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August 8, 2012

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Ms. Alanna Gillis
Acting Commission Secretary
British Columbia Utilities Commission
Sixth Floor – 900 Howe Street
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Dear Ms. Gillis:

RE: Project No. 3698640
British Columbia Utilities Commission (BCUC)
British Columbia Hydro and Power Authority (BC Hydro)
Application (the Application) for a CPCN for the DCAT Project
BC Hydro's Reply Submission

We enclose for filing BC Hydro's Reply Submission in the above noted matter.

The Reply contains no direct reference to evidence filed in confidence and accordingly is available to all parties in its entirety.

Yours very truly,

LAWSON LUNDELL LLP

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CWS/tss
Encl.

cc: All Parties

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IN THE MATTER OF the Utilities Commission Act, R.S.B.C. 1996, Chapter 473 and An Application by the BC Hydro and Power Authority for a Certificate of Public Convenience and Necessity for the Dawson Creek/Chetwynd Area Transmission Project.

Project No. 3698640/Order G-132-11

BC Hydro and Power Authority

Reply Submission

August 8, 2012

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I. Introduction

1. The majority of Intervenors participating in the BCUC's review of BC Hydro's application for a CPCN for the DCAT Project support the granting of the CPCN, in most cases unconditionally. BC Hydro will not respond to those submissions with the exception of CECBC and CSI insofar as it disagrees with observations in those submissions that cause those parties to seek conditions on the CPCN which BC Hydro views as either unnecessary or undesirable. In structuring this reply, BC Hydro has endeavored to limit the reply to arguments that it has not already fully addressed in its original argument.

2. This Reply Submission will address each adverse Intervenor argument in turn and then will address the concerns with respect to the conditions proposed by the two supportive Intervenors referenced above.

3. Prior to addressing Intervenor arguments, BC Hydro does wish to correct one potential source of confusion in its original argument. In the first paragraph of Section 4, page 10 of the Argument, BC Hydro described the project as including "the addition of 230/138 kV transformation". That transformation is at BMT and the sentence would have been clearer if the words "at BMT" were added at the end of that phrase.

II. AMPC

4. AMPC's argument largely reprises the evidence of Mr. Stout that BC Hydro addressed in its original argument. In particular, AMPC again details the basis for its concerns with respect to TS 6 and suggests that those concerns justify denying adequate service to existing customers in the DCAT service area who are no longer served at the standard that applies in the rest of the province, and denying service to the new customers in the natural gas industry that have requested it. BC Hydro fundamentally disagrees. The core of the disagreement implicates paragraph 36 through 42 of AMPC's argument. These paragraphs contain a flawed interpretation of the governing provisions of the *Utilities Commission Act* (**UCA**) in the context of this issue.

5. In paragraph 38, AMPC accepts that a hearing of a type which has not yet occurred must occur before the BCUC has jurisdiction to change an existing rate. But AMPC says that, in the meantime, the BCUC should assume, or worse, conclude, without a hearing on that issue, that BC Hydro's rates in the form of TS 6 are unjust and unreasonable. In argument, BC Hydro said that the BCUC cannot do this.[1] Although unsaid there, the bases for BC Hydro's submissions in that regard are the very sections that AMPC says (in paragraph 40) that BC Hydro neglected. Section 59(4) and (5) of the UCA make it plain that the BCUC is the sole judge of what is "unjust and unreasonable". A public utility is obliged to charge

[1] BC Hydro and Power Authority Final Written Submission at p. 17.

the approved rate and the BCUC's determination that that rate is just and reasonable is a determination of fact that is "binding and conclusive on all persons and all courts" (s. 79 of the UCA). That includes the BCUC until the BCUC has taken the necessary steps to review the rate and conclude otherwise. The only way the rate can be changed is through the complaint process contemplated under section 58(1), or based on a review or appeal under section 99 or section 101 of the UCA. None of those events has occurred here.

6. Again, AMPC is asking the BCUC to assume that the outcome of a rate review will be that TS 6 is not just and reasonable. The BCUC has no jurisdiction to make that assumption without first conducting the review necessary to support that finding. Although questions pertaining to the application of TS 6 have been ruled within the scope of this hearing, such inquiry does not authorize the BCUC to undermine and thus not apply a rate it has approved as just and reasonable.

7. At a non-legalistic level, the approach AMPC has taken is presumptuous. It is AMPC that complains that TS 6 is no longer just and reasonable. BC Hydro does not. BC Hydro accepts that British Columbia faces some extraordinary new opportunities for development and that government has expressed a desire to conduct a review of industrial rate policy generally in that context, but at this time has reached no conclusions with respect to TS 6. Such a review requires engagement of the appropriate stakeholders, which has not yet occurred. Thus, at this stage, BC Hydro is in no position to bring forward an application predicated on the assumption that TS 6 should be changed.

8. Apparently, AMPC considers itself to be in that position. If it has been there for some time, it could have brought forward an application to have TS 6 revised. AMPC should have expected that until it did so BC Hydro, the BCUC, and other ratepayers of BC Hydro would continue to apply TS 6 in its current form.

9. AMPC's position that BC Hydro itself ought to have anticipated a need to change TS 6 is also not consistent with the evidence. It suggests BC Hydro ought to have sought to revise TS 6 as early as 2008 apparently because of a document that was filed by BCUC staff after the evidence relating to non-consultation issues was otherwise complete and which has not been the subject of comment by any party.[2] The inferences drawn at paragraph 75 of AMPC's argument based on that document are entirely speculative. On its face, even if the document is accepted, the most that it shows is that in 2009, BCTC believed that its ability to serve the Dawson Creek and Chetwynd areas at an N-0 standard would be compromised by 2018/19, based on approximate numbers which would need a system impact study (since undertaken) to verify. Accordingly, BCTC sought funding to develop the definition phase of the DCAT Project. That work was done and it eventually led to this proceeding and the considerably more current information contained in the evidence which has been led during it. To suggest that this two

[2] Exhibit A2-3.

page preliminary document ought to have induced a comprehensive review of BC Hydro's major industrial rate policy is an enormous stretch. It is an even bigger stretch to suggest that delay is warranted because of it and that the interests of the existing residents of the Dawson Creek area and the new industry that would like to locate there can be put on hold while AMPC's newfound concerns are considered.

10. The second major basis for AMPC's complaint is the alleged inconsistency between TS 6 and the treatment of customers on the NTL Line, which is an exempted project under s. 7 of the *Clean Energy Act* (**CEA**) and in respect of which BC Hydro is allowed to file a unique rate (s. 8 of CEA). In its evidence AMPC speculated about how NTL customers may be treated. However, there is simply no evidence as to how customers will be treated on the NTL Line before the BCUC. Repeating AMPC's speculation in its argument does not change that situation. There is no evidence before the BCUC that would permit it to conclude that TS 6 is unjust and unreasonable, even assuming that it had the jurisdiction to do so in this proceeding, on the basis that it is inconsistent with treatment of other customers potentially under a different rate, which AMPC has speculated about but provided no evidence of. AMPC's failure in that regard is understandable –BC Hydro has not yet finally determined the treatment that NTL customers will receive, so the evidence does not currently exist.

