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Our File No.: 1010-003
August 8, 2012

ELECTRONIC FILING

Ms. Erica Hamilton
Commission Secretary
BC Utilities Commission
Sixth Floor – 900 Howe Street
Vancouver, BC V6Z 2N3

Dear Ms. Hamilton:

Re: Project No. 3698640
British Columbia Utilities Commission (BCUC)
British Columbia Hydro and Power Authority (BC Hydro)
BC Hydro CPCN – Dawson Creek/Chetwynd Area Transmission Project (DCAT)

Please find attached the Final Written Submissions of the West Moberly First Nations in the above noted proceeding.

Further to our August 2, 2012 correspondence, we can advise that BC Hydro has reviewed the Confidential Final Written Submissions of the West Moberly First Nations and has requested that all direct quotes from the confidential material, including confidential attachments, be redacted. BC Hydro has agreed to allow all paraphrasing of the confidential material to remain in the submissions without redaction.

The attached public version of the Final Written Submissions of the West Moberly First Nations includes BC Hydro's requested redactions.

Sincerely,
RANA LAW

Allisun Rana

Encl.

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. 3698640/0rder G-132-11

WEST MOBERLY FIRST NATIONS

Final Written Submissions

August 2, 2012

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Contents

PART I - INTRODUCTION

1. These are the written submissions of the West Moberly First Nations ("WMFN") in response to BC Hydro's application for a Certificate of Public Convenience and Necessity ("CPCN") in relation to the Dawson Creek/Chetwynd Area Transmission Project (the proposed "DCAT Project"). WMFN's submissions concern the lack of meaningful consultation with respect to potential adverse impacts of the proposed DCAT Project on its constitutionally-protected Treaty rights.

2. BC Hydro's conduct has failed to uphold the honour of the Crown, which is required in order to reconcile the interests of the Crown with those of affected First Nations. BC Hydro alleges that the WMFN comes before the Commission to what amounts to stirring up trouble on a routine application; once again, this shows a lack of respect for the serious concerns of WMFN with respect to potential project impacts on its Treaty rights and the ability of its members to exercise these rights. WMFN suggests that this is indicative of BC Hydro's general lack of good faith throughout the "consultation" process on the proposed DCAT Project.

3. BC Hydro points at the context of the region – the prospect of the proposed Site C Project, shale gas development, and the like - to try to minimize the seriousness of WMFN's concerns on this particular project. However, it is this very context that BC Hydro says cannot or should not be considered in the consultation process when assessing potential impacts on WMFN's Treaty rights. WMFN says that the goal of consultation – reconciliation of the interests of the Crown and of First Nations – cannot be achieved absent a cumulative effects assessment to examine the impact of the proposed DCAT Project in context.

4. As its Written Submissions show, BC Hydro's focus is on the "rights" of its customers to access energy supplied by the proposed DCAT Project in order to further their industrial development aims for the region. BC Hydro even goes so far as to say that its customers have a financial stake in seeing the proposed DCAT Project proceed, and therefore they are "entitled" to receive energy from the DCAT transmission line, and forcefully argues that the proposed DCAT Project must proceed or development in the region will grind to a halt:

> BC Hydro's forecast of significant load growth is not mere conjecture. A portion of BC Hydro's load forecast in the Dawson Creek and Groundbirch areas is corroborated by the fact that five major new loads, with a combined total of 178.5 MW, have made requests for service. The DCAT Project is necessary in order for BC Hydro to provide service to these five new loads in a reasonable timeframe. The five customers are Air Liquide, ARC Resources Ltd., Encana Corporation, Murphy Oil Company Ltd., and Shell Canada Ltd. These customers have come to BC Hydro ready, willing and able to meet the requirements for service, and BC Hydro has an obligation to serve them. Air

> Liquide is reliant on electric service for its energy needs and has no ability to generate its own electricity beyond what any customer has to purchase a generator and pay for fuel. The evidence shows that Air Liquide will be unable to expand its plant as anticipated if it cannot receive electrical service from BC Hydro.16 At least three others of the five customers have made irrevocable decisions by expending capital to configure their facilities to take electricity instead of relying on natural gas compression. These customers have relied on BC Hydro's Electric Tariff in making these investments, and they are entitled to service. If the DCAT Project is not approved, the evidence shows that BC Hydro has no other plan which can provide service to these customers without incurring significant delay beyond the DCAT in-service date.19 A decision by the BCUC now that puts in doubt the right of these customers to expect service could be expected to be very ill-received by the industry, particularly the natural gas sector, and would create unnecessary and unhelpful uncertainty concerning BC Hydro's commitment and ability to meet the needs of new customers contemplating locating in British Columbia.

BC Hydro Final Submission, July 24, 2012, p. 9 [emphasis added]

5. One would think, from reading BC Hydro's submissions on this point, that it is BC Hydro and its customers – rather than WMFN - whose constitutional rights are at risk. It is almost as if BC Hydro is suggesting that the Commission must fetter its discretion and issue the CPCN to ensure that its customers' rights or entitlements to energy are not infringed.

6. WMFN submits that BC Hydro has failed to meaningfully consult with WMFN in relation to the Proposed DCAT Project and requests the Commission to refuse to grant its Application for a CPCN or, in the alternative, that the Commission grant the CPCN subject to the condition that BC Hydro conduct meaningful consultation with WMFN to the satisfaction of the Commission prior to commencing work on the proposed DCAT Project. Anything less will undermine the process of reconciling the interests of the Crown with those of the First Nation.

PART II - FACTUAL BACKGROUND

Treaty No. 8

7. WMFN is a Treaty No. 8 First Nation with reserve lands located in northeastern British Columbia. As introduced by Chief Roland Willson at the July 9-10, 2012 Commission Proceedings (the "Oral Hearings"):

> So this is my community, we are a small community, the smallest of the Treaty 8 First Nations, 247 people, located on the west end of Moberly Lake. We have been there since time immemorial. We have the Charlie Lake Caves located in Fort St. John, one of the oldest known sites of human habitation in North

> America, being dated at 10,500 years old. And it was our ancestors that were in those caves.

DCAT Project Hearing Transcript, July 9, 2012, vol. 1, p. 476, l. 21 to p. 477, l. 2

8. WMFN members are the descendants of the Mountain Denne-Za of the Upper Peace River watershed who have occupied the land and used the resources in that area for at least 10,500 years. The Mountain Dunne-Za were also known as the Beaver Indians.

We Used to Come Here All the Time": A Review of the Proposed Dawson Creek to Chetwynd Transmission Line in Western Treaty, Exhibit C5-20, p. 17

***West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 CarswellBC 1238, 2011 BCCA 247 [*West Moberly (CA)*] at para. 19, leave to appeal ref'd by *Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2012 CarswellBC 386**

9. In the late 1890s, European settlers increasingly sought to settle and exploit the land and natural resources of the Upper Peace region, particularly as a result of the Klondike gold rush. While this was not the first intrusion by strangers into the Mountain Dunne-Za's neighbourhood, the gold rush brought new tension between settlers and locals.

Exhibit C5-20, p. 19

10. In response, the Government of Canada passed Order in Council No. 2749 to set up a Commission for the making of Treaty No. 8. In order that the area set aside within the Treaty be "thrown open to development" and the Indians be lead to "peacefully acquiesce in the changing conditions", the Government recommended that the Commissioners should have "full power to give such guarantees as may be found necessary" to proceed with setting aside land for reserves.

Exhibit C5-20, p. 20-21
Order in Council, p.c. no. 2749

11. Subsequently in 1899, Treaty Commissioner Laird made an opening speech at the meeting between First Nations and representatives to the Crown, which included an express promise to the gathered representatives:

> Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. <u>This is not true</u>. Indians who take treaty will be just as free to hunt and fish all over as they are now. [emphasis added]

Exhibit C5-20, p. 22
Mair C. (1908). Through the Mackenzie Basin: An Account of the Signing of the Treaty No. 8 and the Script Commission, 1899. The University of Alberta Press: Edmonton, AB, p. 56-59

12. As sworn by James Cornwall, a local witness to the meetings at Lesser Slave Lake and Peace River Crossing, the Indians refused to sign the Treaty as read to them by the Chief Commissioner. The Crown subsequently affirmed its promises, as follows:

> The Commissioners finally decided, after going into the whole matter, that what the Indians suggested was only fair and right but that they had no authority to write it into the Treaty. They felt sure the Government on behalf of the Crown and the Great White Mother would include their request [in the Treaty] and they made the following promises to the Indians regarding their rights to "earn their livelihood and maintain their existence":
>
> a – Nothing would be allowed to interfere with their way of making a living, as they were accustomed to and as their forefathers had done.
>
> b – The old and destitute would always be taken care of, their future existence would be carefully studied and provided for, and every effort would be made to improve their living conditions.
>
> c – They were guaranteed protection in their way of living as hunters and trappers, from white competition; they would not be prevented from hunting and fishing as they had always done, so as to enable them to earn their living and maintain their existence.
>
> Much stress was laid on one point by the Indians, as follows: They would not sign under any circumstances, unless their right to hunt, trap and fish was guaranteed and it must be understood that these rights they would never surrender.

Exhibit C5-20, p. 27
Fumoleau R. (1976) ***As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11 1870-1939,*** **McClelland and Steward Limited: Toronto, ON, pp. 74-75**

13. The relevant text of Treaty No. 8 as ultimately expressed by the Crown and signed by the parties, became as follows:

> And Her Majesty the Queen hereby agrees with the said Indians that they shall have <u>right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered</u> as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, <u>and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes</u>.

West Moberly (CA), supra.**, para. 53 [emphasis by the Court]**

14. The Crown made a number of significant oral promises to the Indians in exchange for securing Treaty adherents. As concluded by the British Columbia Court of Appeal (BCCA) in *West Moberly (CA)*:

With this text must be read the report of the Treaty Commissioners submitted to the Superintendent General of Indian Affairs on 22 September 1899. He following extracts of the Commissioner's report are relevant:

> There was expressed [by the Indians] at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges ...
>
> We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them ...
>
> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make the hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.
>
> We assured them that the treaty would not lead to any forced interference with their mode of life.

***West Moberly (CA)*, *supra* at para. 54 [emphasis by the Court]**

15. In 1900, the Crown sent out a new Treaty Commissioner, James Macrae, to secure further adhesions to Treaty No. 8, who again expressed their preference to continue hunting and fishing:

> As was reported by your commissioners last year, there is little disposition on the part of most of the northern Indians to settle down upon land or to ask to have reserves set apart... It appears that this disinclination to adopt agriculture as a means of livelihood is not unwisely entertained, for the more congenial occupations of hunting and fishing are still open, and agriculture is not only arduous to those untrained to it, but in many districts it as yet remains untried. A consequence of this preference of old pursuits is that the government will not be called upon for years to make those expenditures which are entailed by the treaty when the Indians take to the soil for subsistence.

Exhibit C5-20, p. 34-35
McRae, J.A. (1900). Report of the Commissioner for Treaty No. 8, Department of Indian Affairs, Ottawa, December 11, 1900

16. Although little written record exists of the circumstances, in 1914 WMFN's ancestors, the Hudson's Hope Indian Band, became adherents to Treaty No. 8. Indian Agent Harold Laird was instructed to admit the Band into treaty when he made annuity payments in 1914 and he subsequently included members of the Hudson's Hope Band in that year's pay list. The government also surveyed out reserves of the Band, whose surveyor commented that, the [Hudson's Hope] "Indians live by hunting and fishing".

Exhibit C5-20, p. 37
Leonard, D.W. (1995) "*Delayed Frontier.* The Peace River Country to 1909". A Production of the Edmonton and District Historical Society. Calgary: Detselig Enterprises Ltd. p. 81

17. Notwithstanding adhesion to the Treaty and the creation of reserve lands, accounts of the Dunne-za at the time indicate that the Band continued their traditional lifestyle on the land. Local resident Elizabeth Beattie, who was familiar with the practices of the Hudson's Hope Band at the time, documented the following:

> You see at that time they used to catch beaver pretty well all year round. They lived on it, they ate it. Then they go hunting of course and put up their meat. 20 mile and 12 mile that was at one time their headquarters there... They even started to build some cabins there at 12 mile, there was 3 cabins there they started (the Cree)...
>
> They used to come up there· for quite a few years and still hunt even after we lived here. They were up on the flat... and camped there, their whole outfit would camp there, quite a bunch... Then they would go both directions back and down to 12 mile and up Schoolar Creek and like that. They used to put up there meat there... Not so much moose because there wasn't any at that time but deer and bear, lots of bear, there was lots of bear... When they were camping there that spring they used to dry the meat and so on and they would render out the bear fat...
>
> These Indians were from Moberly and the Halfway.

Exhibit C5-20, p. 38-39
Beattie, E. (1989). Transcribed interview, "Hudson's Hope and Early Day Indians, Told by Elizabeth Beattie, Transcribed by L. Palify" August 8, 1989. Archived at Hudson's Hope Museum and Archives

18. Post-treaty, Indian Agent Harold Laird and other federal bureaucrats carried out business with the Indians in the area with an "expansive understanding" of the hunting and trapping rights contained within Treaty No. 8. In 1923, Indian Agent Laird told the North West Mounted Police that the Treaty Indians were "at liberty to hunt and trap wherever and whenever they liked and that the B.C. Game Wardens and Police have no right to interfere".

Similarly, Laird refused to register Indian traplines in the area, saying it was a "direct violation of the Treaty". He also defended the rights of Indians in 1925 by evoking the language of the Treaty: "The Indians [to] hunt and kill game as long as the grass grows and the water flows".

Exhibit C5-20, p. 43
BCARS, GR 1085, Box 2, file 7, Report by Constable Barber, 12 September 1925
BCRA, GR 1085, Box 2, file 7, Indian Commissioner W.E. Ditchburn to the Department of Indian Affairs, 6 October 1925

19. In recent years, Dunne-za and Cree elders have been speaking out publically about the failure of the Crown to honour the promises in Treaty No. 8. In 1992, an Elder from one of the Treaty No. 8 First Nations recounted her knowledge of the Treaty in front of the Royal Commission on Aboriginal Peoples. Her recollection of the adhesion of the Hudson's Hope Band in 1914 was that "the Treaty was there to protect the Indian from white people. It was also her understanding that Indians would retain ownership of fish, wildlife, and fur trapping areas."

