to May 1, 2024, and the return of all Holdback amounts retained after that date together with carrying costs at NSPML's weighted average cost of capital ("WACC"). The Application asserts that NSPML has satisfied the two conditions established by the Board for termination of the Holdback within the 12-month period between May 2023 to April 2024 (the "Compliance Period") "[s]ubject to Board relief". NSPML concedes that it fell short of the 90% delivery threshold in 4 of those 12 months — July 2023, September 2023, March 2024, and April 2024 — and applies to the Board for relief from those shortfalls on the grounds of good utility practice and exceptional circumstances.

Effectively, the Application is a request for discretionary relief over a specified 12-month Compliance Period, not a demonstration of full and consistent compliance. Significantly, the performance record immediately following the Compliance Period (a period that NSPML itself relies upon to demonstrate the LIL's reliability) reveals that NSPML failed to meet the 90% threshold in 5 of the 6 months thereafter, May through October 2024, including a complete absence of deliveries in August 2024.

The Industrial Group submits that NSPML has not satisfied the Board's conditions for termination and, instead, supports the continued application of the Holdback until the requirements for termination are appropriately and consistently demonstrated. In particular:

1. the "Consistent Deliveries" threshold, was not met during the Compliance Period of May 2023 through April 2024, and the Post-Compliance Period performance is inconsistent with the premise that the concerns warranting the Holdback have been "fully resolved";

2. the flexibility built into the Board's test through the concepts of "exceptional circumstances" and "good utility practice" is available only for the 12-month consecutive requirement, not

for the monthly 90% threshold and should be limited to genuinely unforeseeable, non-recurring events or that are required for good utility practice;

3. the evidence does not support the granting of full relief for all three months claimed under good utility practice, nor does the April 2024 outage satisfy the higher standard of exceptional circumstances; and

4. in the alternative, or in any event, should the Board release any portion of the Holdback funds retained since May 2024, NSPML should not be entitled to recover a carrying charge at WACC, given its 21-month delay in advancing this proceeding.

LEGISLATIVE FRAMEWORK

The *Maritime Link Act*, SNS 2012, c 9 (the "*ML Act*"), and the *Maritime Link Cost Recovery Process Regulations*, NS Reg 189/2012 (the "*ML Regulations*"), establish an approval mechanism by which NSPML recovers its costs from NSPI, which in turn then recovers those from ratepayers. Section 8(1) of the *ML Regulations* requires that before receiving energy under the Nalcor Transactions, an applicant must set an assessment against NSPI for the recovery of all approved project costs and obtain the approval of the Board pursuant to section 64 of the *Public Utilities Act*, RSNS 1989, c 380.

Section 4 of the *ML Act* provides that the Board has the general supervision of the ML Project and of NSPML in respect of the ML Project. The Board's jurisdiction is broad and its powers under the *Public Utilities Act* has been, and should be, interpreted liberally with respect to setting rates and cost recovery.

The Industrial Group agrees that a utility is entitled to recover its prudently incurred costs and earn a fair return on its invested capital. For NSPML, however, the Board imposed conditions on cost recovery to ensure that the rates charged to customers are just and reasonable and that ratepayers receive the value that was the basis for the original regulatory approval.

The Board specifically designed the Holdback as a customer-protection tool because of the disparity between the promised benefits and the benefits received. Its creation emphasized caution toward NSPML and the need for consistent deliveries over an appropriate period in order to receive full cost recovery.

HISTORY OF HOLDBACK

The Board approved the ML Project in its 2013 ML Project Approval Decision [1] as the lowest long-term cost alternative for renewable electricity for Nova Scotia ratepayers. The approval was conditional, however, on NSPML securing access to Nalcor Market-priced Energy. Without that access, the ML Project could not stand on its own merits. The resulting suite of complex commercial agreements, referred to as the Nalcor Transactions, represented the “original bargain”: ratepayers would pay the ML assessment costs in exchange for reliable annual deliveries of the NS Block, Supplemental Energy, and access to Market-priced Energy from Muskrat Falls.

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[1] *NSP Maritime Link Incorporated (Re),* 2013 NSUARB 154.

The Holdback mechanism was first established in the Board's 2018 Interim Assessment decision.[2] In that decision, the Board approved the Maritime Link as placed in-service and approved NSPML's interim cost assessment, but directed that NSPI hold back $10 million in both 2018 and 2019, to incent the "conservatively estimated benefits" promised and to take account of the risks to ratepayers from the delay in NS Block delivery.[3]

In both 2018 and 2019, actual benefits were far below the holdback threshold and far below the $120 million+ that NSPML and NSPI had projected in 2017. While the ML was placed in-service on January 15, 2018, the NS Block was delayed due to a variety of problems related to the construction and commissioning of the Muskrat Falls Generating Station and the Labrador Island Link ("**LIL**").