11. AMPC also comments on the questions raised by the Commission. BC Hydro does not believe that any further comment on these questions is required in response because BC Hydro's position is fully set out in its argument and in any event, many of these questions are ones which can better be explored in a forum that is focused on broader industrial rate policy. The exception may be AMPC's submission that the GDAT project must be considered in the context of this hearing.

12. The submission that the GDAT project must be considered in the context of this hearing is supported by BCPSO (formerly BCOAPO) and even by CECBC which otherwise has fully supported BC Hydro's position. BC Hydro will address the comments of AMPC, BCPSO and CECBC in this regard here.

13. BC Hydro does not dispute that restoring service to mandated levels in the Dawson Creek area will require additional capital expenditures over a period of time in the future. The extent of those expenditures will become known over time as the precise nature of the facilities that best fit the evolving conditions becomes known. In this respect, the Dawson Creek area is like any other in the province – it has periods of growth and BC Hydro must respond to those periods with appropriate plans as soon as is practical.

14. TS 6 does not contemplate and indeed BC Hydro has never attempted to predict the indefinite future in determining what contribution new customers should make to the system when they come to it. If customers are fortunate enough to come to BC Hydro's system at a time when their load can be served without any system reinforcement costs being incurred, no contribution is required from them. If they come to the system when specific projects are contemplated in order to get them service at all,

then they are required to either make contributions to or provide security in connection with those developments or both in accordance with the provisions of TS 6. That is the situation in which the new customers to be served in the Dawson Creek area find themselves. In no circumstances are BC Hydro customers required to make contributions based on expected future increases in load, no matter how likely such increases appear to be, if BC Hydro has not yet determined what facilities are going to be necessary in order to serve that future load.

15. The entire structure of TS 6 is facility specific and the costs which can legitimately be imposed on a customer who signs a Facilities Agreement must be connected with specific physical assets that BC Hydro has identified as being necessary to serve the customer's load. Beyond the DCAT Project there are no such physical assets which have at this time been identified by BC Hydro[3] and there is no right under TS 6 for BC Hydro to charge customers for possible future physical assets that have not been specifically identified. In BC Hydro's respectful submission that is the end of that matter and the arguments of all of AMPC, BCPSO and CECBC to the contrary should be rejected.

16. Finally, in paragraph 77 of its argument, AMPC tries to invoke BC Hydro's request for a 4-month suspension of this process to justify its request that customers in the Dawson Creek area wait 2 to 3 years while AMPC's concerns about TS 6 are addressed. Four months is very different than 24 to 36 months. Moreover, BC Hydro engaged in significant discussions with its customers to determine how they might accommodate that 4-month delay and, in its revised schedule, has indicated how to accommodate their needs with minimum disruption. No such accommodation could be reached if the major delays proposed by AMPC became necessary and in that circumstance, customers would face the real prospect of having self-supply thrust upon them[4] notwithstanding the protestations to the contrary of AMPC.[5] AMPC effectively acknowledged this impact when it references customer contingency plans in paragraph 76 of its argument.

III. BCPSO

17. BCPSO at pages 7-8 of its argument suggests that there is uncertainty with respect to BC Hydro's load forecast. However, its comments on those pages entirely ignore the fact that security has been provided by the five new customers that alone make up enough of the forecast increase in load to justify the DCAT Project. BC Hydro has rarely received stronger forms of commitment that new load will materialize than is represented by that security.

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[3] Exhibit B-22, Attachment 2 at p. 7, line 9.

[4] Exhibit B-22, Attachment 2 at p. 13 (A28), p. 15 (A34), p. 17 (A40 and A42), and p. 20 (A50); see also p. 11 (A21 "Air Liquide's only option if electric service is not available from BC Hydro would be to close its operation") and Submission of Air Liquide Canada at para. 7.

[5] Final Written Submission of AMPC, at para. 48.

18. At page 12, BCPSO opines on the methodology used by BC Hydro in comparing local generation alternatives with the DCAT Project and suggests that it is "disingenuous for the Utility to then assume for the purposes of the economic comparisons with gas-fired generation, that the energy supplied to the area for the DCAT option will be sourced from natural gas." While there are a number of different energy costs that could have been used in comparing the G1 and G2 local gas-fired generation options with a "DCAT scenario" that includes the DCAT Project plus energy, the most rational comparison avoids the use of dissimilar energy cost parameters that would distort an economic choice between capital investment alternatives. There is no basis in evidence to conclude that using the cost of new clean energy, as BCPSO seems to suggest, or any other energy alternative would result in a more valid or rational comparison. Further, in light of the revised *Electricity Self Sufficiency Regulation* and Special Direction No. 10 to the BCUC, BC Hydro's new forecast base suggests that the system has and will continue to have surplus capacity for several years,[6] therefore BC Hydro submits that using the cost of new clean energy would not provide a helpful comparison. BC Hydro also notes that CECBC (see CECBC argument at p. 21) supports BC Hydro's assessment that a purely cost-based comparison ignores the statutory limitation on the quantity of gas-fired generation available to BC Hydro, and the opportunity costs associated with using some of that quantity in the Dawson Creek area rather than elsewhere. There is no "serious flaw" in BC Hydro's analysis as suggested by BCPSO.

19. At line 248-50 on page 12 of its argument, BCPSO suggests, without explanation, that "overall, BC Hydro's case for the DCAT Project hinges on loads evolving as anticipated in BC Hydro's base load forecast and very little variation is required before ratepayers face the cost of stranded assets". BC Hydro knows of no support on the record for that suggestion and to the contrary, suggests that the evidence overwhelmingly shows that over a broad range of forecasts, significant reinforcement is required on an urgent basis. It may be that if the actual load growth varies from the base forecast, the specific solution proposed by BC Hydro will look more or less attractive. However, hindsight may always be employed to reassess the ideal alternative but that reassessment does not mean the alternative that was constructed will not continue to be useful. Thus, there is fine tuning in deciding which of alternatives 1 or 2 is preferable based on what is known today, and BC Hydro has put forward its explanation as to how that fine tuning occurred. To suggest however that the consequence of choosing one alternative over the other will lead to "stranded" assets is to fundamentally misunderstand the planning process.

20. On pages 15 to 20, BCPSO addresses some flaws that it sees in the precise details of the manner in which TS 6 was employed to calculate the security required from the five new customers. At the end of a lengthy analysis, BCPSO concludes, "Using 73 MW as opposed to 176 MW in the offset calculation results in $175.8 M which still exceeds these customers pro-rated share of the total capital costs" (page 20, lines 463-5). This is an acknowledgment by BCPSO that even if all of the adjustments that it

[6] Exhibit B-22, Attachment 2 at p. 35, ll. 20 – 28 (A65) and p. 36, ll. 25 – 26 (A68).

proposes were made, there would still be no contribution required from these customers. Contrary to BCPSO's submission, the purpose of this hearing is not to set an appropriate precedent for interpreting TS 6. The purpose of this hearing is to determine whether or not a Certificate of Public Convenience and Necessity (**CPCN**) should be granted for the DCAT Project. Unless a proper interpretation of TS 6 would suggest that a significantly different contribution would be required from customers, the decision whether to issue a CPCN will not be affected by this line of reasoning. Since BCPSO does not submit that a contribution would be required, its submissions need not be addressed further now.