Exhibit C5-20, p. 40

20. The same Elder had testified at the Alaska Highway Pipeline Hearings, over a decade earlier. In those proceedings, her translator recounted her story as follows:

> ...And she said there was a time when the white man promised us Indian people, long as there the rivers run, and as long sun rises that we have been taken care of in a fashion that we should, towards a white man fashion, but this was never so.
>
> We have been cheated on that, and we cannot even trap or hunt any place without experiencing some activity such as logging, all the bush knocked down. So that has deprived us people. She said oh yes, I am an old person. It should not concern me too much, but I am speaking for my grandchildren and my great grandchildren, because there will be more to come. She also said our way of life is the original way, the traditional way. An Indian life is eating meat and living off the land: and to give you an example even the summer that we, there is hardly any moose being killed because of the fact that the white people have come up and shot most of the game away. And even when they do shoot them, shoot moose, they leave them there to rot without taking the meat at all. It is just more or less she is referring to them being sportsman...
>
> And she said we cannot, previous to that I omitted some that it caught on to me now. She said even our reserve is too small to be supporting any kind of hunting at all, and what we have is that, what little we have the white people are even running our way of life on the reserve, She is basically concerned about grandchildren because those are things that, she would like to see the traditional way, you know, to be stabilized"

Exhibit C5-20, p. 41 [emphasis added]
Davis M. 1979. Statement made at the Alaska Highway Gas Pipeline Hearings (As translated by Buddy Napoleon). Vol. 7, West Moberly Reserve, BC, pp. 591-593

The Consultation Record

21. BC Hydro first notified WMFN about the proposed DCAT Project in a letter dated March 3, 2010. The same letter was sent to other Treaty No. 8 First Nations as well, and attached a map of the proposed DCAT Project. The March 3, 2010 letter did not set out any sort of preliminary assessment of the nature and scope of WMFN's Treaty rights or the potential adverse impacts on those rights that may be caused by the project. Instead, BC Hydro advised WMFN that it was not ready to start consultation until the project alternatives "have been further refined". After it had completed that work, BC Hydro advised that it would be contacting WMFN to set up a meeting to discuss how WMFN would like to be consulted.

Exhibit B-1, Appendix G, pp. 10 – 12
Exhibit B-5, Response to BCUC IR 1.1.1

22. Three months later, on June 3, 2010, WMFN first met with BC Hydro to discuss the proposed DCAT project. BC Hydro provided WMFN with a PowerPoint presentation on the proposed DCAT. The presentation provided information on the project generally, including the project drivers, the project plan and the project schedule. The presentation also included a slide on the "DCAT Project Alternatives", which set out two different transmission line configurations. Also included in the presentation was a slide listing the planned environmental studies.

BCUC IR 2.29.1 Confidential Attachment 1, pp. 106-118
Exhibit B-1, Chapter 6, pp. 6-17
Exhibit B-36

23. During the June 3, 2010 meeting, WMFN asked the BC Hydro representatives about BC Hydro's plans for river crossings and for using the existing right-of-way. WMFN also identified concerns related to potential adverse impacts to wildlife, such as fragmentation, wildlife corridors and a wetland area used by moose in the DCAT area, and indicated that they would be interested in capacity funding to undertake a study.

WMFN IR 1.7.1, Attachment 1, p. 2
Exhibit B-1, Chapter 6, pp. 6-17
BCUC IR 2.29.1 CONFIDENTIAL, Attachment 1, p. 103

24. On July 10, 2010, BC Hydro wrote to WMFN to encourage it to initiate a Traditional Use Study ("TUS"), given that the field season was limited. BC Hydro had recently provided an

advance on the capacity funding agreement that was yet to be negotiated, and advised WMFN that it could use some of these funds to initiate the study.

BCUC IR 2.29.2 CONFIDENTIAL, Attachment 5, p. 5

25. WMFN's Land Manager, Bruce Muir, responded on July 12, 2010. He asked BC Hydro to send along a draft of the Capacity Funding Agreement and advised that once an agreement was reached WMFN would [redacted] He noted that the advance funding would be used to negotiate and draft the agreement and to set up the file, not to conduct a study. He also noted that WMFN had a lot of large scale assessments taking place that summer, along with [redacted] from other resource development sectors. Accordingly, the parties would need to discuss and mutually agree on a timeline for work on the proposed DCAT project.

BCUC IR 2.29.2 CONFIDENTIAL, Attachment 5, p. 6

26. On July 29, 2010, BC Hydro forwarded WMFN a draft Capacity Funding Agreement. It included a line item and a budget amount for a TUS, but there was just a place-holder for the terms of reference.

BCUC IR 2.29.2 CONFIDENTIAL, Attachment 5, p. 16

27. On September 10, 2010, BC Hydro sent WMFN a draft terms of reference for the TUS.

BCUC IR 2.29.2 CONFIDENTIAL, Attachment 5, p. 41-43

28. The parties agreed to meet on October 22, 2010, to discuss the Capacity Funding Agreement and the terms of reference for the TUS. In preparation for the meeting, Bruce Muir advised BC Hydro by email that he hoped to be able to provide them with something in advance of the meeting [redacted]

BCUC IR 2.29.2 CONFIDENTIAL, Attachment 5, p. 44
BCUC IR 2.29.2 CONFIDENTIAL, Attachment 5, p. 45

29. BC Hydro responded on October 18, 2010, and confirmed that the terms of reference for the TUS was [redacted] According to BC Hydro, it was willing to [redacted]

BCUC IR 2.29.2 CONFIDENTIAL, Attachment 5, p. 46

30. On October 20, 2010, in advance of the planned meeting, WMFN provided BC Hydro with a proposal for a community-based study (the "Aasen Proposal"). Bruce Muir described the proposal as follows in his email to BC Hydro:

[redacted]

Also included with the email was a copy of the draft Capacity Funding Agreement with revisions proposed by WMFN's legal counsel.

BCUC IR 2.29.2 CONFIDENTIAL, Attachment 5, p. 67

31. The parties met on October 22, 2010. They discussed WMFN's revisions to the Capacity Funding Agreement and the Aasen Proposal (also referred to as the terms of reference or the TOR) that had been emailed to BC Hydro prior to the meeting. At the end of the meeting, BC Hydro committed to providing formal comments on the Aasen Proposal and to work with their legal counsel on a draft workplan.

BCUC IR 2.29.1 CONFIDENTIAL, Attachment 1, pp. 119-120

32. On November 12, 2010, sent WMFN the action items from the October 22, 2010 meeting. In response to its commitment to provide formal comments on the Aasen Proposal, BC Hydro and advised that it was [redacted] A document entitled [redacted] " was included with the action items, which provided further information on the project description, regulatory process and proposed consultation process. Additionally, the document included a draft workplan, which included a place holder for a [redacted]

BCUC IR 2.29.2 CONFIDENTIAL, Attachment 5, pp. 93-100

33. On December 17, 2010, BC Hydro emailed Bruce Muir a revised draft Capacity Funding Agreement that responded to the comments that had been provided by WMFN in mid-October. The email summarized the key items that BC Hydro had tried to address in the revised draft, including the terms of reference for the study. With respect to the terms of reference, BC Hydro stated: "[redacted]

[redacted]

BCUC IR 2.29.2 CONFIDENTIAL, Attachment 5, pp. 108-109

34. The revised draft Capacity Funding Agreement attached to BC Hydro's December 17, 2010 email included a revised Appendix A, setting out the deliverables and timelines. The reference to a [redacted] in the previous draft had been replaced with [redacted] Appendix C had not been completed at this point.

BCUC IR 2.29.2 CONFIDENTIAL, Attachment 5, pp. 108 and 135

35. The parties met on February 8, 2011 to discuss the Capacity Funding Agreement and the study. BC Hydro's minutes of the meeting note that Bruce Muir expressed that WMFN lacked [redacted] While BC Hydro's minutes state that WMFN requested that BC Hydro [redacted], the minutes also state that WMFN is [redacted]

BCUC IR 2.29.1 CONFIDENTIAL, Attachment 1, pp. 121-123

36. The parties exchanged various budget proposals between March and May 2011, referring to the study as an [redacted]. Then in June 2011, BC Hydro attempted to scrap the study and 'piggyback' the study on the Site C Traditional Land Use Study. WMFN rejected this proposal on the basis that the proposed DCAT Project area was not within the Site C project local study area and due to the risk raised by the consultant leading the Site C TLUS (Dr. Craig Candler, the Firelight Group) that 'piggybacking' the studies in this way would compromise the scientific validity of data collection for both studies. Additionally, WMFN emphasised that the Site C study was only an exercise in collecting baseline data, which was not what Wendy Aasen was proposing for DCAT. The DCAT study, as proposed in October 2010, was a community-based impact assessment study.

Exhibit C5-14, November 23, 2011 WMFN Reply Submission on Adjournment Application, pp. 4 - 6
Exhibit B-14-1, Confidential Attachment 1, pp. 124-126; WMFN letter dated June 21, 2011, Exhibit 14-3, Confidential Attachment 5, pp. 433-434; WMFN letter dated July 18, 2011 Exhibit 14-3, Confidential Attachment 5, p. 455

WMFN notes that Dr. Candler's comments were not documented in the draft meeting notes of June 14, 2011 prepared by BC Hydro and disclosed during these proceedings

37. On July 11, 2011, WMFN received an email from BC notifying WMFN that BC Hydro had filed its CPCN application for the proposed DCAT Project. Bruce Muir responded by email as follows:

[redacted]

BCUC IR 2.29.2 CONFIDENTIAL Attachment 5, pp. 442-444

38. BC Hydro did not respond to the concerns raised in Bruce Muir's July 12, 2011 email. On July 19, 2011, BC Hydro replied to the email but did not address the concerns raised about the failure to provide a preliminary assessment and to undertake a cumulative impacts assessment. Instead, BC Hydro stated [redacted] and that BC Hydro [redacted]

BCUC IR 2.29.2 CONFIDENTIAL Attachment 5, pp. 464-467

39. Although BC Hydro advised WMFN on July 19, 2011 that it [redacted] they failed to mention that Chief Roland Willson had provided such information by letter the day before. On July 18, 2011, Chief Roland Willson provided BC Hydro with a lengthy letter, focused on WMFN's view about the current state of Treaty No. 8 territory. In the letter, Chief Willson informs BC Hydro at length about the pressures and challenges arising from industrial development in WMFN's territory in the Peace Region, which now [redacted] (p. 8). Chief Willson objects to BC Hydro's consistent representation that because a large portion of the proposed DCAT Project was on private property, the study that WMFN conducts should be limited. He points out that BC Hydro has taken this position [redacted]

[redacted] Chief Willson also notes that some lands in the area of the Pine River have already been identified for future reserves and that WMFN members continue to exercise Treaty rights in the area (p. 9).

BCUC IR 2.29.2 CONFIDENTIAL Attachment 5, pp. 453 - 463
Exhibit C5-20, page 31

40. Once the CPCN Application was filed, WMFN continued to negotiate with BC Hydro to settle the terms of a proposed impact assessment study to identify the potential impacts of the proposed DCAT Project on WMFN's Section 35(1) rights. As indicated above, the parties had been discussing this proposed study since at least October 2010, long before the CPCN had been filed, although BC Hydro did not engage in substantive discussions about the terms of reference of the study until just prior to filing the CPCN Application

BCUC IR 2.29.2 CONFIDENTIAL Attachment 5, pp. 347-358

41. After continued discussions on the proposed impact assessment study, WMFN and BC Hydro reached an agreement in principle on the terms of reference for an Impact Assessment Study in late 2011 and signed a Capacity Funding Agreement in May 2012. Appendix C to this Agreement sets out the Terms of Reference for the Impact Assessment Study, including the purpose and timeframe for that study, as follows:

[redacted]

CONFIDENTIAL BC Hydro & West Moberly First Nations Log, Exhibit B-33, included in Exhibit B-33, Tab 13; Appendix C of Capacity Funding Agreement, attached to Email string commencing with May 17, 2012 email from Stewart Dill to Jill Wheller

42. WMFN notes that the due dates for the draft report and the final report were revised at the Procedural Conference held on May 2, 2012, when it was determined that the draft report would be due June 6, 2012 and the final report would be due July 5, 2012. At BC Hydro's behest, the hearing date was scheduled for immediately following the due date for the final report.

Reply by Mr. Sanderson, DCAT Procedural Conference, May 2, 2012, Vol. 2, p. 297, lines 18 to 24.
See additional submissions by Mr. Sanderson regarding urgency for hearing, DCAT Procedural Conference, May 2, 2012, Vol. 2, pp. 255.
Exhibit B-27, BC Hydro Proposed Regulatory Timetable

43. On June 22, 2012, WMFN asked why BC Hydro had not provided WMFN with a preliminary assessment of the impacts of DCAT on WMFN's Treaty rights. Clearly, WMFN was still of the understanding that BC Hydro had not yet completed a preliminary assessment. At that point, BC Hydro explained that it believed it had implicitly provided any preliminary assessment of WMFN's Treaty rights in the DCAT application in 2011. As testified by the BC Hydro DCAT Aboriginal Relations Coordinator, Stewart Dill:

> [the] information that BC Hydro had regarding its assessment of the potential impacts of the DCAT projects on First Nation', including West Moberly First Nation, rights, was included in our CPCN application.

July 10, 2012, Volume 2, page 634 line 19 to page 635 line 9
CONFIDENTIAL BC Hydro & WMFN Log, CONFIDENTIAL Attachment 1, June 25, 2012 letter from Chief Roland Willson to Stewart Dill

PART III – ISSUES

44. At the CPCN stage, the Commission must determine whether the Crown's constitutional duty of consultation has been fulfilled. In accordance with the BC Court of Appeal's ruling in ***Kwikwetlem First Nation v. British Columbia Transmission Corp***, the Commission must answer three questions:

1. When did the Crown's duty to consult WMFN arise (when was it triggered)?

WMFN says the Crown was required to consult with WMFN once the project was conceptualized, but before BC Hydro's plans had crystallized to the point where alternatives were no longer being considered. BC Hydro failed to do so.