NSPML executed an Acceleration Agreement with Nalcor on August 6, 2021, commencing delivery of the NS Block prior to full LIL commissioning, but persistent problems with the LIL resulted in continued delays in deliveries. The holdback mechanism continued through the 2020 and 2021 interim assessment decisions.

In the Final Project Costs decision,[4] the Board approved the final project costs, despite finding that the pre-condition to applying for Final Assessment as set in the 2018 Interim Assessment decision had not been met; only 19% of the contracted NS Block had been delivered since the Acceleration Agreement. Recognizing the ongoing harm to ratepayers, the Board imposed a new $2 million monthly holdback. The decision reads:

> *[31] The Board has determined it is appropriate to continue a form of holdback to provide some continued protection to ratepayers. The holdback is as follows: Starting April 1, 2022, and in each subsequent month of 2022, NS Power is to holdback $2 million from the approved assessment. If in that month NSPML/NS Power achieve and receive 90% of the basic NS Block and Supplemental Energy, the holdback will be released to NSPML in the following month. If 90% of the basic NS Block and Supplemental Energy is not achieved, the holdback monies will be used to pay for the cost of any replacement energy that may be required as a result of the failure to achieve the 90%, to a maximum of $2 million per month. Any portion of the $2 million not utilized to pay for replacement cost energy would be paid over to NSPML. This holdback mechanism will continue in each and every month during 2022 and then will be reviewed by the Board in January of 2023.*
>
> *[32] <u>The fact that today's customers are paying for the Maritime Link but not receiving anything close to the full benefit has caused intergenerational equity concerns.</u> <u>This holdback, in some small way, may ameliorate those concerns to the extent an imbalance continues.</u> The Board believes this holdback would not jeopardize NSPML's ability to service the federal loan guaranteed debt; however, if circumstances arise where that becomes a concern, NSPML should immediately apply to the Board for relief.*

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[2] *NSP Maritime Link Incorporated (Re),* 2017 NSUARB 149.

[3] Ibid, para 121.

[4] *NSP Maritime Link Incorporated (Re),* 2022 NSUARB 18.

[Emphasis added]

The $2 million holdback continued following the 2023 cost assessment proceeding.[5] Separately, the Board initiated a proceeding, Matter M11009, to consider the disposition of the Holdback in all months during 2022 and 2023 in which NSPML/NS Power failed to receive 90% of the NS Block. In that decision, the Board:

1. directed that $12 million of holdback funds from April 2022 to June 2023 be credited to ratepayers through the FAM;

2. increased the monthly holdback from $2 million to $4 million effective December 1, 2023; and

3. established the conditions for termination of the Holdback which are at the heart of the current application:

   a) at least 90% of the NS Block, measured in MWh (excluding Make-up Energy), is received during each of 12 consecutive months, and

   b) the net outstanding balance of undelivered energy is less than 10% of the contracted annual amount of the NS Block.[6]

Additionally, the Board added a qualification: NSPML may apply for relief "*if it considers that good utility practice or exceptional circumstances caused it to fail to meet the consecutive 12-month requirement*", and that if the Board is satisfied such circumstances existed, "*it may provide relief and may attach any terms and conditions it deems appropriate at that time*."[7] The Board expressly rejected NSPML's proposal of a three-month threshold, instead requiring a longer period of consistent performance.

Relief under the “good utility practice or exceptional circumstances” provision is a limited exception, not a broad exemption.

Within the compliance filing provided in that proceeding, NSPML made additional requests including the release of holdback funds in certain months, relief in months of certain planned outages, and the release of holdback funds prospectively on a monthly basis where the 90% threshold of deliveries are met. The Board issued a decision[8], which confirms:

1. The good utility practice and exceptional circumstances relief applies only to the 12-month consecutive requirement, not to the monthly 90% threshold.[9]

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5 *NSP Maritime Link Incorporated (Re),* 2022 NSUARB 191.

6 *NSP Maritime Link Incorporated (Re),* 2023 NSUARB 175 at para 94.

7 Ibid, at para 95.

8 *Public Utilities Act (Re),* 2024 NSUARB 17.