21. More generally, in addressing the question of security, BCPSO seems not to appreciate the significance of the posting of the security. It is not just that BC Hydro will have money to protect itself against stranded assets. Security also provides BC Hydro with a very high level of confidence that the load it has forecast will materialize because customers have been willing to put their money on the line in this respect. Obtaining security of this magnitude is not an everyday occurrence and this removes a large element of uncertainty normally inherent in load forecasting.

22. At pages 21 to 24, BCPSO discusses the application of the SET Guidelines to TS 6. In its opening comments, BCPSO seems to acknowledge that the Guidelines at best can be considered an interpretive aid given that they are guidelines, unlike TS 6 which is a filed tariff (see page 21, lines 484 to 490).

23. BC Hydro observed in its argument that employing the Guidelines as an interpretive aid is flawed since the Guidelines were issued some 5 years after the wording of TS 6 had been agreed on and filed as a tariff. Thus, BC Hydro does not believe that the Guidelines are a useful interpretive tool.

24. Paradoxically, it appears that BCPSO does not really think that they are a useful tool in that regard either because at page 22 it acknowledges that the Guidelines are patently inconsistent with TS 6. Thus they can hardly be a tool for interpreting it.

25. In truth, BCPSO's position is that where it suits BCPSO's objectives, the Guidelines should be applied in preference to TS 6. Of course, the BCUC cannot revise filed tariffs in that way and there is no merit to that approach. It is therefore unnecessary to deal with the balance of BCPSO's submissions as they relate to the Guidelines.

26. In response to BCUC issue 6 relating to the public interest component of TS 6, BCPSO goes so far as to equate the meaning of the word "public interest" in TS 6 with the public interest that is in play when BC Hydro seeks a CPCN. BCPSO is suggesting that industrial customers, whether new facilities are required to serve them or not, should only receive service if some sort of broad public interest is thereby served. Were BC Hydro to impose such a requirement on the members of the BCPSO, one could imagine the outcry. Indeed, the hint of imposing a limitation on BC Hydro's obligation to serve in that

respect was what led to the Supreme Court of British Columbia decision in *Chastain*.[7] To suggest that for all industrial customers taking service under TS 6, a full scale inquiry as to the public interest must be undertaken before service can be provided to each customer is to turn on its head not only *Chastain*, but all notions of an obligation on a public utility to serve its customers under approved tariffs.

27. Finally, with respect to TS 6, BC Hydro does accept BCPSO's comments on the application of TS 6 to old and new customers and the inadvisability of retroactive ratemaking.

28. The final section of BCPSO's argument deals with First Nation consultation. This entire section is somewhat surprising since BCPSO played no part in the evidentiary portion of the hearing in connection with these issues and its lack of participation shows in the incomplete understanding of the evidence it obtained by reviewing the transcripts of the evidence. In particular, BCSPO's comments regarding the amount of land to be cleared and how much land is currently used for Treaty purposes demonstrates it has only a passing acquaintance with the evidence relating to land use on the route. BC Hydro will reserve its specific comments in this regard to its reply to WMFN. However, generally the extrapolations of the evidence that BCSPO makes to exaggerate impacts are impossible to reconcile with what the BCUC Panel saw during its flyover of the route.

29. The speculation contained in the balance of BCPSO's submissions does not generally warrant response and any specific issues raised there that do warrant comment are captured in the Reply to WMFN.

30. BCPSO then goes on to comment on the consultations to date. This is remarkable since BCPSO did not have access to the consultation record and really has very little idea of what went on between the parties. BCPSO takes comments made about engagements in 2010 and combines them with comments made about discussions as recently as July 2012 and attempts to leap from there to draw parallels with respect to the Court of Appeal's decision in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*.[8] At the end of the submissions, BCPSO attempts to justify its discussion by suggesting that the regulatory and project cost risk associated with inadequate First Nations accommodation is something that legitimately concerns it. BCPSO cannot point to any project cost risk being passed on to existing ratepayers by reason of any order that might be made with respect to consultation. Indeed, the only thing that would pass on significant additional costs to BCPSO's members is the increase in the cost and expense that may result if the BCUC were to accept BCPSO's request that a CPCN be denied for the DCAT Project and BC Hydro were required to develop another means to meet its obligations in the Dawson Creek area.

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[7] *Chastain v. British Columbia Hydro and Power Authority* (1972), [1973] 32 D.L.R. (3d) 443 (B.C.S.C.).

[8] 2011 BCCA 247, (*"West Moberly"*), leave to appeal denied 2012 CanLII 8361 (SCC).

IV. BCSEA

31. BCSEA's position departs from that of BC Hydro in two fundamental respects. Those departures cause BCSEA to differ with BC Hydro in a number of particulars and ultimately to oppose the granting of a CPCN for the DCAT Project. Rather than respond to each of the particulars, this reply will focus on these two points of departure.

32. The first point of departure is that BCSEA interprets BC Hydro's position that self-supply is not to be considered an alternative to the DCAT Project to mean that the BCUC should, in assessing the DCAT application, ignore the fact that customers may choose whether to self-supply. That is neither BC Hydro's position nor is it logical.

33. The second point of departure is that BCSEA sees this proceeding as an opportunity to review BC Hydro's system extension policy (i.e. TS 6) whereas BC Hydro sees this application as an opportunity to determine whether the DCAT Project is in the public convenience and necessity on the assumption that TS 6 will be applied as currently drafted.

34. BC Hydro's response with respect to the first point is that BCSEA has confused alternatives that BC Hydro and the BCUC can influence with those that it cannot. BC Hydro distinguishes between self-supply and other alternative means of serving customer loads because self-supply is exclusively a choice of the customer, whereas other alternatives are not. The customer has a right to request service on the terms provided in the tariff and in its sole discretion, can exercise that right or not. Thus, self-supply is determined exclusively by the customer.

35. Once the customer elects to receive service from BC Hydro, the choice as to how to serve the customer then shifts to BC Hydro subject to approval by the BCUC or the Lieutenant Governor in Council. Thus, as additional customers come to the system including ones who had the choice of self-supply but have sought service from BC Hydro instead, BC Hydro is obliged to consider the alternative means of serving them and demonstrate that it has chosen a cost effective means of doing so.

36. With respect to the second point of departure, at page 8 of its argument, BCSEA suggests that the SET Guidelines were intended to be implemented in one of two ways. The first opportunity to implement them would be if a utility applied for approval of a proposed system extension policy. BCSEA acknowledges that did not occur with respect to TS 6. The second opportunity suggested by BCSEA could arise if "the Commission would consider the Guidelines in the course of reviewing a utility's system extension policy within a CPCN application for a particular system extension."