2. What was (or is) the scope of the Crown's duty to consult WMFN?

WMFN says that the proposed project will have a serious impact on its Treaty rights, in light of the context of the project (current, compromised state of the land base and future developments that will result from the project). Therefore, consultation at the medium to high level is required. BC Hydro erred in its assessment of the level of consultation owed and did not alter its view despite the results of the IAS Report.

3. Has the Crown fulfilled its duty to consult WMFN?

WMFN says that BC Hydro has failed to meaningfully or adequately consult in several ways. First, it failed to consult WMFN on its preliminary assessment. Second, it failed to consult WMFN on project alternatives. Third, it failed to seriously consider WMFN's concerns regarding cumulative effects, future (inevitable) developments and impacts on moose, including the concerns of the community set out in the Final IAS Report.

***Kwikwetlem First Nation v. British Columbia Transmission Corp*, 2009 CarswellBC 341, 2009 BCCA 68 [*Kwikwetlem*]**

45. Finally, WMFN says that BC Hydro's conduct has shown a pattern of bad faith and that the Commission should not sanction this behaviour by granting BC Hydro's application for a CPCN in relation to the proposed DCAT Project.

PART IV - OVERVIEW OF THE LAW

Principles of Treaty Interpretation

46. In *R. v. Badger*, Cory J. set out the fundamental principles of Treaty interpretation in a case considering the nature and scope of the hunting right in Treaty No. 8. A Treaty must be considered with regard to the solemn nature of promises between the Crown and First Nations and the overriding honour of the Crown. Any ambiguities in the text of the Treaty must be resolved in favour of the First Nation adherents and "any limitations which restrict the rights of Indians under Treaties must be narrowly construed".

***R. v. Badger*, 1996 CarswellAlta 587, [1996] 1 S.C.R. 771 [*Badger*] at para. 41**

47. A Treaty must be interpreted in its historical and cultural context, including considering the process by which "the treaties were negotiated, concluded and committed to writing". A Treaty must be interpreted with regard the verbal promises made on behalf of the Crown.

***Badger, supra* at para. 52**

48. In *R. v. Marshall*, McLachlin J. added that treaty rights should not be "frozen" at the time of Treaty: "The interpreting court must update treaty rights to provide for their modern exercise".

***R. v. Marshall*, 1999 CarswellNS 262 [1999] 3 SCR 456 at para. 78**

49. The text of a Treaty must be interpreted as the First Nations would have understood the words on entering into Treaty. The text of the Treaty must be interpreted as the First Nations would have understood the words on entering into Treaty.

> A Court must ultimately seek to interpret a Treaty in a manner that '"best reconciles" the [First Nation] interests and those of the Crown', which can be achieved by seeking to choose an interpretation which would best represent the common intention of the parties to the Treaty, at the time of Treaty.

***Mikisew Cree First Nation v. Canada* (Minister of Canadian Heritage) [*Mikisew*] at para. 28**

50. The nature and scope of a Treaty right must be interpreted with regard to the established nature of Treaty rights. As recently confirmed in *West Moberly (CA),* "First Nations are entitled to what they have been granted by the Treaty".

***West Moberly (CA), supra* at para. 129**

Treaty No. 8

51. In the case of Treaty No. 8, the text of the Treaty promises that First Nation signatories will be entitled to continue their "usual vocations of hunting, trapping and fishing" throughout the Treaty territory. In exchange, the Crown will be entitled to make regulations and periodically "take up land" for "settlement, mining, lumbering, trading and other purposes".

***West Moberly (CA), supra* at para. 53**

52. Treaty No. 8 must be interpreted by considering certain oral promises made by the Crown; particularly the promises contained within the Report of the Commissioners for Treaty No. 8 submitted to the Superintendent General of Indian Affairs in 1899 ("Treaty Commissioners' Report"). The Treaty Commissioners' Report recounts that the Crown promised the First Nation signatories that they would be as "free to hunt and fish after the treaty as they would be if they never entered into it", which is a promise that now constitutes part of Treaty No. 8.

***Badger, supra* para. 39; *West Moberly (CA,) supra* at para. 54**

53. The Crown also promised more than a right to hunt for food. The Crown promised:

> (a) the same means of earning a livelihood would continue after the Treaty as existed before it, and that the Indians would be expected to continue to make use of them;
>
> (b) they would be as free to hunt and fish after the Treaty as they would be if they never entered into it; and
>
> (c) the Treaty would not lead to "forced interference with their mode of life" (see *R. v. Badger*,1996 CanLII 236 (SCC), [1996] 1 S.C.R. 771 at para. 39).

***West Moberly (CA), supra* at para. 130**

54. Finally, Treaty No. 8 protects a "meaningful" traditional hunting practice, as confirmed in *Mikisew* by the Supreme Court of Canada and in *West Moberly (CA)* by Finch J.A., for the majority in the BCCA.

***Mikisew, supra* at paras. 32-33; *West Moberly (CA)* at para. 80**

55. Regarding the "taking up clause", the First Nation signatories understood that land would be taken up; however, there was "no doubt" that the signatories understood that most of the land would remain unoccupied and be available for First Nation hunting and fishing, as held in *Badger* by Cory J.:

> The Indians understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas or to shoot at the settlers' farm animals or buildings. **No doubt the Indians believed that most of the Treaty No. 8 land would remain unoccupied and so would be available to them for hunting, fishing and trapping.** See *The Spirit of the Alberta Indian Treaties, supra*, at pp. 92-100 [emphasis added].

***Badger, supra* at para. 57**

56. The Crown also expected that development in the north would not impact First Nation hunting rights:

> Since the Treaty No. 8 lands were not well suited to agriculture, the government expected little settlement in the area. The Commissioners, cited in Daniel, at p. 81, indicated that "it is safe to say that so long as the fur-bearing animals remain, the great bulk of the Indians will continue to hunt and to trap." The promise that this livelihood would not be affected was repeated to all the bands who signed the Treaty. Although it was expected that some white prospectors might stake claims in the north, this was not expected to have an impact on the Indians' hunting rights. For example, one commissioner, cited in René Furmoleau, O.M.I., *As Long As This Land Shall Last*, at p. 90, stated:

***West Moberly (CA),* citing *R. v. Badger* at para. 55 and 56**

57. Whether or not the parties understood the problems that would ultimately arise from the "taking up clause", Binnie J. found that that the process would necessarily give rise to "inevitable tensions" in its implementation. Accordingly, Treaty No. 8 includes the constitutional right to be consulted when the Crown considers "taking up" lands in a way that could adversely impact a Treaty right.

***Mikisew* at paras. 33-34**

The Duty to Consult

58. The overarching question in all cases is to determine what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Aboriginal peoples regarding the Treaty interests at stake. The honour of the Crown means this duty must be understood "generously".

***Haida Nation v. British Columbia,* 2004 CarswellBC 2656; 2004 SCC 73 at paras. 45-46, 17 [*Haida*]**

59. Although the scope of the duty to consult "will vary with the circumstances, it 'always requires meaningful, good-faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process.'" Adequate consultation may require the Crown to "change its proposed course of action" based on information gathered – "it may require accommodation".

***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* 2004 CarswellBC 2654, 2004 SCC 74 [*Taku*], cited in *Brown v. Sunshine Coast Forest District (District Manager),* 2008 BCSC 1642, 2008 CarswellBC 2587 [*Klahoose*]; *Kwikwetlem, supra* at para. 68 relying on *Haida* at paras. 46-47**

60. The Crown must design a "reasonable consultation procedure" that will discharge its duty. In order to be meaningful, consultation must take place before the decision and/or action that will potentially impact the First Nations rights and concerns must be addressed at the early planning stages of the project.

***Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.*, 2005 CarswellBC 1121, 2005 BCSC 69 at para. 123; *Mikisew* para 67, citing trial decision, paras 154, 157**

61. The Supreme Court of Canada in Haida also recognized the importance of commencing consultation at the planning stages:

> I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut ("A.A.C.") for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

***Haida*, para. 76**

62. The proper time to adjudicate consultation is before the Commission issues a CPCN. As recognized by the Commission in *ILM,* the certification decision is the "first important decision" that determines much about a project from that point on:

> The certification decision is the first important decision in the process of constructing a power transmission line. It is the formulation of the opinion as to whether a line should be built to satisfy an anticipated need, rather than to upgrade an existing facility, find or develop alternative local power sources, or reduce demand by price increases or other means of rationing scarce resources.

***Kwikwetlem*, para. 13, 63; *In the Matter of British Columbia Transmission Corporation Reconsideration of the Interior to Lower Mainland Transmission Project*, February 3, 2011 at page 16**

63. The Crown's duty to consult First Nations "lies upstream" of statutory decision makers": see *West Moberly (CA),* para. 106, citing *Beckman* at para. 48 and *Halfway River First Nation v. British Columbia*, 1999 CarswellBC 1821, 1999 BCCA 470 at para. 177.

PART V - ARGUMENT

Issue 1: When did the Crown's duty to consult WMFN arise (when was it triggered)?

64. WMFN submits that the Crown's duty to consult was triggered once the proposed DCAT Project was conceptualized, but before BC Hydro made decisions about the project alternatives. As the Crown entity responsible for consultation on delivery of electricity to

customers in the Dawson Creek-Chetwynd area, BC Hydro was required to consult WMFN regarding potential alternatives to what became the proposed DCAT Project.

65. It is well-established that the Crown is obligated to consult potentially affected First Nations whenever the Crown "contemplates conduct that might adversely affect" a Treaty or Aboriginal right. The duty is owed, and consultation must begin, when an activity is contemplated, not when it is crystallized to the point of inflexibility.

***Haida* at paras. 19 and 35**
***Mikisew* at paras. 33-34**
See BCH Panel, DCAT Project Hearing Transcript, July 10, 2012, Vol. 2., p. 693, line 14 to p. 696, line 1. [Re: Starting point of consultation]

66. The Crown is obligated to consult potentially affected First Nations at each stage of a proposed project or activity that has the potential to affect their Treaty or Aboriginal Rights. This includes a duty to consult at the planning stages of a proposed activity.

67. In *Kwikwetlem First Nation v. BC Utilities Commission*, the BC Court of Appeal confirmed that "[t]he Crown's obligation to First Nations requires interactive consultation and, where necessary, accommodation, at every stage of a Crown activity that has the potential to affect their Aboriginal interests." [Emphasis added]

***Kwikwetlem, supra* at para. 62**

68. In ***Klahoose,*** a case concerning regulation of timber harvesting, the BC Supreme Court held that the Crown is required to consult at the strategic planning stage, not merely at the permitting stage of the overall process. In that case, the First Nation claimed that BC failed to consult it with respect to the development of the strategic plan (the Forest Stewardship Plan or "FSP" stage) and that consultation at the permit stage (the tree farm licence or "TFL" stage) did not make up for this failure. The BC Crown argued that consultation was not needed at the strategic planning stage because it was a mere step in the approvals process.

69. Mr. Justice Grauer found that, while the right to harvest timber came from the permit (TFL), consultation was nevertheless also required at the planning stage. He reasoned that:

> I have no hesitation in concluding that the potential adverse effect upon the aboriginal interests of the Klahoose of approving a Forest Stewardship Plan for a Forest Development Unit that is set in the heartland of Klahoose traditional territory is serious indeed. It matters not that the FSP is but one step in the process of moving from obtaining the right to harvest timber granted by the TFL, to exercising it. Any step in that process carries the potential of adversely affecting Klahoose aboriginal interests to a serious degree.

***Klahoose, supra* at para. 68**

70. In *Xeni Gwet'in v. British Columbia*, the Court noted that, "all of the events that lead up to the granting of a cutting permit signal the Province's intention to manage and dispose of an Aboriginal asset. These events demand consultation and, where necessary, appropriate accommodations where Aboriginal rights are claimed." [Emphasis added]

***Xeni Gwet'in First Nations v. British Columbia*, 2008 CarswellBC 2587, 2007 BCSC 1700 at para. 1131 [*Tsilhqot'in*]**

71. At the Oral Hearing, Mr. Dill, for BC Hydro, testified that, "in order to have a basis of consultation, that requires a certain conceptualization of what's being considered." He stated that the proposed DCAT Project reached that stage in early 2010; it was only at this stage that consultation with First Nations was made "valuable".

Evidence of Mr. Dill, DCAT Project Hearing Transcript, July 10, 2012, Vol. 2, p. 695, lines 1 to 18

72. Contrary to what BC Hydro appears to say, consultation at the planning and conceptual stage of a potential project provides value to the consultation process. Indeed, in this case, some of the input that WMFN might have put forward had it been consulted on project alternatives are set out in WMFN's IAS. For instance, that section contains a significant critique of the assumptions on which BC Hydro's feasibility assessment of DCAT is based, including:

    a. The assumption that the capacity level of electricity that industry may need justifies the DCAT transmission line;
    b. The assumption that financial benefits and burdens to industry override the impacts on WMFN's rights; and
    c. The assumption that impacts to cultural activities do not influence the "cost effectiveness" of a proposed project alternative.

Exhibit C5-20, p.117

See also: Discussion of when the consultation process should begin, including the issue of "pinning down" alternatives and usefulness of consultation at a conceptual stage: BCH Panel, Questions of Commissioner Morton, DCAT Project Hearing Transcript, July 10, 2012, Vol. 2., p. 693, line 14 to p. 696, line 1

73. While it is true that some level of project conceptualization is required to frame consultation – it is clear consultation cannot occur on a mere whim – the courts have made it abundantly clear that consultation is triggered as soon as the Crown contemplates conduct that might adversely affect Treaty or Aboriginal rights.

74. With respect, consultation once all alternatives to the project have been dismissed does not meet the Crown's obligation to consult at the strategic planning stage. Consultation must take place before the project has crystallized to the point where all alternatives have been dismissed (with the only question remaining being 'what route do we take?').

75. WMFN submits that in light of the case law, the onus is on BC Hydro to consult early and often. Despite the fact that it was required to consult WMFN early on in the process, prior to the dismissal of project alternatives, BC Hydro failed to do so. This failure is discussed more fully later in these submissions (at "Issue 3" below).

Issue 2: What was (or is) the scope of the Crown's duty to consult WMFN?

76. The second issue for the Commission to assess is the scope, or level, of consultation owed to WMFN.

77. The Commission is not required to undertake a "strength of claim" assessment in this case because WMFN, as a signatory to Treaty No. 8, relies on its Treaty rights. Unlike cases involving Aboriginal rights, there is no need to establish the strength of the right claimed. As a result, the scope of consultation in this case depends on an understanding of the nature and scope of the existing right and an assessment of the seriousness of the potential adverse impacts on WMFN's established Treaty rights.