9 Ibid at para 12.

2. The 12-month period does not need to begin prospectively, and can begin no earlier than May 2023 (the month after LIL commissioning in April 2023).[10]

3. The Board signaled it would not be inclined to grant relief for the March 2023 planned outage, as it pre-dated LIL commissioning, and highlighted that, "*the technical difficulties with the Labrador Island Link were a significant factor in the delay of NS Block deliveries and were a key reason for the imposition of the monthly holdback itself*."[11]

4. The Board cautioned against planning outages to circumvent holdback consequences.[12]

5. The Board confirmed WACC is appropriate when holdback funds are owed but not yet paid, on a reciprocal basis with the treatment of funds owed to customers.[13]

NSPML then advised in June 2024 that it intended to file its termination application in the fall of 2024.[14] It did not. The current application was filed February 2026, approximately 20 months after its letter to the Board and 21 months after the date it now claims the termination conditions were first satisfied. Accordingly, the 2025 and 2026 Annual Cost Assessments continued the $4 million monthly holdback pending further Board Order.

NSPML now requests termination of the Holdback dating back to the earliest possible period, May 2023 to April 2024, and is seeking accumulated WACC on the amounts held back within the 2025 Cost Assessment, which total approximately $16.5 million.[15]

NSPML HAS NOT MET THE THRESHOLD FOR TERMINATION OF THE HOLDBACK

There are two Holdback termination conditions: (1) the 12-month delivery requirement of 90% basic NS Block and Supplemental Energy (referred to as the "Consistent Deliveries" threshold); and (2) the 10% outstanding balance threshold of Undelivered Energy. The termination test is stated in quantitative conditions, excluding Make-up Energy, and requires consecutive months.

NSPML does not dispute that it failed to achieve the 90% monthly NS Block delivery threshold in 4 of the 12 months of its chosen Compliance Period. As set out in Appendix A of the Application, and as acknowledged expressly in NSPML's request for relief, Base NS Block deliveries (excluding Make-up Energy) fell below the 90% threshold in the following months:

- July 2023: 82% of the contracted NS Block amount delivered;

- September 2023: 66% of the contracted NS Block amount delivered;

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10 Ibid at paras18-22.

11 Ibid at para 21.

12 Ibid at para 26.

13 Ibid at para 39.

14 Matter M11773, N-01 NSPML Holdback Mechanism Letter (June 28, 2024).

15 N-1, Application, Section 6.0, and Appendix B. Holdback amounts since the Compliance Period total $15,352,756; and interest at WACC (6.75% for the period of April 2024 – March 2025 and 6.65% for April 2025) equals $1,148,502.

- March 2024: 87% of the contracted NS Block amount delivered; and
- April 2024: 60% of the contracted NS Block amount delivered.

NSPML requires Board relief for three months based on good utility practice (July 2023, September 2023, and March 2024) and one month based on of exceptional circumstances (April 2024).

Bates White, the Board Counsel consultant, confirmed its opinion that NSPML has not clearly met its evidentiary burden to satisfy the Consistent Deliveries threshold, and it has not recommended the Board grant NSPML's request to end the Holdback.[16] The Industrial Group agrees.

What is particularly concerning, however, is that this selected 12-month period was immediately followed by five months of underperformance, which emphasizes why the Holdback's purpose remains unsatisfied. As confirmed in Appendix C of NSPML's Application, the delivery performance in the six months immediately after the end of the Compliance Period is as follows:[17]

Month	**Base Contract Delivery (%)**	**Met 90% Threshold**
May 2024	62%	No
June 2024	99%	Yes
July 2024	86%	No
August 2024	0%	No
September 2024	44%	No
October 2024	83%	No

Consistent with the Post-Compliance Period delivery failures, the net outstanding balance of Undelivered Energy again exceeded the 10% threshold. As a result of the planned outages and associated delivery shortfalls in the summer and fall of 2024, the balance climbed back above 10%. By September 2024, it had risen to 11% of the annual contract amount, and by October 2024, it reached 12%.[18] The balance was not reduced below 10% again until November 2024. Had NSPML applied to terminate the Holdback at any point from September through October 2024, it would not have satisfied the conditions imposed by the Board.

The Industrial Group further notes that in the Post-Compliance Period, outages were undertaken in connection with DC current transformer ("DCCT") replacements that had reportedly been in

[16] N-9, BW (IG) RIR-1

[17] See also N-3, NSPML (CA) RIR – IR 3 for additional explanation for outages during July – October 2024.