37. With respect, there is no support for this second formulation. The BCUC is obliged to apply the system extension policy embodied in the rate schedules of a utility in assessing a particular CPCN application. However, the BCUC would not have a basis for "reviewing utilities system extension

policies" unless someone had lodged a complaint with it that the policy was unjust and unreasonable and thus should be amended. As BC Hydro submitted during the prehearing and as the BCUC order resulting from that prehearing made clear, this application is to proceed on the basis that TS 6 will be in force and in light of that assumption assess whether DCAT is in the public convenience and necessity. Arguments about whether BC Hydro has proposed to properly apply TS 6 are well within scope, but suggestions that TS 6 should be amended are not. BCSEA's concerns with TS 6 can be aired in the review that the Ministry has said will be undertaken, but they have no place in determining whether or not a CPCN should be granted for DCAT.

V. Gary and Marilyn Robinson

38. BC Hydro has been and continues to be in negotiations with the Robinsons. In determining whether the DCAT Project is in the public convenience and necessity, the BCUC is entitled to consider the interests of private landowners such as the Robinsons as a factor to weigh against the public interest in the project. However, individual private interests will not normally be given significant weight when put up against a larger and more general public interest.[9] The expansion of the Bear Mountain Terminal (**BMT**) requires the acquisition of private land, whether it be from the Robinsons (siting Option 1, which is BC Hydro's preferred option) or from the owners on the other side of the terminal (siting Option 2).[10]

VI. Current Solutions Incorporated

39. CSI is generally supportive of granting a CPCN for the DCAT Project but seeks to have the BCUC impose certain conditions relating to substations. BC Hydro does not support those conditions for the reasons given below.

40. CSI suggests that the proposed BMT expansion is sub-optimal because it would result in new customers being required to construct longer lines at their own expense in order to connect to BC Hydro's system. There is no evidence to support this allegation and CSI's position ignores some key evidence. First, CSI seems to assume that all customers will be required to interconnect through the BMT substation. That is not correct. In several instances points of interconnection are still being determined and the system reinforcement plan by BC Hydro will accommodate a broad variety of interconnection points.[11] Some customers may choose to interconnect along the line rather than routing through a system substation and BC Hydro has not precluded those solutions where they are

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[9] BCUC, *In the Matter of British Columbia Transmission Corporation an Application for a Certificate of Pubic Convenience and Necessity for the Vancouver Island Transmission Reinforcement Project*, Reasons for Decision on Order C-4-06, July 7, 2006, at p. 15.

[10] Exhibit B-1-3, pp. 4-21A to 4-21B.

[11] Exhibit B-30, Response to BCUC IR No. 4.4.8.1.

technically appropriate. The evidence demonstrates that Shell is considering that option and it may be available to other customers as they come forward.

41. More generally with respect to CSI's observations concerning BMT, there is no evidentiary basis for suggesting that the BMT expansion was chosen to accommodate the Bear Mountain Wind IPP. The evidence shows that the BMT expansion was carefully planned in the context of BC Hydro's normal planning process and BC Hydro's system planners concluded that at this time, expansion of that plant was the most effective way to address future needs. CSI has provided no basis to conclude otherwise. It is important to note that none of the customers that stand to be affected by this planning decision take any issue with it (see the submissions of Shell Canada Ltd., Air Liquide Canada, and Arc Resources Ltd., Encana Corporation and Murphy Oil Company Ltd.).

42. With respect to conditions 2 and 3 proposed by CSI, BC Hydro respectfully submits that this proceeding is not the proper place to predetermine the GDAT process nor to decide to initiate a process of system resource planning to compare the virtues of wind and natural gas source generation. The GDAT process should be determined when the project is defined and approval is sought from the BCUC. Consideration of the relative merits of wind versus natural gas is completely beyond the scope of this proceeding.

VII. CECBC

43. At pages 8 - 9 of its submission CECBC suggests that low natural gas prices may present a risk that the forecasted load may not materialize, and therefore the BCUC may want to consider CPCN conditions that may mitigate some of that risk. However, the existing customer load plus the loads of the five new customers who are providing security fully justify the DCAT Project, and there is simply no reason to add conditions to further mitigate risk that these loads will not materialize. Any significant load growth beyond this will require another stage of system reinforcement, at which point BC Hydro will take load forecast risk into account. BC Hydro anticipates that new loads to be served by such a project will be required to provide security in accordance with the terms of the tariff.

VIII. WMFN

44. WMFN has filed an extensive, reference laden submission seeking to turn BC Hydro's application for a CPCN into a debate between First Nation rights on the one hand and non-aboriginal development within their traditional areas on the other. The issues raised by WMFN are, in principle, profound, important and controversial. They involve matters of significant importance to Canadian society in general and First Nations in particular. They should be treated with the utmost respect.

45. BC Hydro submits that these important issues command respect from all participants in the process. All parties are required to make rigorous efforts to distinguish between material and incidental

impacts and between process and substance. Failure to bring this rigour renders the consultation efforts of BC Hydro and the efforts of the BCUC to determine the adequacy of those efforts much more difficult than need be. In this Reply, BC Hydro will attempt to refocus the hearing process on the real question to be determined by the BCUC: What does the evidence before the BCUC actually show the potential impacts of the decision contemplated by BC Hydro may be on the exercise of treaty rights by the WMFN? In BC Hydro's respectful submission this is the question on which the BCUC's assessment as to the adequacy of consultation hinges.

46. BC Hydro submits that WMFN's argument does not focus on this issue. Instead, the WMFN has focused on the parties' diverging views as to the law on consultation and what WMFN believes to be procedural inadequacies. BC Hydro's failure to accept WMFN's understanding of the law as it relates to historical impacts does not result in a failed consultation process. Contrary to paragraph 2 of WMFN's submissions, BC Hydro's understanding of the law does not demonstrate "a lack of respect for the serious concerns of WMFN". Indeed, BC Hydro has acted honourably and has acted in good faith throughout the consultation process. BC Hydro appreciates that WMFN has serious concerns about the extent of development in its traditional territory and has taken committed steps to ensuring that the DCAT Project limits any further impacts. It is within BC Hydro's right to articulate to the BCUC its understanding of the nature of the obligations it sees in this case, and the fact that this understanding is not identical to that of WMFN does not equate with a lack of respect for WMFN or their interests.

47. More generally, WMFN's oft-repeated allegations that BC Hydro failed to participate in the consultation process in good faith and worse, its direct suggestion that BC Hydro acted in bad faith, are unwarranted on the record of this proceeding. BC Hydro accepts its obligation to uphold the honour of the Crown and has done its best to meet that obligation. While it accepts that there may be honest disagreement between the parties to consultation, casting unsubstantiated aspersions does not further the constructive dialogue needed to achieve reconciliation. BC Hydro will not comment further on the tone of the exaggerated accusations in WMFN's final submissions but does wish to be clear that it completely rejects the implications of bad faith that are cast about in WMFN's submission.