***West Moberly (CA), supra* at para. 129**

78. The Commission must assess the seriousness of the potential adverse effects of the proposed DCAT Project on WMFN's Treaty rights. Adverse effects can be "any effect that may prejudice" a First Nation right. The category is not closed. Even adverse impacts that do not immediately materialize may be considered.

***Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 CarswellBC 2867, 2010 SCC 43 [*Rio Tinto*] at para. 47**

79. In fact, the courts have said that it is important to evaluate the scope of consultation owed in the context of historical impacts. In the *West Moberly* case, the BC Court of Appeal determined that the Crown was required to assess the seriousness of potential adverse effects in light of the context of the context on the ground (the existing state of affairs) "in an area of fragile caribou habitat":

> To take those matters into consideration as within the scope of the duty to consult, is not to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from pursuit of the exploration programs.
>
> ***West Moberly (CA), supra* at para. 119**

80. WMFN submits that, when assessed in the proper context, the proposed DCAT Project may have potentially serious adverse impacts on its ability to meaningfully exercise its Treaty right to hunt, fish and trap as promised in Treaty No. 8. Accordingly, BC Hydro is required to engage in high or medium-high level of consultation with WMFN because:

    a. There is little useful land left in WMFN's traditional territory on which to meaningfully exercise treaty rights to hunt, trap and fish or select land for Treaty Land Entitlement ("TLE) settlement;

    b. Serious adverse impacts will potentially flow from the proposed DCAT Project, including impacts from certain planned transmission lines, or "tie-ins";

    c. The proposed Project may have serious adverse impacts on wildlife habitat and wildlife identified as significant to the meaningful exercise of WMFN's Treaty rights, such as moose.

81. WMFN is faced with continuing development in a territory that is suffering numerous and continuing ill-effects of extensive previous and ongoing natural resource development, including oil and gas, mining, forestry, agriculture, hydroelectric and alternative energy (wind) development. When the Crown contemplates "taking up land" it must interpret the Treaty as the parties to the Treaty would have understood that provision. The agreement that the Treaty makers to allow for "taking up land" would never have included the possibility that WMFN's members would be forced to navigate an onslaught of industrial development that has not been studied and is "unprecedented" when it comes to natural gas development.

***West Moberly (CA), supra* at para. 150**

82. At this point, each little piece of land available for the meaningful exercise of WMFN's Treaty rights becomes increasingly important: 80% of the DCAT land footprint has already been alienated or "disturbed". Given that only 20% of the proposed DCAT Project's land base remains usable for the exercise of WMFN's Treaty rights, WMFN says that the potential adverse impacts of the proposed DCAT Project on these lands take on increased significance.

83. WMFN has given evidence that the 20% of land at issue in the DCAT application is exponentially important to WMFN. Whether or not 80% of the land taken up by the proposed DCAT Project is already alienated (or seriously adversely impacted), the importance of the remaining 20% becomes greater in context, particularly in the lands around the Pine River area. WMFN has identified this area for current and/or future TLE selection. Most importantly, the area is critically important in the overall ecosystem of an area already compromised by industrial development. As a river valley, the Pine River area is crucial habitat for the stability of WMFN's seasonal round.

WMFN IAS, Exhibit C5-20, p. 151

84. The IAS notes that it is crucial to understand the existing state of WMFN's Treaty territory – and specifically the area in that territory in which WMFN prefers to exercise its rights - in order to understand the impact of the proposed DCAT Project on WMFN's Treaty rights. The IAS sets out a number of unique factors that should be considered; for example, uses of land and natural resources, traditional values, population growth, industrial development on the land base, impacts of agriculture and private lands and a First Nation's culture.

WMFN IAS, Exhibit C5-20, pp. 60 - 81

85. Further, WMFN submits that the potentially adverse impact of the proposed DCAT Project is increased in light of the context of the unprecedent scale of planned development within WMFN's preferred Treaty territory; including tie-ins to the proposed DCAT Project , coal mines, hydroelectric dams, landfills, windfarms, industrial facilities and reasonably foreseeable activities in the area, which include shale gas development.

WMFN IAS, Exhibit C5-20, pp. 90 – 108

86. Indeed, as BC Hydro says in its written submissions, the proposed DCAT Project, if approved, will lead to future development in the region. BC Hydro relies on the "need" of its five natural gas industry customers (Air Liquide, ARC Resources Ltd., Encana Corporation, Murphy Oil Company Ltd., and Shell Canada Ltd.) – three of whom "have made irrevocable decisions by expending capital to configure their facilities to take electricity instead of relying on natural gas compression" - to argue that the CPCN is necessary. BC Hydro even goes so far as to say that "[t]hese customers have relied on BC Hydro's Electric Tariff in making these investments, and they are entitled to service."

BC Hydro Final Submission, July 24, 2012, p. 8
Exhibit B-22, p. 3 and at Attachment 2, p. 15, lines 13-18 (A34), p. 17, lines 8-9 (A40), and lines 23-25 (A42), p. 20, lines 4-15 (A50)
Transcript, Vol. 2, p. 178, lins 17-25 and p. 180, lines 23 to p. 181, line 10

BC Hydro's load forecast: Exhibit B-1, Appendix B, pp. 73-87 and Exhibit B-22, pp. 22-34 Exhibit B-22, p. 3 and at Attachment 2, line 9(A8), p. 8, lines 19-27, p. 10, lines 12-13 (A19), lines 22-26 (A20), p. 11, lines 3-7 (A21)
Exhibit B-30, Response to BCUC IR 4.1.1.
Transcript, Vol. 2, p. 183, lines 12-23

Exhibit B-1, Chapter 7, Page 7-2
Exhibit B-1, Chapter 2, page 2-19
Exhibit B-1, Chapter 2, page 1-2
Exhibit B-5-3, CONFIDENTIAL Revised BCUC IR 1.38.2.3

87. In sum, BC Hydro is proceeding on the basis that the proposed DCAT Project, if approved, will give rise to larger industrial impacts, and there is little doubt that the Proponents proceed with their tie-ins to the transmission line, along with the required supporting facilities.

88. The level of potential adverse impact on WMFN's Treaty rights, therefore, is heightened by the fact that the proposed project, if approved, is guaranteed to lead to further, more significant industrialization of the area in which WMFN exercises its Treaty rights.

89. While the BC Oil and Gas Commission ("OGC") may consult with WMFN about the tie-ins because the OGC is generally responsible for overseeing all issues related to oil and gas development, the OGC has only refused to authorize "one project in six years because of the First Nation concern" about potential impacts of a proposed project.

DCAT Project Hearing Transcript, July 9, 2012, vol. 1, p. 404, l. 15-23

90. Further, BC Hydro's has unfairly fettered its own discretion as a Crown decision maker. BC Hydro acts as both proponent and as the Crown. As a matter of procedural fairness, a decision maker "cannot limit the exercise of the discretion imposed upon them by adopting a policy, and then refusing to consider other factors that are legally relevant". As Crown decision-maker, BC Hydro has unfairly fettered its discretion by wholly adopting a policy to encourage an "economic boom" of natural gas development in British Columbia[1] and then failing to consider the whole scope of legally relevant impacts that may arise from encouraging that "economic boom", such as the construction of the tie-ins. Further, BC Hydro have unfairly fettered the discretion of the Crown decision maker who must assess the merits the applications to construct the tie-ins. The Crown decision maker will hard pressed to refuse to issues permits for Proponents to connect to the proposed DCAT Project, (and face a high likelihood of attracting a claim for damages) given that the proponents will have largely paid for the proposed DCAT Project.

[1] See for example at page 9 of BC Hydro's Written Submissions where BC Hydro discusses that the "development of unconventional gas in northeast BC has the potential to be a major economic driver" and that natural gas development from the Montney gas basis would represent "an economic boom to British Columbia" that BC Hydro does not want to see diminished.

***Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 CarswellBC 1821, 1999 BCCA 470 [*Halfway River*] at para. 62**
BC Hydro Final Submission, July 24, 2012, p. 9

91. In conclusion, BC Hydro's continued assessment of its legal duty to consult WMFN at the "low end of the spectrum" is incorrect. BC Hydro has applied for the CPCN on this assessment and has not changed its position at the close of the CPCN Application process. The scope of the Crown's obligation to consult is depends on the seriousness of potential adverse impacts on the full scope of the promised Treaty right: *West Moberly (CA),* para.

92. Given the exponential importance of the 20% of crown land that will be adversely impacted by the proposed DCAT Project's footprint, and the fact that the proposed DCAT Project will "irrevocably" lead to larger industrial impacts from the tie-ins by natural gas industry customers, BC Hydro cannot continue to take the position that it is only required to minimally consult with WMFN about the potential adverse impacts to arise from the proposed DCAT Project.

BC Hydro Final Submission, July 24, 2012, pp. 32, 40

Issue 3: Has the Crown fulfilled its duty to consult WMFN?

Consultation on the proposed DCAT Project: Too Little, Too Late

93. The goal of consultation is reconciliation. When Treaty rights might be adversely impacted by a proposed development, the duty to consult requires a meaningful exchange of information and ideas between the potentially affected First Nation and the Crown. Adverse impacts on the exercise of Treaty rights – including how to avoid or mitigate these impacts – can only be assessed when both parties to the consultation have a meaningful opportunity to participate in this dialogue.

For a review of the consultation case law, see *Part IV - Overview of the Law*

94. In WMFN's submission, BC Hydro has not provided WMFN with a meaningful opportunity to participate in such a dialogue on the proposed DCAT Project. It has not provided for serious consideration or accommodation of WMFN's concerns. In short, the process cannot be viewed as meeting the constitutional requirements for meaningful consultation in the name of reconciliation.

95. BC Hydro is required to conduct meaningful consultation with WMFN with respect to potential adverse impacts of the proposed DCAT Project on WMFN's established rights granted under Treaty No. 8 and protected under section 35 of the *Constitution Act*. The consultation that BC Hydro claims to have conducted falls far short of what is required to maintain the honour of the Crown for three crucial reasons:

96. First, BC Hydro failed to conduct a proper preliminary assessment about the potential adverse impacts on WMFN's rights from the proposed DCAT Project, share that assessment with WMFN and consult with WMFN on the same.

97. Second, BC Hydro failed even to discuss alternatives to a transmission line with WMFN. In doing so, BC Hydro effectively pre-determined that any other means of meeting the energy need in the area - primarily the energy needs of five natural gas sector customers - was not feasible, before it even met with WMFN for the first time about the proposed DCAT Project.

98. Third, BC Hydro failed to seriously consider the concerns raised by WMFN and WMFN's Impact Assessment Study[2] (the "WMFN IAS" or the "WMFN Study") including specific concerns raised about cumulative effects, impacts on moose populations in the area, and the development implications of the proposed DCAT Project, such as the future web of transmission lines that will be tied in to the DCAT should it proceed.

99. In its written argument, BC Hydro points to the number of letters it has written and telephone calls it has made to WMFN over the course of the "consultation" process, but this misses the point – consultation cannot be adequate without a dialogue, and dialogue cannot begin without adequate information. In this case, a large measure of the relevant information with respect to potential impacts on WMFN's Treaty rights are outlined most specifically in WMFN's IAS – a study to which BC Hydro agreed, yet gave very little time to with respect to review and dialogue with WMFN. Indeed, in pushing for an early hearing date, BC Hydro effectively gave itself only one business day to review the IAS prior to the Oral Hearing portion of the CPCN Application.

100. As BC Hydro knew or should have known, WMFN was not in a position to provide specific information regarding potential adverse effects on its Treaty rights – the very information requested by BC Hydro - until it could complete the IAS. The fact that BC Hydro seems to have expected this information to be provided prior to completion of the IAS indicates its fundamental misunderstanding of the importance of this Study to the assessment of potential adverse impacts and to the consultation process as a whole. Repeated requests for information that WMFN was not in a position to give until completion of the Study do not constitute adequate consultation.

101. Since BC Hydro agreed to the purpose and objective of the IAS, it must be taken to have understood that the purpose of the IAS was to gather the specific information required for effective consultation. Yet BC Hydro continued to request specific information from WMFN prior to completion of the IAS. For instance, in November 25, 2011, Hydro asked Chief

[2] It should be noted, for the record, that WMFN does not allege a failure to consult on the basis that a TUS or a TK study was not conducted. Portions of BC Hydro's submission appear to argue against this complaint – for clarity, WMFN makes no such complaint.

Willson for information on potential impacts at the Pine River. At that meeting, Chief Willson noted that the purpose of the IAS was to identify such potential impacts.

CONFIDENTIAL BC Hydro & West Moberly First Nations Log, Exhibit B-33, included in Exhibit B-33, Tab 13; Appendix C of Capacity Funding Agreement, attached to Email string commencing with May 17, 2012 email from Stewart Dill to Jill Wheller

CONFIDENTIAL BC Hydro & West Moberly First Nations Log for 12 October 2011 to March 2012, p. 123, at Tab 22, BC Hydro Meeting Minutes for November 25, 2011 meeting.

102. Despite BC Hydro's repeated statements to the effect that WMFN provided its concerns "on the eve of the hearing", it must be remembered that BC Hydro itself agreed to the delivery date of the WMFN IAS and it was BC Hydro that, nevertheless, pushed for a hearing date mere days following that delivery date. BC Hydro cannot now complain that the fact that the Study was delivered on the agreed-to date puts it in a difficult position.

Confidential Exhibit B-33, Attachment 14, page 368, Capacity Funding Agreement, Appendix C, Impact Assessment Study – Terms of Reference
Reply by Mr. Sanderson, DCAT Procedural Conference, May 2, 2012, Vol. 2, p. 297, lines 18 to 24
See additional submissions by Mr. Sanderson regarding urgency for hearing, DCAT Procedural Conference, May 2, 2012, Vol. 2, pp. 255
Exhibit B-27, BC Hydro Proposed Regulatory Timetable

103. It is no answer – and it is wrong in law - for BC Hydro to say that it will continue to consult WMFN on an ongoing basis. BC Hydro misstates the law when it says that the "BCUC does not need to be persuaded that all consultation is complete and that all issues raised have been fully addressed before issuing the CPCN." While it is true that implementation of the appropriate accommodation measures is (or should be) ongoing, and it is equally true that further consultation must occur as a project advances through various stages, it is incontrovertibly clear at law that consultation must occur prior to the making of the relevant decision, in this case the issuance of the CPCN. Otherwise, meaningful consultation cannot take place.