[18] N-1, NSPML Application, Appendix C, Column entitled "Make-Up Balance".

service for approximately six years and were causing reliability concerns.[19] However, within its Holdback Review Compliance Filing in Matter M11009, the DCCT replacement was among the work items that NSPML referenced as a pending multi-day outage planned for the November/December 2023 timeframe.[20] At that time, this replacement was described as relating to the replacement of originally installed DCCTs, which were noted as presenting a "*risk that (absent holdback relief) this planned outage will result in a material monthly holdback disallowance and restart of the 12 consecutive months of reliable operations*."[21]

When the Industrial Group specifically asked NSPML about the reasoning and records related to the further delay of this DCCT replacement work ultimately completed in 2024 —after the applied-for Compliance Period — NSPML provided no internal documentation or communications relating to the decision to further delay this work, and stated only: "*This outage was deferred because the DC Current transformers were not available from GE's manufacturing facility to install*."[22] This is despite NSPML having confirmed knowledge of the required replacement as early as 2022.[23]

The Board specifically cautioned NSPML in para. 26 of 2024 NSUARB 17 "*about planning outages to circumvent the financial implications of the holdback conditions.*" The DCCT deferral, combined with the absence of documentation, appears to be precisely the scenario the Board warned about.[24]

As confirmed by the Consumer Advocate's expert, Mr. Wilson, NSPML's 14% outage rate since April 2024 is itself concerning,[25] and Mr. Wilson, acknowledged that the holdback criteria "*probably would not have been met if the 14% outage rate had occurred during the 'Compliance Period'*."[26] Ratepayers continue to absorb the impact of these delivery shortfalls.

RELIEF FROM THE THRESHOLD REQUIREMENTS IS NOT WARRANTED

The Board has allowed for a degree of flexibility for NSPML to meet the stated threshold obligations, to address the need for some margin of interruption that is "*required due to good utility*

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[19] See: N-01, Application, page 23; N-04(C), NSPML (IG) RIR-11. For further context, the RIR-11 confirms that the DCCTs were "installed prior to 2019 when monopole operation of the LIL was first attempted" and "were not in continuous electrical operation from this date; however, they were physically installed in the system." This suggests that the noted "in service for approximately six years" in the Application at page 23, line 19, is technically inaccurate, as the transformers were installed before 2019, but the LIL was not commissioned until April 2023, so they were not in continuous electrical service operation for six years.

[20] Matter M11009, Exh. N-24, NSPML Holdback Compliance Filing, page 9.

[21] Matter M11009, Exh. N-24, NSPML Holdback Compliance Filing, page 10.

[22] N-4, NSPML (IG) RIR – 11(d).

[23] N-4, NSPML (IG) RIR – 11(b).

[24] See N-4, NSPML (IG) RIR-7, which confirms the number of DCCT Transformer related forced outages between June 2023 and April 2024. After April 2024, the DCCT-related outages no longer appear as "forced outages", but instead are "planned outages". There were then notable outages in May 2024 and July-September 2024 related to these similar issues.

[25] N-8, Evidence of John Wilson, page 6, lines 17-22.

[26] N-10, CA (IG) RIR-3.

practice or exceptional circumstances".[27] The interruptions must be "required" by good utility practice or exceptional circumstances, not merely *consistent* with them.

Relief is discretionary, not automatic. The burden rests with NSPML to establish that the Board should exercise its discretion to grant such relief over the 12-month Compliance Period. That burden has not been met based on the evidentiary record in this proceeding.

<u>Good Utility Practice</u>

Good utility practice is not limited to a single definition or universal standard and is not a standard of perfection. Rather, it includes a variety of reasonable approaches while adhering to industry regulations and sound business practices. Planned outages for maintenance of complex assets are inherently part of good utility practice, but not every outage automatically qualifies.

Concentric notes in its evidence that the Joint Operating Agreement defines "Good Utility Practice" consistently with FERC's standard.[28] This includes: practices, methods, and acts engaged in or approved by a significant portion of the electric utility industry, or practices which, in the exercise of reasonable judgment, would have been expected to achieve the intended result in a manner consistent with safety, environmental requirements, economy, and expedition. Regardless, this is a contractual definition, and the Board is not bound by the description contained within the Nalcor Transactions.

All planned and unplanned outages cannot be deemed to fall under "good utility practice". As the Industrial Group submitted in Matter M11009, if every planned maintenance outage were to automatically qualify for relief, the Holdback would provide no meaningful protection and NSPML could simply schedule outages in ways that systematically avoid the delivery threshold. This does not provide the protection intended by the Board. The Board took note of these prior submissions and confirmed good utility practice must be assessed on the specific facts and evidence for each month.

July 2023 Outage

NSPML seeks good utility practice relief for the five-day planned LIL bipole outage in July 2023, characterizing it as a post-commissioning software and SCADA update outage required to enhance reliability. Base NS Block deliveries in July 2023 were 82%.