48. The underlying difference in views on the Crown's legal obligations comes down to this. WMFN asserts that because the obligations of the Crown have a constitutional source, they trump all other concerns, objectives or obligations that BC Hydro or the Crown may have in connection with other interests. WMFN further asserts that on the facts of this case, the Crown's obligation to consult extends beyond the impacts of replacing a 138 kV transmission line with a 230 kV line. Rather, WMFN says that the obligation requires the Crown to consult with respect to WMFN's outstanding concerns regarding unrelated historical activities that have occurred in their territory over the last 30 or more years.

49. BC Hydro on the other hand asserts that the Crown's obligation to act honourably which is given constitutional force by section 35 of the *Constitution Act, 1982* requires the Crown to fully consider the

treaty rights of affected First Nations when making decisions that might affect the exercise of those rights. It does not however preclude the Crown from considering the other public interests that it is obliged to serve and, in this case, does not eliminate or permit BC Hydro to ignore its obligations to serve customers as a public utility. BC Hydro further asserts that in this case, its obligation is to consult about conduct it is contemplating, not about past conduct of the Crown or others. The law referred to by WMFN does not support imposing on BC Hydro an obligation or indeed an ability to assume responsibility for all that has gone before. The evidence does not establish a link between the current conduct contemplated by BC Hydro and the consequences of past interference with WMFN treaty rights in the way that the Court found existed in *West Moberly.*

50. WMFN characterizes BC Hydro's view of its responsibilities as constituting bad faith. BC Hydro rejects this characterization and asks that the BCUC directly address both the question of whether BC Hydro and the BCUC are to ignore other public interests when a First Nation invokes aboriginal rights and also indicate whether, on the facts of this case, BC Hydro is required to consult in respect of WMFN's past concerns.

51. BC Hydro's views on the balancing exercise that must be undertaken by the Crown after it has undertaken fulsome consultation is set out in section 8.2 of BC Hydro's argument. Both *Haida*[12] and *Beckman*[13] refer to a balancing exercise in which the Treaty rights of aboriginal people are given informed and knowledgeable consideration before the Crown embarks on a course of conduct. The evidence in this case, demonstrates BC Hydro's efforts to do exactly that.

52. BC Hydro's views with respect to the extent to which consultation in respect of past conduct is necessary are based on its reading of the Supreme Court of Canada's decision in *Rio Tinto Alcan*[14] and the BC Court of Appeal's decision in *West Moberly.*

53. *Rio Tinto Alcan* establishes the general proposition that there must be a causal connection between a decision being contemplated by the Crown and an adverse impact on aboriginal interests (or ability to exercise Treaty rights where they exist as here)[15]. In consequence, generally, the Crown will not have to consult in connection with its past conduct.

54. *West Moberly* identifies that an exception can exist where contemplated conduct may limit the extent to which the Crown can achieve reconciliation in connection with its past conduct. Thus, in *West Moberly*, the decimation of the Burnt Pine Caribou herd upon which the WMFN had traditionally relied, needed to be taken into account when consulting with respect to the impacts of proposed development

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[12] *Haida Nation v. British Columbia (Minister of Forests),*2004 SCC 73, (*"Haida"*).

[13] *Beckman v. Little Salmon/Carmacks First Nation* 2010 SCC 53, (*"Beckman"*).

[14] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43, (*"Rio Tinto Alcan"*).

[15] Para, 45.

the Crown was considering[16]. The evidence was that if the project went ahead, the ability of the Crown to reconcile with WMFN in connection with its past decision would be compromised because the few remaining Burnt Pine Caribou would be threatened and the ability to restore the herd lost forever. The Court found that the link between the currently contemplated conduct (approving a new mine) and the impacts of past Crown conduct (permitting the destruction of the Burnt Pine Caribou herd) was sufficient to require the Crown to consult about the past before approving the contemplated mining activities.

55. Without the kind of factual linkage between the historical impacts and currently contemplated conduct such that the former causes the latter to give rise to an impact that otherwise would not arise, there is no basis in law on which to broaden consultation beyond incremental impacts as to encompass consideration of historical grievances. In the present case, there is no evidentiary support for the factual basis necessary to make such an argument. Indeed the uncontradicted evidence from Mr. Slaney was that there was no such link. Chief Willson agreed that the impacts of the DCAT Project were not comparable to those in *West Moberly.*[17]

56. The parties' diverging understanding of the extent of the Crown's duty likely explain the unsatisfactory nature of the consultation process from both parties perspective. The confidential consultation record reflects BC Hydro's ongoing efforts to uncover any specific concerns that WMFN had with respect to impacts that could arise if the DCAT Project proceeded. BC Hydro received little, if any, information to this effect over the past two years despite repeated efforts to elicit this information. BC Hydro never abandoned its efforts with WMFN and has evidenced in every way a willingness to continue to consult with WMFN and address any impacts that WMFN has identified up until the present day. More than that cannot be asked of the Crown.

57. BC Hydro does not believe that the relevant legal principles governing consultation support WMFN's lack of engagement on the key issues that consultation ought to have addressed. As the case law makes clear, consultation requires both the Crown and First Nations to act honourably:

> At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw*, supra, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached:

[16] Para 118.

[17] DCAT Project Hearing Transcript, July 9, 2012, vol. 1, p.559 (1.23) to p.560 (1.5); DCAT Project Hearing Transcript, July 10, 2012, vol. 2, p.606 (1.11) to p.608 (1.5).

> see *Halfway River First Nation v. British Columbia (Ministry of Forests),* 1999 BCCA 470 (CanLII), [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* 2003 BCSC 1422 (CanLII), (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.[18]

58. In addition to the disagreement on the law, the WMFN makes a number of further assertions about inadequacies in the consultation process. BC Hydro appreciates and accepts that the consultation process is extremely important in the context of the Crown fulfilling its obligations to deal honourably with First Nations. BC Hydro has spent two years engaged in a consultation process to discharge that obligation. In the end, regardless of the ultimate structure chosen, that process is only important in the context of the objectives it is designed to achieve. Those objectives are as follows:

(a) to ensure that WMFN is provided with adequate information necessary to understand the potential impact of the proposed project upon its exercise of treaty rights;

(b) to ensure BC Hydro is provided with the information that it needs in order to make the decision that it is contemplating with a full understanding of the potential impacts that decision may have on the exercise of treaty rights by a First Nations as understood by the First Nation itself;

(c) to ensure that BC Hydro, as the Crown decision-maker in this case, considers this information before making a final commitment to the contemplated conduct; and

(d) to ensure, where appropriate, that impacts on the exercise of treaty rights by First Nations were accommodated as honestly and fully conveyed to the First Nations that might be affected.