BC Hydro Final Submission, page 42, section 8.6, paragraph 2.
***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2001 CarswellNat 2902, 2001 FCT 1426 ("*Mikisew (FC – Trial)*") at paras. 154 and 157, cited with approval by the in *Mikisew (SCC), supra* at para 67**

104. BC Hydro's statements to the effect that the Commission should take comfort in the knowledge that BC Hydro intends to consult on an ongoing basis are, in WMFN's submission, a tacit admission that BC Hydro's consultation to-date has been inadequate.

BC Hydro Final Written Argument, Page 42, section 8.6, paragraph 2

105. A general theme running through BC Hydro's submission is that WMFN did not make itself available to engage in consultation. With respect, BC Hydro has been highly

selective in its reliance on the evidence and, in some cases, has entirely mischaracterized the evidence. WMFN submits that this is simply another example of the bad faith that BC Hydro has exhibited throughout this process.

106. At page 34 of its submissions, BC Hydro states that it has "maintained a constant dialogue with WMFN *despite a lack of similar commitment from WMFN*" [emphasis added]. BC Hydro then refers to attempts to schedule a meeting in the summer and early fall of 2011 to discuss the proposed DCAT Project and WMFN's desire to conduct a study. BC Hydro's summary of these attempts clearly implies that WMFN was not interested in meeting with BC Hydro.

107. The consultation record does not support BC Hydro's interpretation of the dialogue between the parties. On August 5, 2010, BC Hydro representative Joanna Mullard wrote to WMFN to request a meeting to discuss WMFN's proposed study on the DCAT. Mr. Muir responded on August 16, 2010, and explained the following:

[redacted]

BCUC IR 2.29.2 CONFIDENTIAL Attachment 5, pp. 635-636.

108. Ms. Mullard extends her condolences on August 22, 2010 and thanks Mr. Muir for explaining [redacted] Yet BC Hydro, in its Written Submissions, implies that the difficulties in scheduling this meeting represented a lack of commitment from WMFN.

BCUC IR 2.29.2 CONFIDENTIAL Attachment 5, p. 635.

109. It is important to point out that Mr. Muir did not say that a meeting "was likely not possible until September", as BC Hydro's Written Submissions state, but that he would likely be able to confirm a meeting date after the long weekend in September. His email explains

that Chief and Council are out on the land and he is not able to confirm any dates until that time.

110. The September 8, 2010 letter that BC Hydro refers to at page 34 of its Written Submissions is more than simply a request to meet. The letter actually enclosed a package of maps and a request to WMFN to simply mark on the maps the locations where their Treaty rights were exercised in the proposed DCAT Project area. Essentially, BC Hydro was asking WMFN to provide some of the very information that the community-based impact assessment study was planning to collect. WMFN saw this as a complete end-run around the study and responded as such in a letter dated October 17, 2011. In WMFN's view, this tactic only further demonstrates the bad faith exhibited by BC Hydro throughout this process.

BCUC IR 2.29.2 CONFIDENTIAL Attachment 5, pp. 636-583.
BCUC IR 2.29.2 CONFIDENTIAL Attachment 5, pp. 709-713.

111. Despite this offensive tactic, on September 22, 2011, Mr. Muir advised Ms. Mullard that WMFN had booked October 20, 2010 for a meeting between BC Hydro and WMFN Chief and Council on DCAT. BC Hydro is correct in stating that the meeting was subsequently cancelled by WMFNN, but fails to point out that when Mr. Muir advised BC Hydro on October 4, 2011 of a scheduling conflict that had arisen with respect to the October 20, 2010 meeting, he also offered October 27 and 28 as alternative dates. BC Hydro could not accommodate the alternative dates, so the meeting was ultimately scheduled for November 25, 2011. BC Hydro, in its Written Submissions, simply refers to *its* attempts to reschedule the meeting, leaving the impression that WMFN cancelled the meeting and did nothing to ensure that another date was secured.

BCUC IR 2.29.2 CONFIDENTIAL Attachment 5, p. 584.
BCUC IR 2.29.2 CONFIDENTIAL Attachment 5, pp. 705-708.

112. Also missing from BC Hydro's written submission is any reference to the explanation Mr. Muir provided to Ms. Mullard about the scheduling challenges he First Nation was facing after the cancellation of the October 20, 2010 meeting. Specifically, Mr. Muir advised that Chief Willson was in Victoria for TLE negotiations and then was travelling to Quebec City to attend a conference on Treaty rights and consultation. Clearly the proposed DCAT project was not the only issue WMFN was dealing with.

CONFIDENTIAL BC Hydro and West Moberly First Nations Consultation Log, p. 97.

113. Chief Willson also explained the challenges the First Nation was facing in his letter to Ms. Mullard dated November 9, 2011. After proposing a meeting date of November 25, 2010,

Chief Willson takes issue with the [redacted] in BC Hydro's correspondence concerning WMFN's ability to meet with them. The Chief explains in detail the [redacted] of meeting requests they receive, the unprecedented amount of consultation they are engaging in and the capacity challenges that they face. Despite this, Chief Willson states [redacted] This entire context is completely absent from BC Hydro's description of events in its Written Submissions.

CONFIDENTIAL BC Hydro and West Moberly First Nations Consultation Log, pp. 100-106.

114. Clearly, all WMFN could do was "their best". This is exactly how Mr. Muir explained it in his testimony at the Oral Hearing. When asked how capacity challenges affected WMFN's engagement on the proposed DCAT project, Mr. Muir acknowledged the difficulty WMFN had in responding quickly to project proponents. He explained:

> We try our best within what we have. We only have a couple of people in the office to do work like this. And community members only have so much time as well. So we really wanted to -- we did focus on the report, that was our main thing. That's the -- really, that kind of gets our office engaged, in terms of the consultation, because now we have some substantive input from the community. So, was it a challenge? Yes, it was a challenge, and it was very similar to some of our other challenges internally as well.
>
> MR. MILLER: Q: Okay.
>
> MR. MUIR: A: But I do think we tried our best.

Examination of Mr. Muir by Mr. Miller, DCAT Hearing Transcript, July 9, 2012, Vol. 1, page 437, lines 13-15.

Failure to conduct - and consult on - preliminary assessment of nature and scope of WMFN's rights

The Law: The Crown must conduct and consult on its preliminary assessment of the scope and impacts on a potentially-affected First Nation's rights

115. Whenever the Crown proposes to "take up land" under Treaty No. 8, the Supreme Court of Canada has set out a clear initial obligation for the Crown to meet – the Crown is obliged to "inform" and "communicate'; that is, to "inform itself of the impact" a proposed project will have on a Treaty rights holder and to "communicate its findings" to the Treaty rights holder.

***Mikisew, supra* at para. 55**

116. BC Hydro was required to – and failed to:

a. Conduct an adequate preliminary assessment of the scope of WMFN's rights and the potential impacts of the proposed DCAT Project on those rights;

b. Notify WMFN of this preliminary assessment in a timely manner sufficient to afford WMFN an opportunity to provide input on the same; and

c. Provide WMFN with an opportunity to discuss the preliminary assessment and its implications for design of the consultation process.

117. Contrary to the submissions of BC Hydro, it is settled law that:

> The Crown is required to conduct a preliminary assessment of the nature and scope of a potentially-affected First Nation's rights and the potential impacts of the proposed Crown activity on those rights:
>
> The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

***Haida, supra* at para. 39**

118. It is well established that where the Crown has notice of a claim asserted by an aboriginal group and the duty to consult has been triggered, the Crown is obliged to make a preliminary assessment of the strength of claim and the potential impact of the proposed decision on the asserted rights.

***Adams, supra* (relying on *Haida*) at para. 131**

119. The Crown is required to conduct such preliminary assessment at the outset because it informs the design of the consultation process:

> The Crown's preliminary assessment of the strength of the claim and the potential adverse effect of government action on aboriginal interests must be made at the outset of the proposed consultation, if it is to inform the scope and extent of that process. In this case, there is nothing to indicate that the Crown made such an assessment before embarking on the consultation with Gitanyow with respect to the FL replacements.

***Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 at para. 147**

120. The Crown is required to provide its preliminary assessment to the potentially-affected First Nation and to provide an opportunity for the First Nation to give feedback on the same:

> The Crown's obligations also extend to providing the affected aboriginal group with an opportunity to comment on these preliminary assessments. This is necessarily a key step in the consultation process because the scope of the duty to consult is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.": *Haida* at para. 39.

***Adams, supra* at para. 131**

121. The Crown is required to provide its preliminary assessment to the First Nation in a timely manner to facilitate meaningful consultation. In *West Moberly,* the BC Court of Appeal determined that the Crown's refusal to provide a timely preliminary assessment, in conjunction with providing "standard referral letters" to constitute an unreasonable consultation process in response to WMFN's concerns.

***West Moberly (CA), supra* at para 152, 219**

122. BC Hydro has asserted in its written submissions that it is not required to consult on its preliminary assessment by alleging that there is a lack of Supreme Court of Canada jurisprudence on the issue. BC Hydro has also referred to previous decisions of the Commission in support of this argument. With respect, the decision of the BC Court of Appeal in *West Moberly* on the preliminary assessment issue is binding in the Province of British Columbia.

123. Further, BC Hydro's reliance on the *Taku* decision is illogical. The Supreme Court of Canada in *Taku* denied a duty to consult because the process unfolded before the Supreme Court of Canada released its decision in the companion case of *Haida*. The Court in *Haida* created the preliminary assessment requirement. The Court in *Taku* could not impose a process on the parties that had not yet been created.

124. Further, we note that s. 75 of the *Utilities Commission Act* provides that the Commission is not bound to follow its previous decisions:

> The commission must make its decision on the merits and justice of the case, and is not bound to follow its own decisions.

***Utilities Commission Act, supra* at s. 75**

125. Even if the Commission's previous decisions support BC Hydro's argument on this point – which is denied and which is unlikely given the context-driven, evolving nature of

consultation law – the Commission is not bound to follow its previous decisions: it must decide this matter on the merits.

The Facts: BC Hydro's failure to provide an opportunity for dialogue on the design of the consultation process

126. Despite its obligation at law to do so, BC Hydro failed to provide a preliminary assessment to WMFN regarding BC Hydro's assessment of the potential adverse impacts of the proposed DCAT Project on WMFN's Treaty rights at the outset and, as a result, failed to engage with WMFN on the contents of the assessment and its implications for the design of the consultation process.

127. While BC Hydro claims that a preliminary assessment was included in its CPCN application (about 1 year after BC Hydro first contacted WMFN in relation to the proposed DCAT Project), it is clear that BC Hydro did not notify WMFN until the June 22, 2012 meeting just prior to the Oral Hearing, that its alleged preliminary assessment was contained (in a few short paragraphs buried in its CPCN application).

128. For the record, WMFN notes that the portion of the CPCN Application that BC Hydro claims constitutes its preliminary assessment of the scope and potential impacts on WMFN's Treaty rights consists of two lines taken from the text of Treaty 8 and an edited quote from one court case. This so-called preliminary assessment is cursory and ignores the fact that the Treaty must be interpreted in its historical and cultural context and does not consider the oral promises contained in the Treaty. The modern scope of WMFN's Treaty 8 rights includes a promise by the Crown not to interfere in its "mode of life" This is insufficient to fulfill BC Hydro's obligation.

See Part IV – Overview of the Law

129. Significantly, this "preliminary assessment" does not consider the ancillary rights, those practices that are part of the overarching rights set out in the text and the oral promises contained in Treaty 8. For example, the right to hunt caribou is not merely the right to hunt, but to do so as part of its traditional seasonal round. The Treaty is not simply about 'hunting, trapping, and fishing', but the modes in which the First Nation exercises these rights.

***West Moberly (BCSC)* at para. 63, cited by BC Court of Appeal in *West Moberly (CA)*, *supra* at para 51**

130. Finally, the "preliminary assessment" does not include any mention of WMFN's Treaty right to select reserve land as part of its entitlement to land under Treaty. This is a fatal flaw in the assessment.

131. As to provision of the preliminary assessment to WMFN, Chief Willson testified at the Oral Hearing: "We're still waiting for the preliminary assessment. We've never seen it. It was never sent to us".

DCAT Project Hearing Transcript, Vol. 2, July 10, 2012, Vol. 2, page 558, lines 3-13

132. Notwithstanding the *prima facie* unique geographical location, population and histories of each First Nation within Treaty No. 8, BC Hydro started its consultation with a generic non-specific understanding of the nature and scope of WMFN's Treaty rights as shown by its delivery and presentation of a set of general letters and presentations. BC Hydro embarked on the consultation without a preliminary assessment of the nature and scope of WMFN's Treaty rights and seriousness of the potential impacts on those rights.

Exhibit B-1, Chapter 6, page 6-5

133. On July 11, 2011, well into the "consultation" process, WMFN asked for BC Hydro's preliminary assessment. BC Hydro ignored WMFN's request. Stewart Dill, who is responsible for BC Hydro's consultation with WMFN on the proposed DCAT Project, was not even aware that WMFN had raised this issue a year earlier until he was asked about it when giving evidence at the Oral Hearing. BC Hydro did not take the consultation process seriously enough to ensure that it maintained any continuity with their consultation team. As agent for the Crown, BC Hydro carries a constitutional responsibility which suggests a reasonable amount of due diligence by its employees to stay updated would be warranted.

BCUC IR 2.29.2 CONFIDENTIAL Attachment 5, pp. 442-444 and 464-467

DCAT Project Hearing Transcript, July 10, 2012, Vol. 2, p. 635, lines 4-13 [re: Mr. Dill unaware of WMFN request for a preliminary assessment]

134. Significantly, when WMFN again asked for BC Hydro's preliminary assessment at the recent June 22, 2012 meeting, BC Hydro provided a troubling response– BC Hydro told WMFN that the preliminary assessment of WMFN's Treaty rights was contained within the CPCN. BC Hydro again declares this version of events in its written argument. BC Hydro says that it shared its preliminary strength of claim and impacts assessments with WMFN on July 11, 2011 (by email) and again on July 14, 2011 (by hard copy).