The Industrial Group submits that the evidence surrounding the July 2023 outage does not establish a good utility practice excuse for non-compliance with the 90% threshold. The work performed in July 2023 was post-commissioning work that had been anticipated prior to commissioning of the LIL. While the July 2023 outage technically occurred after LIL commissioning in April 2023, this work was directly tied to activities that were ongoing as part of, and in continuation of, the LIL commissioning process.

NSPML's Application acknowledges that the July 2023 outage was required for "*software backup/validation efforts relating to the final software updates designed to remedy non-critical*

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27 *NSP Maritime Link Incorporated (Re),* 2023 NSUARB 175 at para 93

28 N-1, Application, Attachment 1, Concentric Evidence, page 14 of 36; N-4, NSPML (IG) RIR- 23, Attachment 1, page 18-19 of 111.

software punch list items."[29] By NSPML's own description, the work was tied to the completion and validation of software needed to resolve outstanding LIL punch-list items, and was therefore directly related to the successful commissioning of the LIL.

That evidence sits in contrast with NSPML's response to IG IR-8, where NSPML stated that there were no software updates to the ML that required either a multi-day bipole outage or any multi-day outage at all.[30] NSPML has not clearly explained why software-related work on the LIL required a five-day bipole outage in July 2023, or why that outage should excuse NSPML's failure to meet the Consistent Deliveries requirement on the basis of good utility practice, in consideration of the fact that there have been no multi-day outages for any software updates completed to the ML. This simply confirms that the July 2023 outage work completed was not a general maintenance or software update; rather, it was directly tied to the completion of the LIL commissioning process.

Software issues have hampered the LIL's performance for years. Despite commissioning of the LIL in April 2023, the LIL still required a "final" version of software to resolve a total of 111 "punch-list items and other items that were deferred to the final release." Installation of this final software did not occur until August 2024, which is several months after the conclusion of NSPML's Compliance Period.[31]

While NSPML's expert, Concentric, characterizes the July 2023 outage as consistent with good utility practice on the basis that post-commissioning software work is normal for large infrastructure, the Industrial Group submits this characterization conflates the existence of post-commissioning work generally with the question of whether the timing, scope, and planning of this particular outage reflects that standard. This was not routine post-commissioning optimization; it was deferred commissioning work.

A five-day bipole outage to install software that was required for full commissioning is not evidence of good utility practice; it is evidence of an asset that was not fully commissioned at the time the Compliance Period began.

September 2023 Outage

NSPML seeks good utility practice relief for September 2023, during which 10 days of LIL bipole outages were taken for planned annual maintenance, resulting in a Base NS Block delivers of 66%.

The Industrial Group previously acknowledged in Matter M11009 that it would *"not object to relief being granted for the month of September 2023 only in regard to achievement of the continuous reliability condition*."[32] That position was taken in Matter M11009 based on limited information then available. In this proceeding, Bates White's IR responses have established that the claimed coordination between the ML and LIL outages did not occur as NSPML described. In principle, a genuinely coordinated annual planned outage of a complex asset, taken in a lower-load shoulder period and coordinated with regional system operators, is consistent with good utility practice.

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29 N-1, Application, page 18, line 11.

30 N-4, NSPML (IG) RIR 8.

31 As confirmed in N-7, BW Evidence, page 27 lines 5-16.

32 Matter M11009, IG submissions dated November 10, 2023, page 6.

However, the evidence adduced in this proceeding confirms that was not what occurred in September 2023.

Bates White raised a concern about the claimed coordination between the ML and LIL outages in September 2023. As confirmed in its IR responses, the LIL bipole outage ran from September 17 to 26, 2023 whereas the Maritime Link planned outages ran from approximately September 11–14 (Pole 1) and September 14–17 (Pole 2).[33] This means the ML maintenance was already complete by the time the LIL went offline on September 17; the outages ran in sequence, not in parallel. Bates White characterized this as "*a missed opportunity to better optimize the Maritime Link annual outage*."[34]

Relief for good utility practice is not warranted. Rather, it appears that NSPML's separate, 10-day bipole outage of the LIL may have been contrary to good utility practice and failed to optimize the ML annual outage. Despite Bates White's apparent invitation for a "*compelling reason or constraint as to why*" these outages were done in sequence, the Rebuttal Evidence fails to provide one. In fact, the Rebuttal Evidence of Concentric acknowledges that the ML had full availability during the LIL bipole outage period.[35] Concentric's explanation of single-pole overlap earlier in September does not address the key point: the bipole outage causing the delivery shortfall began on September 17, after the ML was fully restored. There was no concurrent impairment of the ML during the period of the LIL bipole outage that actually caused the delivery shortfall.