59. In BC Hydro's respectful submission, the evidence demonstrates that all of these objectives were met and that any individual dispute about who said what to whom and at what time in the process is rendered moot by the achievement of those ultimate objectives. BC Hydro's argument outlines how the above objectives were achieved in this case. In the end, regardless of the precise process utilized, the focus of the BCUC's assessment should be whether the consultation was reasonable, adequate and appropriate given the nature and extent of the potential impacts arising from the DCAT Project on the WMFN's treaty rights. Given this, BC Hydro will focus its reply on what is truly relevant to the BCUC's assessment, namely the evidence on record in respect of the seriousness of the impacts of the DCAT Project.

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[18] *Haida* at para. 42.

60. Beginning at paragraph 80, WMFN suggests that there are significant impacts on WMFN's treaty rights. Those assertions bear close scrutiny.

61. At paragraph 82, WMFN suggests that because 80% of the "DCAT land footprint" has already been alienated or disturbed, the other 20% is particularly important. That is sophistry. If the DCAT land footprint totalled one acre of which 80% was disturbed and 20% was not, the overall impact of DCAT would be to remove .2 acres from the land base available for WMFN to exercise treaty rights. It is hard to conceive that would be meaningful. The issue is not what percentage of the DCAT land footprint is disturbed relative to that which is undisturbed but rather the extent of undisturbed land in total that will be less amenable to the exercise of treaty rights after DCAT than before. Notwithstanding all of the efforts of BC Hydro to obtain that information, there is still no evidence that undisturbed land currently being used by WMFN members to exercise treaty rights will become disturbed through the implementation of the DCAT Project.

62. WMFN also identifies the Pine River crossing as a significant impact. It asserts that the Pine River area is crucial habitat to the stability of WMFN's Seasonal Round. While WMFN circles around the issue of the Pine River Crossing at paragraph 83 to 85, it fails to actually identify what the precise impact on the Pine River area will be. The fact is that there already exists a transmission line that crosses the Pine River.[19] That crossing is around the bend from the area which the WMFN has identified as of key importance to it and is separated from that area by a long existing highway and railroad. The existing crossing will be removed and the right-of-way remediated and the location of the new crossing will be very close to the existing crossing and will exhibit those same characteristics.[20] Despite numerous requests to WMFN throughout the consultation process, including the BCUC process, WMFN has not provided any information that the proposed Pine River Crossing will impose any actual impacts not being experienced now because of the existing line and that are not rendered insignificant by the existing railroad and highway in any event.

63. At paragraph 159 of its argument, WMFN lists four concerns that it raised during consultation with respect to the adverse impacts of the DCAT Project. Each of these where heard and understood by BC Hydro and BC Hydro has been anxious to discuss each of these elements with WMFN from the moment they were first articulated. Each was dealt with in BC Hydro's main argument. WMFN's argument on the other hand raises the issues but, with one exception, does not provide any specific details as to the precise nature of the impact or refer to any evidence in connection with them. Specifically, there is no attempt to identify evidence of Item B – Impacts on Treaty Land Entitlement on Its Selection for Future Reserves; Item C – Adverse Impacts on WMFN's Historic Trails and Seasonal Rounds; and Item D – Adverse Impacts on the Pine River Crossing. Given the prominence that the

[19] Exhibit B-34, p. 6.

[20] Exhibit B-34, p. 6.

WMFN afforded the IAS in previous submissions to the BCUC (e.g. Exhibit C5-13 and C5-14) and in consultation with BC Hydro, this lack of concrete evidence is telling.

64. The one exception is at paragraph 176, WMFN returns to the issue of moose. The evidence with respect to moose and moose habitat is clear. Moose were understood by BC Hydro and its consultant, AMEC, to be an important ungulate species in the area reliant on wetland habitat. Accordingly, the Valued Ecological Component ("VEC") that AMEC choose to look at was wetland habitat.[21] The result was that the transmission line route was carefully chosen to minimize interference with wetland habitat because of the importance of that VEC.

65. Commencing with its draft report in June 2012, some two years after BC Hydro first engaged with WMFN, WMFN for the first time began focusing its concern on moose and concerns about potential decrease of the population.[22] To be responsive to this concern, BC Hydro undertook a new study which was filed as Exhibit B-34, Appendix B. BC Hydro did what it could to meet with WMFN between receipt of the draft report in early June 2012 and the commencement of the hearing, but was only able to arrange a single meeting, despite efforts for fuller engagement. At that meeting, BC Hydro was unable to extract any additional information from WMFN with respect to their specific concerns about moose or any other the impacts identified in the draft IAS.[23] In any event, the moose study is uncontradicted and corroborates the views that formed the original environmental assessment. Moose continue to be in abundance in the region and provided the suggested mitigation measures are followed, residual effects from the DCAT Project are expected to be 'not significant' (minor) on moose.[24]

66. As noted above, WMFN has identified a number of specific quarrels they have with the consultation process. BC Hydro does not agree with WMFN that the process was procedurally flawed. In any event, any procedural inadequacies, which BC Hydro denies, are overcome in the present case because the ultimate objectives of consultation have been met. That being said, BC Hydro feels it necessary to respond to some of the points raised by WMFN and does so below.

67. WMFN begins its specific arguments relating to the consultation process at paragraph 64 of its submission wherein it alleges that BC Hydro did not begin consultation early enough. WMFN alleges that as BC Hydro did not consult until it had identified a project, BC Hydro implicitly rejected the alternative of proceeding with no project at all. WMFN further takes issue at paragraph 141 of its submission that BC Hydro failed to adequately consult on project alternatives.

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[21] DCAT Project Hearing Transcript, July 10, 2012, vol.2, p.678 (1.24) t p.679 (1.19).

[22] Exhibit B-34, p. 10.

[23] Exhibit B-34, p. 11.

[24] Exhibit B-34, Appendix B, p. 26.

68. The law is clear that consultation is required in connection with a contemplated Crown decision.[25] Until there is a contemplated decision, there is nothing to consult about. The decision in question here is the decision to build a transmission line to serve Crown purposes unrelated to the exercise of treaty rights by WMFN. The obligation on the Crown is to consult with WMFN to see whether or not that contemplated decision will have adverse impacts on the exercise of its treaty rights. If it will, the Crown must see what can and should be done to avoid, mitigate, and if necessary, accommodate those impacts. Only when those impacts are fully understood through the consultation process is the Crown in a position to turn its mind to what form of accommodation is possible and may at that stage conclude that the only form of accommodation that is honourable is abandonment of the project entirely.

69. The Crown has only two ways to make the required assessment. First, the Crown can seek the cooperation of the First Nation and inform its understanding of the impacts of the decision that it is contemplating with the benefit of the insights the First Nation can provide. It must do everything it can to facilitate consultation in that regard, which is precisely what BC Hydro did. However, if the First Nation declines to provide any specific input to the process, then the Crown must make its own assessment of those impacts and honourably take those impacts into consideration in determining its future conduct. In this case, BC Hydro made what assessments it could in the absence of constructive engagement with WMFN but left open the opportunity for them to participate throughout. As soon as it received constructive comments in the final version of the Impact Assessment Study ("IAS"), BC Hydro showed itself willing to consider that information as it did in Exhibit B-34 and to further engage in consultation to discuss the concerns that were finally identified by WMFN.