DCAT Project Hearing Transcript , July 10, 2012, Vol. 2, page 635, lines 4 to
BC Hydro's Written Submissions dated July 24, 2012, pp. 30, 32

135. Notably, when BC Hydro sent a copy of its CPCN Application for the proposed DCAT Project to WMFN in July 2011, it did not provide WMFN with an identified or identifiable preliminary assessment, as it suggests in its written argument. The only way WMFN could have determined that the CPCN contained a preliminary assessment would have been to guess or ask BC Hydro. As mentioned above, despite the onus on BC Hydro to provide one, WMFN did request a preliminary assessment and did not receive an answer to this request.

136. WMFN says that it is unreasonable – and clearly bad faith conduct in the context of BC Hydro's duty to consult – for BC Hydro to notify the Nation over two years after first engaging with the First Nation on the proposed project and barely two weeks before the hearing of a CPCN Application on that project, where it might be able to locate the preliminary assessment. It is also difficult to see how providing notice of the location of the preliminary assessment, over one year after the Nation raised concerns about not receiving the same, and two years after BC Hydro first approached WMFN about the proposed DCAT Project, can be considered as "timely and effective" consultation that would maintain the honour of the Crown.

137. Indeed, in *West Moberly,* the Court of Appeal rejected a consultation process partly because the Crown "was extremely slow in providing West Moberly with its initial assessment of the potential adverse effects of the project" on WMFN's Treaty rights.

138. The implications of this failure are significant: as the courts have said, preliminary assessments – and consultation on the same – are key to informing the design of the consultation process: [case]:

139. As Chief Willson testified, a preliminary assessment is necessary to clarify the issues that the parties will consider in the scope of its consultations:

> I believe what we considered to be a preliminary assessment is that they say, "This is what we're going to look at," and then we have a discussion and say, "Well, yeah, this is good, this isn't; you know, have you thought about this?" We never got to that stage. We've never seen it. We've asked for them. Typically what they would do is kind of guess to what we would be interested in talking about, and we would get that and we would say, "Yes; no; yes; this is good; have you considered that?" You know, so it's -- we've never seen that. [emphasis added]

140. In this case, WMFN could not respond to the alleged preliminary assessment because WMFN was not made aware that BC Hydro considered the CPCN application to include a preliminary assessment. WMFN had no opportunity to engage in a meaningful dialogue about the assessment and, as a result, was not afforded this important opportunity to

participate in a dialogue on the how the process should be designed to ensure effective consultation.

BC Hydro's Written Submission, p. 32

Failure to Consult on Project Alternative

141. As previously noted, it is clear that the Crown is obligated to consult potentially affected First Nations whenever the Crown "contemplates conduct that might adversely affect" a Treaty or Aboriginal right. The duty is owed, and consultation must begin, when an activity is contemplated, not when it is crystallized to the point of inflexibility.

***Haida, supra* at paras. 19 and 35**
***Mikisew, supra* at paras. 33-34.**

142. Yet, despite carrying the onus for ensuring consultation at all stages of the process, the evidence is clear: BC Hydro never discussed with WMFN alternative means of delivering the electricity its customers say they require. As Chief Roland Willson put it:

...

Page 553, line 10

Right from the very beginning, from the first initial letter that we received, the first initial review, it was already determined that this was going to be a transmission line...all we were going to talk about is where we're going to put the transmission line. We never go to talk about, is there alternatives. The possibility of shell, or one of the proponents, building a co-gen plant to run gas, to burn gas to create energy. We never go to talk about possible geothermal activity. They're drilling wells all over the place out there. And the down hole temperatures in these wells are extremely hot. They can put a geothermal plant out there quite easily. We never had any discussions about any of the that kind of stuff.

You know, they made a determination that it was going to be a transmission line. So they had already decided they were building a transmission

Page 554, line 1

line. Well, that's not consultation. That's: This is what we're going to do. We may adjust it a little bit but how do we start consultation when they've already pre-determined what they're doing?

Examination of Chief Willson by Mr. Miller, DCAT Project Hearing Transcript, July 10, 2012, Vol. 2., p. 553, line 10 to p. 554, line 5.

See also: Examination of Bruce Muir by Mr. Miller, DCAT Project Hearing Transcript, July 9, 2012, Vol. 1, p. 442, line 18 to p. 443, line 13.

143. Ms. Dutka confirmed that project alternatives to the DCAT transmission line were not discussed with WMFN. Instead, BC Hydro determined that these alternatives were "not feasible", in its opinion, prior to the start of any consultation process with WMFN. Clearly, the feasibility of project alternatives was assessed without regard to WMFN's Treaty rights or impacts on the same.

Examination of Ms. Dutka by Ms. Rana, DCAT Project Hearing Transcript, July 10, 2012, Vol. 2., p. 616, line 15 to page 618, line 8.

See also: Exhibit B-1, System Planning Report, Appendix "A", "Dismissed Alternatives", and new Exhibit B-36, the "do nothing" slide (referenced at DCAT Project Hearing Transcript, July 10, 2012, Vol. 2, pp. 615-616]

144. BC Hydro appears to rely on the new Exhibit B-36, the PowerPoint presentation apparently presented to WMFN representatives in June 2010, and specifically the so-called "do nothing" slide to discharge its obligations to discuss project alternatives. The presentation included one slide that set out the "Implications of Doing Nothing", including
    - Not meeting customers' needs;
    - Power shortages;
    - Load shedding – shutdown of customer sites; and
    - Risk of cascading outages.

145. This is simply not enough to meet the onus on BC Hydro to consult on all aspects of the planned Crown activity. The only "alternative" discussed was to not supply the electricity at all. BC Hydro did not advise WMFN that any other alternatives to actually respond to the "customers' needs" had already been considered and dismissed.

Exhibit B-36, Power point presentation dated June 2010, a.k.a. the "do nothing" slide.

146. As the evidence of BC Hydro shows, BC Hydro refused to consider any other alternatives to the DCAT Project. This differs from the Commission's Reconsideration of the Interior to Lower Mainland Transmission Project ("ILM Project") case. In that case, the BCUC determined that the decision as to project alternatives was not foreclosed by the BCTC because the BCTC remained "willing to receive input" after it decided to pursue the ILM Project.

***BCUC Decision in the matter of BCTC Reconsideration of the Interior to Lower Mainland Transmission Project*, February 3, 2011, pp 54-58.**

147. The IAS also points out that BC Hydro's CPCN Application did not set out the methods it used to indentify alternatives to the DCAT transmission line. WMFN was never provided with an opportunity to provide input on the design of that methodology, let alone an opportunity to review BC Hydro's methodology in relation to selecting feasible project alternatives.

Exhibit C5-20, p.117.

148. This is significant because, when BC Hydro says that alternatives to DCAT are "not feasible", and then eliminates those "unfeasible" options from the discussion, WMFN does not have the opportunity to question either the soundness of BC Hydro's assessment of customer requirements and financial feasibility of all of the alternatives (including DCAT). This denies WMFN an opportunity to test BC Hydro's assessment and the potential for favouring its customers' preferences for energy provision over other important considerations, including potential impacts on constitutionally-provided Treaty rights of affected First Nations.

149. By the time BC Hydro had filed its CPCN, it had already dismissed a number of alternative scenarios, which meant WMFN could not even use the IR process to test a number of BC Hydro's assumptions about the project alternatives. Most importantly, WMFN could not question the adequacy of BC Hydro's consideration of the feasibility of various options from a Treaty-rights perspective. WMFN's input on these issues could very well result in a different methodology by which BC Hydro assesses the project alternatives and, thereby, the outcome resulting from employing such a methodology.

150. Indeed, BC Hydro has never engaged WMFN in a substantive discussion of options for alternatives routes. As Chief Willson testified, BC Hydro has not provided any response as to why they cannot use existing corridors to route the transmission line, and WMFN only recently discovered that there was a possible alternative option of having the line travel under the river, as opposed to over the land:

Page 558 line 14	MR. MILLER: Q: B.C. Hydro has offered alternatives for a transmission line, if it is to proceed, and I questioned Mr. Muir on this yesterday about which one of the alternatives, if one was to proceed would have the least impact from West Moberly's perspective. And I believe his answer was but the transcript will show was the one that used the existing corridors as much as possible, the disturbed corridors or possibly some variation. Do you agree with that position? CHIEF WILLSON: A: I would think so, yes. It would

depend on if it was actually possible, but we've never had the discussion. They have said that they couldn't follow existing corridors, but we've never had any in-depth discussion on why -- we just found out the other day that there was a mention that could they drill underneath the river, not hanging the lines over top. I think the only thing that we got told was, "No, it's too expensive, we can't do that." We've never looked at any other alternatives to that scenario.

Page 559, line 6

Examination of Chief Willson by Mr. Miller, DCAT Project Hearing, July 10, 2012, Vol. 2, p. 558, line 14 to p. 559,line 6

151. Further, discussion of alternatives through the Information Request process does not fulfill the Crown's obligation to consult a potentially-affected First Nation as soon as the Crown contemplates activity that has the potential to interfere with its Treaty or Aboriginal rights. For example, in the IR process, the sum total of the consultation on natural gas alternatives was BC Hydro's response that its customers did not want or prefer that alternative. The IR process does not provide adequate consultation on options that have already been determined by BC Hydro to be unfeasible.

152. It must be remembered that BC Hydro is playing the role not only of the DCAT Project proponent, but also of the Crown agency responsible for consulting potentially-affected First Nations. It cannot do this effectively if it does not conduct a reasonable assessment of the feasibility of the project alternatives weighed against the potential seriousness of adverse impacts on Treaty rights. In this regard, the Crown needs to consider the implications of all alternatives on constitutionally-protected Treaty rights, and to do so, it must consult the potentially affected First Nation. This simply was not done.

153. The only alternatives presented to the WMFN in meetings or discussions with BC Hydro concerned alternate transmission lines; there was no consideration of alternative forms of energy delivery, such as hot-tapping.

154. How did this happen? Why did BC Hydro fail to consult WMFN on project alternatives? Perhaps it was an internal failure on BC Hydro's part to recognize the scope of its consultation obligations, or perhaps it was a failure on the part of another Crown agency or department to properly delegate its authority to BC Hydro. Either way, the result is the same – a lack of meaningful consultation at the key planning stage of the project. By

failing to consult WMFN at this stage, WMFN lost the opportunity to provide input on a fundamental decision in the planning process.

Failure to consult on Treaty-rights Related Concerns

155. The Supreme Court of Canada has said that consultation must be conducted with the "intention of substantially addressing [Aboriginal] concerns… through a meaningful process of consultation": *Haida*, para. 42. The goal is to ensure that the First Nation's concerns are given serious consideration. In order to ensure such serious consideration, the Courts have said that:

> Consultation must occur prior to the making of the relevant decision: "it is not consistent with the honour of the Crown…for it to fail to consult with the First Nation prior to making a decision that infringes on constitutionally protected treaty rights."

***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2001 CarswellNat 2902, 2001 FCT 1426 ("*Mikisew (FC – Trial)*") at paras. 154 and 157, cited with approval by the in *Mikisew (SCC)*, *supra* at para 67**

156. The First Nations being consulted must be provided with timely information, in order to provide them with an opportunity to express their concerns and to ensure these concerns are seriously considered by the Crown and, "wherever possible, demonstrably integrated into the proposed plan of action".

***Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 CarswellBC 1821, 1999 BCCA 470 at para. 160, cited with approval in *Mikisew (SCC)*, *supra* at para. 64.**

See also: *R. v. Sampson* , 1995 CarswellBC 1070, 16 B.C.L.R. (3d) 226 (B.C.C.A.); *R. v. Jack*, 1995 CarswellBC 1069, 16 B.C.L.R. (3d) 201 (B.C.C.A.); *R. v. Nikal*, 1996 CarswellBC 950, [1996] 1 S.C.R. 1013

157. The Crown must also respond to new information as it arises during the consultation process: "the level of consultation required may change as the process goes on and new information comes to light."

***Haida*, *supra* at para. 45**

158. BC Hydro has failed to engage in a dialogue with WMFN regarding the concerns WMFN has raised about potential adverse impacts at a number of points in time, including those raised in and as a result of WMFN's IAS. As a result, BC Hydro has failed to give serious consideration to WMFN's concerns and, in the words of Justice Finch, has failed to "demonstrably integrate" these concerns "into the proposed plan of action". As previously noted, when asked if any information in the IAS changed BC Hydro's assessment of the

seriousness of the impacts on WMFN's Treaty rights, the answer from BC Hydro was "No".

Examination of the BC Hydro Panel by Mr. Miller, DCAT Project Hearing Transcript, July 10, 2012, Vol. 2, p. 663, line 8 to p. 664, line 7.
***Halfway*, *supra* at paras. 159-160**
***Mikisew*, *supra* at para. 64**

159. WMFN has raised several concerns in relation to potential adverse effects of the DCAT Project on the exercise of its Treaty rights, including:

a. Potential adverse impacts on moose populations in WMFN territory;
b. Potential adverse impacts on Treaty Land Entitlement land selections for future reserves;
c. Potential adverse impacts on WMFN's historical trails and seasonal rounds; and
d. Potential adverse impacts at the Pine River crossing.

Exhibit C5-21, p. 31, July 18, 2011 letter from Chief Willson to Joanna Mullard, Aboriginal Relations and Negotiations, BC Hydro.

160. WMFN has also raised concerns about the anticipated "spider web" of impacts that will result from proceeding with the DCAT Project, including tie-ins and concomitant industrial growth in WMFN territory.

161. In its final written submissions, BC Hydro points to what it calls "exhaustive and extensive consultation" comprised of "numerous attempts to engage with WMFN" and says that it "did everything that it could reasonably have done to encourage and facilitate feedback from WMFN." In this way, BC Hydro attempts to cast WMFN in a poor light by essentially saying 'we wrote to them and called them innumerable times and they didn't tell us about their concerns until the eleventh hour!'