The Industrial Group submits that the Board should consider whether the claimed coordination which is central to NSPML's good utility practice argument for September was in fact achieved. At a minimum, the evidence raises legitimate questions about whether the scheduling of the ML outage was optimized in the manner NSPML claims. While the annual planned maintenance itself is consistent with good utility practice, the failure to align the ML and LIL outages to minimize impact on deliveries is a factor the Board should weigh in assessing whether this month warrants relief.

March 2024 Outage

NSPML also seeks good utility practice relief for March 2024 based on a planned two-day LIL bipole outage (March 26–27) to repair damage from an ice storm, including OPGW repairs and electromagnetic interference mitigations. However, the Application's footnote 25 suggests that the March 30–31 icing event, which NSPML separately characterizes as an "exceptional circumstance" justifying April 2024 relief sought, was independently sufficient to have caused the March 2024 shortfall.[36] Base NS Block deliveries in March 2024 were 87%.

Context on this outage is important. The March 2024 planned outage work relates to corrective maintenance arising from prior failures on the line, rather than routine, scheduled maintenance required by good utility practice. The Industrial Group notes that the derating of the ML on March

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[33] N-9, BW (IG) RIR – 2 (a).

[34] N-9, BW (IG) RIR – 2(d).

[35] N-11, Rebuttal Testimony of Danielle Powers, pages 8-9. It is further worth noting that it appears Ms. Power's knowledge of the Nova Scotia system may be limited, having referenced the NSIESO (which did not yet exist) as the body that would have limited the transfer over the ML to single pole capabilities, at page 9 lines 5-7.

[36] N-1, Application, page 18, footnote 25.

11 and 12, 2024 due to inclement weather in Newfoundland (limiting imports to 170 MW) appear to have separately contributed to the delivery shortfall. [37] The Board should assess whether the derating on March 11–12, caused by weather conditions that limited import capability, independently reflects good utility practice or forms part of a broader pattern of weather-related vulnerabilities.

The Industrial Group does not suggest that repairing damaged equipment, or taking corrective action to address reliability concerns, is inconsistent with good utility practice. To the contrary, such work may be necessary and prudent. The consideration before the Board on this proceeding, however, is not whether the actions in March 2024 are *consistent* with good utility practice – they may very well be. The question is instead whether a delivery shortfall caused by corrective work on a system already operating in a degraded or vulnerable condition should be excused under the Board's Holdback relief, based on this delivery shortfall being *required by* good utility practice. Essentially, the Board is asked whether the consequences of that corrective work should be shifted to ratepayers through Holdback relief. They should not.

Good utility practice relief should not convert ordinary corrective maintenance, undertaken to address prior failures or known system vulnerabilities, into an exemption from the Consistent Deliveries requirement. The Holdback was imposed precisely because ratepayers were not receiving the promised level of deliveries. Where the outage is required to repair or mitigate problems on the LIL, the resulting shortfall is part of the very reliability risk the Holdback was intended to protect against and not a reason to release NSPML from its consequences.

The Industrial Group respectfully submits that ratepayers should not be expected to bear the consequences of shortfalls caused by the LIL operating in a degraded state.

<u>Exceptional Circumstances</u>

The meaning of "exceptional circumstances" for the purposes of this Application, should be informed by the same principles applicable in *force majeure* analysis, as has been suggested by Bates White.[38] Through that lens, extreme weather can be considered an exceptional circumstance, but not always.

Bates White has helpfully provided some guidance into *force majeure* criteria:

> *From a policy perspective, force majeure clauses often try to isolate events that (1) prevent performance by a party to the agreement, (2) that such non-performance is not directly or indirectly caused by the non performing party, (3) that the event is outside the control of the non-performing party, (4) that the event could not have been prevented by the non-performing party through taking all reasonable precautions to avoid such an event, and (5) the non-performing party could not overcome the event by the exercise of due diligence.*

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[37] N-1, Application, page 20.

[38] N-7, Bates White Evidence, page 30; N-9 Bates White (IG) RIR-3.

The Industrial Group agrees with using this approach. The event must be one that could not have been prevented through the exercise of reasonable precautions, was outside the party's control, and, most applicable to this matter, was not foreseeable.

Where known prior events have raised specific design concerns, and where the same type of failure (unbalanced ice loading) has contributed to other historical outages on the same asset, the threshold for calling the resulting damage "exceptional" should be elevated.