70. With respect to the alleged inadequate consultation on the doing nothing alternative, it is correct to say that BC Hydro must be open to the alternative of doing nothing. It is clear from Exhibit B-36 that BC Hydro did exactly that. WMFN's comments on the slide discussing the 'do nothing' option in Exhibit B-36 imply that the words of the slide are somehow inadequate. As Ms. Dutka testified, BC Hydro and WMFN spent time discussing the 'do nothing' option during the June 3, 2010 meeting:

> MS. DUTKA: A: What we present and discussed at the June meeting with West Moberly were the options that BCTC at the time was seriously contemplating, as project alternatives, to supply power to the South Peace region, and these were the two transmission alternatives which have been described in the application. We also discussed, as the implications of doing nothing slide discusses, what would happen if we were to not implement a project here, to reinforce what those repercussions would be.[26]

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[25] *Haida,* para. 35.

[26] DCAT Project Hearing Transcript, July 10, 2012, vol. 2, p. 616 (ll. 15-24).

At no point after that meeting did WMFN indicate that this discussion was inadequate in explaining the consequences of BC Hydro choosing not to proceed with the DCAT Project. BC Hydro explained the consequences from the perspective of its overriding policy objectives. This is what the law requires and what BC Hydro did.

71. With respect to the alleged inadequate consultation on Project alternatives, the law is clear that consultation is only required on those options that are seriously contemplated.[27] There is no point in engaging First Nations in consultations with alternatives that are non-feasible in the sense that they do not serve the Crown's other objectives. It would be disrespectful to discuss with them alternatives which the Crown has no interest in undertaking. Thus, BC Hydro was quite right not to burden WMFN with those alternatives that it had concluded were not a feasible means of serving load in the DCAT area. Contrary to submissions in paragraph 36, there is no evidence to suggest that BC Hydro refused to consider any other alternatives to the DCAT Project. To the contrary, the record is replete with details of its considerations of a plethora of alternatives.[28]

72. Insofar as transmission alternatives are concerned, BC Hydro chose the route that it understood would provide the least impact on the exercise of treaty rights because it employed existing right-of-ways to the maximum extent possible. During the oral hearing, and as quoted at paragraph 50 of WMFN's submission, Chief Willson testified "we just found out the other day that there was mention that they could drill underneath the river". This suggests that BC Hydro withheld information about the transmission alternatives. The evidence does not support that suggestion. The record shows that the Pine River Crossing was in fact first raised by WMFN as a concern during the June 25, 2012 teleconference call.[29] Once this issue was raised, BC Hydro took immediate steps to investigate the possibility of avoiding an aerial crossing altogether. However, as Exhibit B-34 makes clear, there would be a significant probability of major problems going underneath the river and this coupled with the additional costs makes it not feasible[30]. As soon as BC Hydro was aware of this, it shared its conclusions with WMFN by filing them in this process. The BCUC process is a legitimate part of the consultation process.[31]

73. The second issue addressed by WMFN's argument is BC Hydro's alleged failure to provide WMFN its preliminary assessment. BC Hydro agrees with the formulation in paragraphs 76 through 78 of WMFN's argument and in particular, that it was not necessary to undertake a strength-of-claim assessment because this is a treaty case. From the beginning, BC Hydro has acknowledged that WMFN

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[27] See for instances *In the matter of British Columbia Transmission Corporation Reconsideration of the Interior to Lower Mainland Transmission Project,* Decision, February 3, 2011, at p. 62.

[28] Exhibit B-1, Appendix B.

[29] Exhibit B-34, p. 3.

[30] DCAT Project Hearing Transcript, July 9, 2012, vol.1, p.434 (11.7-10).

[31] *Rio Tinto Alcan,* para. 56.

holds treaty rights under Treaty 8. Thus, BC Hydro's "preliminary assessment" that treaty rights were held by WMFN was long known to them. Given this, the focus of any preliminary assessment in the present case is on the seriousness of any potential adverse effects arising from the proposed DCAT Project.

74. BC Hydro's preliminary assessment as to the seriousness of the potential impacts arising from the DCAT Project was that any impacts on the exercise of WMFN treaty rights would be minimal as expressed in the CPCN Application provided in July 2011.[32] Contrary to the submissions of WMFN, BC Hydro's conclusions in this regard were not hidden – the application makes it clear that because of the route chosen, BC Hydro believed that the DCAT Project would have minimal impact on environmental or cultural resources relied upon by WMFN, nor would it have an impact on the exercise of any of its traditional rights.[33] BC Hydro believes it was reasonable to have expected the WMFN to review the application, and in any event, BC Hydro sought to meet with WMFN to explain the basis for its application and the assessment of potential impacts. BC Hydro was open to receiving new information that would cause it to revisit this assessment, but its preliminary view was clearly made known as soon as the studies upon which it was based were concluded. BC Hydro made it clear throughout the course of last year that it would receive through the consultation process with WMFN, any information that WMFN had in its possession that should cause BC Hydro to question that conclusion.

75. It is instructive to consider Chief Willson's description of what he believes to be a helpful preliminary assessment. Chief Willson testified that in his opinion, the purpose of a preliminary assessment is to have an exchange in which the First Nation is able to comment on what is good and what is not and help ensure that the Crown has considered all the different elements that the First Nation believes are important.[34] For the last two years, this is precisely the type of dialogue BC Hydro has been trying to have with WMFN. BC Hydro was under the understanding that the March 29th call would be of this nature in that BC Hydro would learn about any significant concerns that it had missed. Sadly, that was not the case. Instead, BC Hydro' learned for the first time in oral testimony that Mr. Muir had intended to restrict his comments on what the report had turned up to matters dealing only with sacred sites.[35] There is no corroborative written evidence to suggest such a limited focus for that conversation, and moreover, such a limited focus would clearly not serve the objectives set forth for that conversation when it was originally contemplated as early as November 2011. Mr. Dill's explanation of what that call was about is more plausible and consistent with the record than that of Mr. Muir.

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[32] Exhibit B-1, p. 6-12.

[33] Exhibit B-1, p. 6-12.

[34] DCAT Project Hearing Transcript, July 10, 2012, vol. 2, p. 558 (ll. 3-13).

[35] DCAT Project Hearing Transcript, July 10, 2012, vol. 2, p. 582 (l. 12) to p. 584 (l. 20).

76. WMFN suggests that BC Hydro should have changed its assessment of the seriousness of the impacts of the DCAT Project on the exercise of treaty rights based on what it has learnt since the CPCN application was filed. BC Hydro has been open to receiving any evidence which may possibly provide a basis on which to revisit its preliminary assessment. BC Hydro received new information in the final IAS and has reviewed it. As stated during the oral hearing, the information received has not caused it to vary its original assessment that any potential impacts arising from the DCAT Project will not be significant on the WMFN's treaty rights.[36]

77. At paragraph 99, WMFN comments on the time BC Hydro had to review the IAS and implies that BC Hydro did not treat the concerns therein seriously. To the contrary, from November 2011 until the hearing, BC Hydro pressed for expedition with respect to obtaining this information. Getting the report was delayed for two months because WMFN failed to act on the agreement made in November until late January 2012. Thereafter, WMFN held back information in the March call relating to impacts of significance[37] and again in the draft report in June declined to provide any useful information to either BC Hydro or the BCUC until July 5th.[38] In these circumstances, WMFN's criticisms of BC Hydro are patently unfair.