BC Hydro Final Submission, July 24, 2012, pp. 25-26

162. With respect, BC Hydro ignored WMFN's numerous responses saying that it was not in a position to respond with its specific concerns until it had conducted its IAS and completed the study report. BC Hydro's insistence that WMFN should have responded with specific concerns is even stranger given that BC Hydro agreed that the IAS [redacted] That is, BC Hydro agreed that the very point of the IAS was to allow WMFN to gather the information needed to understand and articulate specific concerns with respect to the Project. Given that BC Hydro agreed to the original IAS delivery date of May 31, 2012 (which was subsequently altered by the Commission to

a filing date of July 5, 2012), BC Hydro's insistence on receiving detailed responses prior to that time makes little sense.

Confidential Exhibit B-33, Attachment 14, page 368, Capacity Funding Agreement, Appendix C, Impact Assessment Study – Terms of Reference

CONFIDENTIAL BC Hydro and West Moberly First Nations Consultation Log, filed July 5, 2012, p. 125.

163. The consultation record also does not support BC Hydro's characterization of its efforts to facilitate input from WMFN on the proposed DCAT, particularly with respect to the negotiation of the study. Much of this is set out in WMFN's submissions on its Adjournment Application, but the matter warrants further comment here, given BC Hydro's written submissions.

Exhibit C5-13, November 9, 2011 WMFN Submission on Adjournment Application
Exhibit C5-14, November 23, 2011 WMFN Reply Submission on Adjournment Application

164. BC Hydro's written submissions include a number of inaccurate statements with respect to the negotiation of the terms of reference for the study. Taken individually they may not appear to have much significance, but collectively, when provided in a narrative, they appear to leave the impression that WMFN was not being reasonable with respect to this matter. Given that BC Hydro is serving as a Crown agent with respect to the consultation process, these misstatements cause WMFN significant concern.[3]

165. Contrary to the narrative provided on page 35 of BC Hydro's Written Submissions, BC Hydro did not provide an initial draft of a Capacity Funding Agreement to WMFN in June 2010. BC Hydro provided it on July 29, 2010. BC Hydro did not "work with WMFN as early as June 2010 to address its request to undertake a study." WMFN indicated it interest in capacity funding to undertake a study when the parties met in June 2010, but BC Hydro did not provide WMFN with a draft terms of reference for a study until September 2010.

166. More importantly, however, BC Hydro has misstated the nature of the study that WMFN was attempting to undertake. WMFN did not initially propose to conduct a TUS. They referred to the study as a [redacted] with a TUS being one example of such a study. Ultimately, when WMFN provided BC Hydro with the Aasen Proposal in October 2010, they made it clear to BC Hydro at that time that they were proposing a [redacted]

[3] Citations to the evidence relied on paragraphs 165-168 are included in the Part II – Factual Background, Consultation Record.

167. Even after BC Hydro advised WMFN that it was [redacted] set out in the Aasen Proposal, it referred to the contemplated study in its own draft documents as a [redacted] or an [redacted]. In December 2010, BC Hydro further revised the draft Capacity Funding Agreement to refer only to an [redacted] BC Hydro explained [redacted] Clearly, as Mr. Muir indicated in his testimony at the Oral Hearing, the traditional knowledge (TK) component is one of the first things that is usually taken out when a study is "scaled back".

Examination of Mr. Muir by Mr. Miller, DCAT Hearing Transcript, July 9, 2012, Vol. 1, page 398, lines 11-17.

168. Contrary to BC Hydro's Written Submissions, WMFN did not "change its position" and decide to pursue an impacts study. As early as October 2010, when WMFN provided BC Hydro with the Aasen Proposal, it was clear that WMFN was pursuing an impact assessment. BC Hydro's acknowledgment of this is included in its own documents, including the draft Capacity Funding Agreement and its Appendix "C", in the fall of 2011.

169. BC Hydro also appears to misunderstand the process required to obtain specific information relevant to potential project impacts: it is not just a matter of one person sitting down and placing dots on a map; it is a process of engaging community members who hold the relevant knowledge in relation to the relevant portion of WMFN's territory, compiling that information and sharing it in a way that does not compromise confidential traditional knowledge information belonging to the community.

Cross-Examination of Mr. Muir by Mr. Sanderson, DCAT Project Hearing Transcript, July 9, 2012, Vol. 1, p. 332. [re: need for Land Manager to obtain concerns directly from the community; he himself does not hold the knowledge].
Examination of Mr. Muir by Ms. Rana, DCAT Project Hearing Transcript, July 9, 2012, Vol. 1, p. 309. [re: certain individuals in the community hold specific knowledge about rights, impacts and mitigation measures].

Examination of Mr. Muir by Ms. Rana, DCAT Project Hearing Transcript, July 9, 2012, Vol. 1, p. 361, lines 10 to 16. [re: nature of IAS as a community-based report reflecting views and values of the community members, as expressed in interviews].

Exhibit C5-20, pp. 14 to 15. [re: Primary data collection through interviews with community members]

170. BC Hydro also attempts excuse its failure to consult by suggesting that WMFN delayed in providing its concerns and delivering them in the Final IAS Report "on the eve" of the

hearing. WMFN says that it met its obligation to deliver the IAS draft and final reports and that it did so in good faith.

171. BC Hydro alleges that the June 6th draft report was insufficient because it did not include portions that were included in the Final Report provided on July 5. As co-author of the IAS Report, Mr. Muir testified that there was no agreement with BC Hydro to provide them with a Draft Report that included all of the sections or topics that were to be included in the Final Report. His understanding was that WMFN was to provide BC Hydro with a draft as it stood on June 6, 2012 and nothing more.

DCAT Project Hearing Transcript , July 9, 2012, Vol. 1, p. 459, line 11 to p. 460. Line 11.

172. Mr. Muir testified that his first priority was to get as much of the community interview information as possible into the draft report for BC Hydro, and that, in fact, the draft report contained all of the interview transcript excerpts that were included in the final report. He testified that his goal was to provide BC Hydro with as much as he could, especially in terms of the community's information provided during interviews. He also noted that the key concerns raised with respect to future impacts from shale gas, for example, were raised in these interview sections of the draft report. It follows that these concerns should not have been a surprise to BC Hydro when the final draft arrived. He testified that as the drafting process continued after June 6, the report evolved and new sections were added and headings were changed as part of that drafting process, resulting in new sections discussing some of the community's concerns.

DCAT Project Hearing Transcript, July 9, 2012, Vol. 1, p. 462, line 6 to p. 463, line 5 [re: all excerpts included in draft report]; p. 459, line 24 to p. 460, line 3 [re: goal of getting as much community information as possible to BC Hydro in the draft report]; p. 460, line 12 to p. 462, line 4 [re: evolving nature of the draft to final form]

173. Further, Mr. Muir noted that, to his recollection, BC Hydro did not raise any concerns with the sufficiency of the Draft Report once it was provided until the hearing. Indeed, in its June 15, 2012 letter responding to the Draft Report, BC Hydro did not raise any concerns regarding the sufficiency of the draft. If BC Hydro had had concerns about the nature of the Draft Report, is should have raised them at this time instead of waiting until the hearing to do so.

DCAT Project Hearing Transcript, July 9, 2012, Vol. 1, p. 463, lines 6 to 9

CONFIDENTIAL BC Hydro and West Moberly First Nations consultation log, Exhibit 33, Tab 32, June 15 letter from Stewart Dill to WMFN re: Draft IAS Report

174. Second, BC Hydro alleges wrongdoing on the part of WMFN in terms of delivering the Final IAS report "on the eve" of the hearing. As already noted, BC Hydro agreed to the

terms of reference for the IAS, and the IAS delivery date, but then proceeded to push for a hearing date on the CPCN Application that guaranteed insufficient time to assess the results of the IAS. To clarify, BC Hydro agreed: (1) that the purpose of the IAS was to inform the design of the DCAP Project and to avoid or mitigate potential adverse impacts of the Project on WMFN's Treaty rights; (2) that the objective of the IAS was to identify the potential impacts of the DCAT Project on WMFN's Treaty rights; and (3) that the final report for the IAS would be delivered on July 5 (the date agreed-to at the May 2 Procedural Conference).

175. Yet, BC Hydro pushed for a hearing date immediately following the IAS delivery date, giving it little to no time to consider and respond to the concerns raised by WMFN in the IAS. This suggests that BC Hydro had no intention of considering the results of the IAS. This is not good faith consultation.

Failure to consult on moose and moose habitat

176. BC Hydro failed to consult WMFN on a number of specific concerns but particularly failed to respond adequately about the issue of moose and moose habitat, which was a concern raised by WMFN in June 2010 when BC Hydro first approached WMFN to discuss the DCAT Project and a concern noted in the CPCN application.

WMFN IR 1.7.1 Attachment 1, p 2
Exhibit B-1, Chapter 6, page 6-11

177. Initially, BC Hydro's Environmental Overview Assessment ("EOA") study appeared not to have included moose at all, despite the concerns already raised by WMFN before BC Hydro carried out the study. The EAO prepared for BC Hydro by AMEC, and submitted with the CPCN application, did not include moose as a valued ecological component ("VEC") to be studied or even include it in the list of potential VECs to be considered.

178. BC Hydro met with WMFN on June 22, 2012. At that meeting, WMFN raised the concern that BC Hydro's EOA did not include moose as a VEC for the study. Without notifying WMFN or asking for its input on study design, BC Hydro proceeded to do a "desk top" study of moose and filed a draft report entitled "Moose Habitat Management and Mitigation plan for the DCAT Project" ("Draft Report") with the Commission on July 6, 2012]. BC Hydro did not advise WMFN that it had prepared the Draft Report or provide it to WMFN directly. Most problematically, BC Hydro did not consult with or seek WMFN's comments on the Draft Report. Instead, BC Hydro filed the Draft Report with the Commission and WMFN was served through the hearing process.

Cross-Examination of Mr. Slaney by Ms. Rana, DCAT Project Hearing Transcript, July 10, 2012, Vol. 2, p. 630, line 7 to Exhibit B-1, Appendix F Exhibit B-34, Appendix B

179. It is important to note that unilateral Crown action does not fulfill the duty to consult, even where the unilateral action is done with the intention of addressing First Nation concerns. For example, in the Mikisew case, the Crown breached its duty to consult the Mikisew Cree in relation to a proposed winter road, which it proposed to route through Mikisew's reserve. This duty was not discharged despite the fact that the Crown re-routed the road to track the boundary of Mikisew's reserve because the Crown unilaterally took this action and did not consult Mikisew on the proposal to re-route the road or whether or not this re-routing addressed its concerns about impacts on its Treaty rights.

***Miksew*, *supra* at para. 64**

180. At the oral hearing, BC Hydro also submitted a revision to the EOA submitted in July 2011. This correction added a reference to moose, elk and deer. It was the evidence of BC Hydro that moose habitat was considered in the report, although moose was not considered as a study VEC. BC Hydro did not engage WMFN's input on selection of the VECs for the EOA:

Page 680 line 21	MR. MILLER: .....Did someone from Hydro, or on behalf of Hydro, go to West Moberly and say, "We finalized the list of VECs we're going to be looking at. Here it is. What do you think?" MR. DILL: A: No.

Examination of Mr. Dill by Mr. Miller, DCAT Project Hearing Transcript, July 10, 2012, Vol. 2, p. 680, lines 21 to 26. [re: failure to engage WMFN on VECs]

Examination of Mr. Slaney by Mr. Sanderson, DCAT Project Hearing Transcript, July 10, 2012, Vol. 2, p. 594, lines 13 to p. 596, line 11. [re: correcting report to include reference to moose the area]

181. BC Hydro has said that impacts on moose will be minimal, but it has not conducted a field study specifically on moose and moose habitat. Although the EAO contained cursory comments about moose habitat, the species was not considered as a VEC and was included in passing in that study. BC Hydro could have incorporated WMFN's concerns raised

about moose as a VEC in the EAO because BC Hydro had already spoken with WMFN by the time the EAO was scoped. The Draft Report is not a field study, but a desk top exercise.

182. It must be remembered that WMFN's right to hunt has been impacted by the loss of caribou populations, which is a matter of public record as considered in the *West Moberly* case. Although moose is not (yet) an endangered species, it has taken on more significance to WMFN in the context of impacts on the traditional staple of caribou. As is shown in WMFN's IAS, 86.2% of potentially useful moose habitat within BC Hydro's designated study area has been adversely impacted – the total moose habitat remaining within the DCAT Project is already down to 13.8%. Within WMFN's preferred Treaty territory, a "substantial amount" of quality moose habitat has been "considerably compromised" by industrial development. The most difficult issue is that the extent of the impact of this habitat loss on the moose population is unknown.

183. Even in its Draft Report, BC Hydro is relying on data from 2004 about the moose population in the area. BC Hydro has not adequately answered whether DCAT will adversely impact the already overwhelmingly compromised moose habitat area. Given the exponential importance for WMFN to be able to access moose for the meaningful exercise of its Treaty right to hunt because of the near-extirpation of caribou in the area, BC Hydro's failure to answer this crucial question in response to WMFN's concerns is a particularly egregious breach of its constitutional duties.

Cross-Examination of Mr. Slaney by Ms. Rana, DCAT Project Hearing Transcript, July 10, 2012, Vol. 2, p. 629, line 21 to p. 630, line 6. [re: acknowledgment of recent drop in moose population in 2007-08
Exhibit C5-20, page 126

184. The fact that the 2004 moose population count is out-of-date indicates that BC Hydro's "desk top" study does not meet the standard set by the BC Supreme Court in the Tsilhqot'in case, where Mr. Justice Vickers stated that before it could assess the impact of harvesting activities on wildlife, BC was required to obtain "sufficient credible information to allow a proper assessment of the impact on the wildlife in the area." In this case, an out-of-date moose count does not provide a sufficient, credible basis for the proper assessment of potential adverse impacts of the proposed DCAT Project on moose.

***Tsilhquot'in Nation v. British Columbia*, 2007 BCSC 1700 at para 1294; aff'd by 2012 BCCA 285**

185. Finally, WMFN had no opportunity to provide feedback on the design of the BC Hydro "desk top" study, or its outcomes or implications prior to BC Hydro seeking a final decision on issuance of the CPCN. As Mr. Muir testified, he did not have an opportunity

to properly review the study in the short time frame provided (one business day). It is also notable that, in his testimony, Mr. Muir was able to raise substantive concerns regarding the limited scope of the study (i.e. its failure to look at the context of impacts on the broader landscape) and the conclusion of a "small impact" in light of a lack of scientifically credible data on current moose populations.