April 2024

NSPML seeks relief for April 2024 deliveries on the grounds of "exceptional circumstances," arising from the forced LIL bipole outage caused by significant ice accumulation in late March that continued into April 2024. Ice accumulation and wind speeds at the affected section of line (estimated at 100–125 mm of radial ice) are said to have nearly doubled the maximum design capacity of the lines, which are designed for a maximum of 50 mm of radial glaze ice. Base NS Block deliveries in April 2024 were 60%.

The key question is whether the event qualifies as "exceptional circumstances", given the context of pre-existing knowledge about the LIL's vulnerabilities to unbalanced ice loading.

In response to Industrial Group IR-9, NSPML has produced the LIL Strengthening Overview Report of NL Hydro which confirms that in total, there have been ten failure events on L3501/2 over the past five years; each was a localized issue affecting a small number of specific transmission line components.[39] Investigations determined that the root cause of the damage for seven of the 10 events was overloading due to significant ice accumulation and unbalanced ice loads from ice shedding.[40] The March/April 2024 icing event was not the first, second, or even third time the LIL has experienced structural failure from ice loading. Prior significant events occurred in January 2021, December 2022, and February 2024.[41]

The line had known design vulnerabilities to unbalanced ice loading, which were acknowledged by NLH's expert in the Haldar Report completed March 2021.[42] NLH had identified structural vulnerabilities in the LIL and assessed LIL reliability in consideration of climatological conditions. As confirmed in Bates White's evidence, the Haldar study "*concluded that the LIL lacked structural integrity to handle certain circumstances of unbalanced icing load, a phenomenon that occurs due to 'unequal ice accumulations or shedding in adjacent spans' that can 'include critical out-of-balance longitudinal loads on the supports*.'"[43] While further study may have been completed, the issue is that the vulnerabilities were known and identified but not fully remediated before the March-April 2024 event.

Given the known concerns around the insufficiency of the LIL's design, the multiple prior icing events before April 2024, and the possibility that ice shedding causing unbalanced ice loads on

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39 N-4, NSPML (IG) RIR 9, Attachment 1, LIL Strengthening Overview January 2026, page 10 of 195.

40 N-4, NSPML (IG) RIR 9, Attachment 1, LIL Strengthening Overview January 2026, page 13 of 195.

41 N-4, NSPML (IG) RIR 9, Attachment 1, LIL Strengthening Overview January 2026, page 13-14 of 195 and 100-101 of 195.

42 N-2, NSPML (BW) RIR -15 Attachment 1.

43 N-7, Bates White Evidence, page 31, lines 10-13.

the structures contributed to the damage of the towers,[44] relief is not warranted for NSPML's failure to meet the Consistent Deliveries threshold in April 2024. The Industrial Group supports Bates White's conclusion that the findings in the Haldar Report do not support NSPML's position that the March–April 2024 outage was excused by exceptional circumstances.[45]

Relief for "exceptional circumstances" should be just that — exceptional. It should not be granted for foreseeable events where there are known design flaws in the line.

CONSISTENT PERFORMANCE HAS NOT BEEN ACHIEVED OVER THE COMPLIANCE PERIOD

The Industrial Group notes the importance of examining the full picture of the 12-month Compliance Period in determining whether the multiple failures in delivery, including two months in which only approximately 60-66% of the contracted NS Block was delivered, warrant relief on the basis that those failures were required by good utility practice or exceptional circumstances. These are not marginal under-deliveries, and represent one third of the Compliance Period.

The Board quite deliberately set the requirement at a 12-month consecutive threshold, not a three- or six-month one, in recognition of NSPML's "unbridled optimism" and the pattern of over-promising and under-delivering. Relief from a threshold that has not been met should not be afforded liberally, particularly where there is demonstrated underperformance immediately following the applied-for Compliance Period.

The Industrial Group does not consider it reasonable that NSPML could select any 12-month period of its choosing for purposes of termination, and then immediately thereafter fail to meet the 90% threshold in many subsequent months — including receiving 0% of the promised energy in August 2024. That outcome defeats the protections the Holdback was designed to provide. Termination of the Holdback would leave ratepayers without any meaningful protection in circumstances where the post-Compliance Period performance demonstrates that the delivery concerns were not fully resolved.

In essence, NSPML would permanently remove the Holdback protections, retroactively over two years, by identifying a 12-month window of improved performance, applying for relief for one-third of those months, and then immediately return to months of underperformance without consequence. Above that, ratepayers would then be asked to compensate NSPML with interest on Holdback funds from those subsequent months of underperformance. That would be unreasonable and unjust.