78. Having failed to substantiate the DCAT impacts it identified in paragraph 159, WMFN retreats to an induced development argument that it suggests BC Hydro has acknowledged by virtue of its assertion that its customers are entitled to service.

79. BC Hydro's assertion in that regard is simply a statement of the law. BC Hydro's proposition is that if customers require service, BC Hydro is obliged to develop plans to provide it. That does not mean, as the evidence made clear, that those projects proceeding is contingent upon them obtaining electric service and BC Hydro has not said that it does. Rather, BC Hydro has said that these customers are as entitled to electric service if that is what they choose as any other customer and BC Hydro is consequently contemplating conduct to meet their needs. BC Hydro has recognised throughout that undertaking that conduct is subject to BC Hydro consulting and if appropriate accommodating any First Nation impacts that might occur as a result of the conduct it is contemplating and that is what the current debate before the BCUC is all about.

80. Similarly, at paragraph 203 of its argument WMFN raises what it calls the "spider web" of alleged and anticipated future impacts that flow from the DCAT Project. This is the portion of the argument in which WMFN seeks to whipsaw BC Hydro between its assertion that the Project is needed

[36] DCAT Project Hearing Transcript, July 10, 2012, vol. 2, p. 663 (l. 13) to p. 664 (l. 7).

[37] DCAT Project Hearing Transcript, July 10, 2012, vol. 2, p. 582 (l. 12) to p. 584 (l. 20).

[38] DCAT Project Hearing Transcript, July 9, 2012, vol. 1, p. 351 (l. 21) to p. 354 (l. 4).

and BC Hydro's responsibility for the impacts associated with the use to which its customers put that energy in future. Notwithstanding WMFN's submission, there is no catch-22 here.

81. BC Hydro does expect that there will be growth in the area and that is why it believes that more transmission is required. It bases those submissions on its load forecast.

82. BC Hydro forecasts load but it does not control the specific activities that customers will undertake or how they will undertake them. Electrification is not a cause of development but rather a piece of infrastructure that needs to be developed in response to development. Whether those other developments will be undertaken in a way that has an adverse impact on First Nations is beyond BC Hydro's knowledge or control and BC Hydro cannot consult meaningfully with respect to them. Thus, BC Hydro rejects the notion that it should be obliged to consult with WMFN with respect to its concerns about third party developments in the area.

83. At paragraph 202 of its argument, WMFN concludes that the parties remain in disagreement with respect to this issue and that the BCUC cannot be reasonably assured that further discussions between the parties will resolve the issue. BC Hydro asks the BCUC to clearly indicate that BC Hydro is not required to consult with respect to the entire pattern of industrial development in British Columbia before it is able to undertake a specific project within a particular area. BC Hydro seeks confirmation from the BCUC that its duty to consult is connected with the adverse impacts, if any, the conduct it proposes to undertake may have on the exercise of treaty rights. In this respect, BC Hydro asks the BCUC to apply the principles enunciated by the Supreme Court of Canada in *Rio Tinto Alcan*.

84. Again, BC Hydro has included a response to WMFN's specific assertions about the consultation process to correct the record, not because these issues are determinative of the BCUC's assessment. In the end, it is not necessary for the BCUC to determine which actions were right or wrong in respect of the consultation process. The BCUC must decide whether the consultation undertaken was adequate in light of the potential impacts arising from the DCAT Project on the WMFN's interests. The evidence is that any potential impacts arising from the DCAT Project on the WMFN's interests are minor. There is no evidence that the potential impacts from the DCAT Project are such that when coupled with past impacts will result in a new impact therefore requiring consultation on those past impacts. The facts are that this is a minor replacement project and as evident by the BCUC's flyover takes advantage of previously disturbed areas to ensure a minimal footprint.

85. For the reasons set out above, BC Hydro entirely rejects WMFN's basis for seeking to have the BCUC refuse to issue a CPCN or to attach a multitude of conditions to it if it does issue it. In that last regard, BC Hydro notes that the alternative of a conditional CPCN described in paragraph 247 is no alternative at all. That is, Proposed Condition h) makes it clear that the CPCN would be void and of no effect if the BCUC determined that the very far ranging and broad consultation process laid out in earlier proposed conditions had not been met. BC Hydro could not undertake construction with that

uncertainty. Thus, WMFN's alternative is really a request that the BCUC suspend this process and require the parties to report back 180 days from the date of the decision. That suggestion is fundamentally flawed for a number of reasons including:

(a) the significant delay would lead to BC Hydro being unable to provide needed electric service in the area;

(b) the recognition by WMFN that the consultation it envisages would take between 6 months to a couple of years and thus it could not reliably be accomplished in a 180 day period in any event; and[39]

(c) the reconcilable differences between the parties with respect to what consultation is in fact required.

86. In short, there is no point in sending the parties back to the table to discuss first principles. BC Hydro continues to wish to consult with WMFN about how to construct and implement the DCAT Project but intends to limit that consultation to issues raised by the DCAT Project. WMFN is insistent that consultation extend well beyond the boundaries of the DCAT Project. The BCUC must resolve that core dispute before any progress can be made. If the BCUC resolves that dispute in the manner that BC Hydro has suggested is appropriate, then it will follow that the consultation undertaken to date has been appropriate and the narrow focus of consultation going forward is also appropriate. In those circumstances, the BCUC should grant the CPCN without condition other than with regard to BC Hydro meeting the commitments it has made on the record in this proceeding.

87. Conversely, if the BCUC were to determine that BC Hydro ought to have engaged in a cumulative effects assessment of the type identified by WMFN, assumed the responsibility for hypothetical induced developments or undertaken a quasi-resource planning exercise and ought to have provided capacity funding to permit WMFN to engage with respect to the same, as implied in proposed conditions (b), (e), (g), and (c) respectively, the viability of the DCAT Project would have to be reconsidered. In these circumstances, BC Hydro would prefer that the BCUC refuse to certificate the DCAT Project rather than make it subject to the conditions suggested by WMFN because they could not realistically be met.

[39] DCAT Project Hearing Transcript, July 9, 2012, vol.1, p.436 (11.5-12).

88. The remaining conditions seeking further studies on wildlife generally (d) or moose specifically (f) have not been limited to the impacts of the DCAT Project or the evidence and could only be necessary if consultation was broadened to cover the items listed in paragraphs (b), (e), and (g). BC Hydro believes it would need to reassess the viability of the DCAT Project if these conditions were imposed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8TH DAY OF AUGUST, 2012.

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