While the Industrial Group recognizes the genuine improvements in ML and LIL performance since April 2023, and acknowledges the many real benefits of the ML for Nova Scotians since that time, those improvements do not erase the years of shortfalls that ratepayers have absorbed nor does it negate the fact that ratepayers continue to pay for the reduced deliveries and increased costs of replacement energy since that time. This includes through the increased assessment payments related to the recent $500 million bond issuance backstopped by the second Federal Loan Guarantee. The improvements do not mean that the threshold requirements have been met; they have not.

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44 N-4, NSPML (IG) IR-9 (a).

45 N-9, BW (IG) RIR-4, (d-e).

The Board's 12-month requirement was intended to ensure that consistent reliable delivery was established before the Holdback was removed. The period between May 2023 and April 2024 does not do that. Neither does the period that followed.

It is the Industrial Group's position that the Holdback should remain in place until the full conditions are met, and that the appropriate course is for NSPML to continue toward full compliance.

NO INTEREST ON POST-COMPLIANCE PERIOD HOLDBACK AMOUNTS

In the alternative, should the Board find that the evidence supports termination of the Holdback effective May 1, 2024, the Industrial Group submits that NSPML should not be entitled to recover interest (WACC) on the Holdback funds accumulated after that date.

NSPML advised the Board in its letter of June 28, 2024, that it believed the conditions for termination had been met and that it would file an application in the fall of 2024.[46] NSPML did not file this Application until February 3, 2026, which is approximately 20 months later.

The consequence of NSPML's delay in bringing this Application is that approximately $15.3 million in post-Compliance Period holdback funds has been withheld from NSPML, with WACC continuing to accumulate. Not only does the significant quantum of these Holdback funds underscore the concerns noted above regarding the failure to meet the Consistent Deliveries threshold, but the associated interest over the past two years[47] is itself substantial: exceeding $1 million.

The Industrial Group notes that the accumulation of these holdback amounts and associated WACC is a consequence of NSPML's own choice to delay its application. It would be unreasonable for ratepayers, who have carried the full burden of the ML assessment costs throughout the years of under-deliveries, and who carry a FAM balance of over $120 million partly attributable to ML underperformance, to also be required to compensate NSPML with interest on Holdback funds that accumulated because of NSPML's self-inflicted inaction in bringing this Application.

It is further worth noting that NSPML confirmed its retention of Concentric in connection with the Holdback application in February 2024, two years before this Application was filed.[48] Within the 2026 Assessment hearing, during questioning by Vice Chair Deveau, the only reason given for the delay was that there were other priorities.[49]

In the M11009 Decision on the Holdback Disposition compliance filing, the Board allowed WACC on released holdback funds as a matter of reciprocity, noting that "*when funds are owed to customers, they are repaid inclusive of WACC*."[50] That rationale applies to delays caused by the regulatory process itself, not to delays caused by a party's own choice to defer its application.

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46 Matter M11773, N-01 NSPML Holdback Mechanism Letter (June 28, 2024).

47 See for comparison, N-4, NSPML (IG) RIR – 3 (a), which provides a summary of prior Holdback amounts dating back to 2018 that total $31 million. In the period since May 2024, the Holdback has already reached half that total amount accumulated over six years.

48 N-4, NSPML (IG) RIR 19 (a).

49 M12394, NSPML 2026 Assessment Application, Transcript Day Two, pages 559-560.

50 *Public Utilities Act (Re),* 2024 NSUARB 17, at para 39.

NSPML knew in June 2024 that it intended to file; the decision to wait approximately 20 months was its own, regardless of the stated reason. NSPML should not benefit from a retroactive termination date it could have secured far earlier and at the same time claim a carrying cost created by its own delay.

The Industrial Group submits that if the Board directs that the Holdback be terminated retroactively to May 2024, the post-Compliance Period holdback funds should be released without the addition of WACC. Granting both retractive termination and WACC would give NSPML the full value of compliance it did not achieve, and reward delay which is inconsistent with the remedial purpose of the Holdback.

CONCLUSION

The Industrial Group respectfully requests that the Board:

1. Reject NSPML's request to terminate the Holdback retroactively to May 2024 on the basis that:

    (a) NSPML has not demonstrated full compliance with the Board's holdback termination conditions;

    (b) Relief from the threshold requirements is not warranted for either good utility practice or exceptional circumstances over the 12-month Compliance Period applied for.

2. In the alternative, if the Board grants termination, NSPML should not receive WACC on post-Compliance Period holdback amounts, given that NSPML's delay in bringing this Application is the reason those amounts accumulated.

All of which is respectfully submitted.

Yours truly,

Nancy G. Rubin, K.C.

Brianne Rudderham

BER/NGR/cj

cc Participants in M12696