DCAT Project Hearing Transcript, July 9, 2012, Vol. 1, p. 448, line 2 to p. 450, line 17

Failure to consult on cumulative effects

186. WMFN is very concerned with BC Hydro's refusal to conduct a cumulative effects assessment concerning the potential adverse impacts of the proposed DCAT Project on aspects that affect the ability of its members to meaningfully exercise their Treaty rights. A cumulative effects assessment is important in the context of the high-level of development that continues to occur in WMFN's "backyard".

187. The critical balance between WMFN's Treaty rights and the Crown's right to "take up land from time to time" have been lost. As explained by Chief Willson, "future projects "are just whittling away at what little bit" of area WMFN has to exercise its Treaty rights:

> You know, and we are not saying no to development, we are saying there has got to be a balanced approach. You can't just keep telling us to go somewhere else, because as you've seen in the maps, we are getting to the point where there is no other place to go. We are completely surrounded now, and we are just whittling away at what little bit we have left. And if the treaty is supposed to be a sacred document, you have to honour the words of the treaty on that.

DCAT Project Hearing Transcript, July 9, 2012, Vol. 1, p. 476, at lines 5 to 14

188. The need for a cumulative effects assessment in these circumstances is clear. As Chief Justice Finch stated in the *West Moberly* case, there is a need to consider the relevant "historical context" in assessing the seriousness of a potential adverse impact:

> I do not understand *Rio Tinto* to be authority for saying that when the "current decision under consideration" will have an adverse impact on a First Nations right, as in this case, that what has gone before is irrelevant. Here, the exploration and sampling projects will have an adverse impact on the petitioners' treaty right, and the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners' treaty right to hunt. *[Emphasis added]*

***West Moberly (CA), supra* at para. 116, citing *Rio Tinto Alcan* at para. 45, and para. 117**

189. As held by Chief Justice Finch in *West Moberly*, it is crucial for the Crown to start the analysis of the seriousness of potential adverse impacts with regard to "historical context". Or, in other words, to start the analysis with a "recognition of an existing state of affairs".

***West Moberly, supra* at para. 117**

190. Indeed, as increasing amounts of land are taken up or used for industrial development, this reduces the amount of land remaining for the meaningful exercise of Treaty rights in places such as the Pine River area. As the BC Supreme Court stated in Taseko:

> It seems to me, with respect, that this highlights one of the significant problems raised by the petitioners. Each new incursion serves only to narrow further the habitat left to them in which to exercise their traditional rights. Consequently, each new incursion becomes more significant than the last. Each newly cleared trail remains a scar, for although reclamation is required, restoration is impossible. The damage is irreparable. It follows that if only a portion of the proposed new clearings and trails prove to be unnecessary, the preservation of that portion is vital.
>
> The geology will always be there. The ore bed is not going anywhere. The same cannot be said of the habitat that is presently left to the petitioners. Once disturbed, it is lost. Once lost, the exercise of aboriginal rights is further diminished. This is supported by the evidence of Chief Baptiste, Alice William and Sonny Lulua.

***Taseko Mines Ltd. v. Phillips*, 2011 BCSC 1675, paras. 65-66**

191. Chief Roland Willson articulated this concern in his unchallenged testimony at the oral hearing, as well as his letter to BC Hydro dated July 18, 2011, which included specific concerns about :
    a. The history of external development pressures on WMFN's territory, in light of the role of the region in the generation of energy, including development of two major hydroelectric dam projects, approval of 8 mines, 5 wind farms, over 10,000 industrial facilities, well over 18,000 oil and gas wells; 60,000 km of road, 100,000 km of pipeline, and over 6,000 forestry clear cuts. This is not to mention the extensive agricultural development in the area.

    b. Adverse Impacts of cumulative effects on the cultural integrity of WMFN, including impacts on wildlife species, fisheries (including the near extirpation of Lake Trout in Moberly Lake).
    c. Growing concerns over the region's water quality, including rising levels of Selenium and potential impacts on species, especially egg-laying vertebrates.
    d. Impacts of increasing shale gas development in the region.
    e. Impacts of decreasing habitat suitability in light of the loss of contiguous and mature old growth forest.
    f. The need to view impacts in the context of a shrinking land base.

Exhibit C5-21, p. 31, July 18, 2011 letter from Chief Willson to Joanna Mullard, Aboriginal Relations and Negotiations, BC Hydro

192. Chief Willson testified on the extensive adverse impacts of industrial development on WMFN's preferred Treaty territory, including:

- conventional oil development (p. 477 - 478 lines 3 to 10);
- fragmentation and wildlife predator corridors (p. 478 line 12 to page 479 line 4);
- seismic lines (page 479 lines 5 to 21)
- "Piggybacking" of development by different resource sectors" which results in "two, three hundred trucks roaring up and down the roads" (page 479 line 22 to page 480 line 25)
- Coal mining, involving 5 operating mines and 10 applications for future mines (page 481 line 7 to page 483 to line 4)
- Work camps in critical moose habitat (page 483 line 5 to page 483 line 25):
- Pine beetle infestation, the resulting forestry clear cuts and adverse impacts to fur-bearing animals (page 484 line 24 to page 485 line 23)
- The Williston Reservoir (page 485 line 24 to 486 line 18)
- Site C proposal, including potential impacts to the Yellowstone to Yukon corridor which is "the last remaining piece where grizzly bear can cross from north to south" (page 487 line 6 to 488 line 6
- 100,00 kilometers of pipeline through the territory (page 489 lines 7 to 10)

193. The IAS Final Report shows a deep level of concern in the WMFN community regarding both the quantity and quality of land base remaining on which to exercise their traditional Treaty rights and practices. Examining the cumulative effects of encroaching development on WMFN territory is an essential part of both assessing the nature and scope of impacts on WMFN's Treaty rights and designing appropriate mitigation and accommodation measures.

194. As Mr. Muir testified, it is insufficient to merely assess cumulative effects from the perspective of the impacts that are already on the land today; the point is to measure the impacts over time from the relevant time period to today, and then assess the potentially adverse impact of the project in that context. As was noted by Mr. Muir, the baseline or starting date for the study will vary with the VEC that is being considered. For instance, a potential baseline for moose in this context might be 1970 - approximately the time just prior to the influx of oil and gas development in the region.

195. A sound environmental assessment study looks at the whole question of the impact of the proposed project through the lens of the past impacts. It helps us to understand the real

significance of the adverse impacts that are going to take place if the project goes ahead without sufficient mitigation or accommodation measures.

DCAT Project Hearing Transcript, July 9, 2012, Vol. 1, pp. 401-405; and p. 409, line 1 to 411, line 11

196. As Mr. Muir stated, a cumulative effects assessment "not only understands the impact of species, but also characterize(s) what that means to people" and "[w]ithout that picture, its very difficult to understand what does this really mean? We are left with a piecemeal approach."

DCAT Project Hearing Transcript, July 9, 2012, Vol. 1, p. 405, lines 19 to 24

197. Nonetheless, BC Hydro has taken the position that a cumulative effects study is not warranted, and appears to suggest that to the extent that WMFN sought a cumulative effects study, what was done in the IAS was intended to suffice. WMFN notes that the IAS is not a cumulative effects study, as noted in the IAS final report.

Examination of Mr. Slaney and Ms. Dutka by Mr. Miller, DCAT Project Hearing Transcript, July 9, 2012, Vol. 1, Page 670, line 16 to page 671, line21 [Re: BC Hydro view that there is no need for a cumulative effects assessment]
Cross-Examination of Mr. Dill by Ms. Rana, DCAT Project Hearing Transcript, July 10, 2012, Vol. 2, page 655, line 10 to page 656, line 10. [Re: suggestion that cumulative effects looked at in IAS.]
IAS report, section 1.4 Limitations of the Report, p. 16

198. Apart from asserting that they have done an adequate environmental assessment, BC Hydro has not provided a substantive response to how their studies address cumulative impacts over time as a predictor of the potential adverse impacts of the proposed DCAT Project. BC Hydro looked at existing pre-project conditions as a baseline.

199. Mr. Slaney testified that the baseline methodology used by BC Hydro would meet the requirements of the Canadian *Environmental Assessment Act*. With respect, whether or not this methodology would or would not, in Mr. Slaney's opinion, meet that standard, is not relevant. The level of consultation required is fact-driven and it is an open question as to whether the standards employed in the CEA process meet or do not meet consultation requirements in the present case.

Examination of Mr. Slaney by Mr. Sanderson, DCAT Project Hearing Transcript, July 20, 2010, Vol. 2, p. 602, line 13 to p. 604, line 17

200. In any event, if indeed the IAS was intended to provide a fulsome cumulative effects analysis (as Mr. Dill seems to have suggested in his testimony) andwhich is denied, – BC Hydro has certainly not given the time or attention necessary to engage in serious consultation or accomodation of the results of the Study with WMFN.

201. WMFN submits that the Commission cannot rely on BC Hydro's promise to conduct future negotiations and to resolve issues raised by WMFN. The Commission's counsel raised a number of specific concerns about the cumulative effects assessment issue that remains unresolved between WMFN and BC Hydro, and asked BC Hydro's panel of witnesses, "if it's not resolved, what comfort does the Commission have that everyone is really working as diligently as they could to make sure there is agreement?" BC Hydro simply stated that it has done an adequate environmental assessment.

202. Clearly, the parties remain in disagreement. The Commission cannot be reasonably assured that the issues remaining to be discussed between the parites will be resolved absent some sort of regulatory supervision.

Failure to consult on "spider web" of anticipated future impacts flowing from DCAT

203. The proposed DCAT Project is not just about DCAT – in it's very nature, it is a project that will support and lead to other developments in the region. That is its chief purpose. Indeed, BC Hydro is quick to point out the level of anticipated development in the area that DCAT will serve in terms of justifying the need for the Project to proceed, including shale gas development in the Montney basin.

Exhibit B-1, Chapter 2: Project Justification

204. As Chief Willson explained, it is clear that DCAT is not just about DCAT –it is about what DCAT will lead to: a growing spider web of tie-ins and developments in the region:

Page 497 line 10	Shell is going to tie into it. All the other companies are going to tie into it. It's going to turn into this spider-web of stuff out there. You know? And, yeah, there is an argument. Shell is going to develop the shale gas. But it's going to be at a different pace than what it is now. You know? And it's going to allow companies that would not have had infrastructure, because they don't have the money to build a pipeline, or build a transmission line to tie into here. Because it would have cost them too much money. This creates the opportunity for them to expand into there, which they never would have had. So we don't get to talk. That's the

> cumulative impact that's coming, that we don't get to talk about. You know? They have to take that into consideration when they're doing this. We don't know what the thresholds are in here. We don't know how much good moose habitat is left here, and where the companies are planning to expand into. We need to have those discussions to understand what the effect of that TransCanada -- the line is.

Page 497,
line 24

Presentation by Chief Roland Willson, DCAT Project Hearing Transcript, July 9, 2012, p. 497, lines 10 to 24

205. The future adverse effects of the proposed DCAT Project on WMFN's Treaty rights must be considered. As stated in *Rio Tinto*, the question is whether current Crown conduct will impact a First Nation's rights, and this question must be answered by looking at "any effect" of the proposed project, including those that are not immediate. When read with the entirety of the case law, this means that any potential effects of the proposed project – including those that the project may (or, in this case, will necessarily) lead to in future – must be considered in assessing impacts on First Nations rights.

206. BC Hydro is seeking to build the proposed DCAT Project for five natural gas sector customers (whom BC Hydro calls "proponents"), who will carry 60% of the financial risk associated with the DCAT Project and each of whom has been asked to provide pro rata security deposits on BC Hydro. Clearly, BC Hydro is applying for its CPCN on the basis that this project will lead to larger industrial developments in the area. It follows that the approval of DCAT will lead to further adverse impacts on WMFN's Treaty rights.

Final Written Argument of BC Hydro, p. 8.
BC Hydro's load forecast: Exhibit B-1, Appendix B, pp. 73-87 and Exhibit B-22, pp. 22-34. Exhibit B-22, p. 3 and at Attachment 2, line 9(A8), p. 8, lines 19-27, p. 10, lines 12-13 (A19), lines 22-26 (A20), p. 11, lines 3-7 (A21).
Exhibit B-30, Response to BCUC IR 4.1.1.
Transcript, Vol. 2, p. 183, lines 12-23.
Exhibit B-1, Chapter 7, Page 7-2
Exhibit B-1, Chapter 2, page 2-19
Exhibit B-1, Chapter 2, page 1-2
Exhibit B-5-3, CONFIDENTIAL Revised BCUC IR 1.38.2.3

207. As BC Hydro states in its final written argument

> At least three others of the five customers have made irrevocable decisions by expending capital to configure their facilities to take electricity instead of relying on natural gas compression.17 These customers have relied on BC Hydro's Electric Tariff in making these investments, 18 and they are entitled to service.

BC Hydro Final Submission, July 24, 2012, p. 8

Exhibit B-22, p. 3 and at Attachment 2, p. 15, lines 13-18 (A34), p. 17, lines 8-9 (A40), and lines 23-25 (A42), p. 20, lines 4-15 (A50)
Transcript, Vol. 2, p. 178, lines 17-25 and p. 180, lines 23 to p. 181, line 10

208. While BC Hydro has argued that its five natural gas customers would proceed with their natural gas developments even if BC Hydro does not construct the proposed DCAT Project, the plain fact is that the proposed DCAT Project would provide key infrastructure that, if constructed, will assist in (potentially more rapid) development of natural gas projects in the area. Indeed, BC Hydro tries to have it both ways by saying on the one hand that this future development will occur with or without DCAT, while at the same time arguing that it the DCAT Project does not proceed, it will have a near-catastrophic impact on industry in the region.

BC Hydro Final Submission, July 24, 2012, p. 8

209. In answering a question from Mr. Miller regarding whether it would be preferable from WMFN's perspective to have the line run on an existing corridor, Chief Willson discussed some of the issues that arise with respect to impacts from related developments, including the issue of what or how much new development will result from development of the proposed DCAT Project:

Page 559 line 12	But then at stage we would have to understand what the proponents, the tie-ins were and stuff like that, where they were. Are they going to run on existing development or is it all going to be new? New development and new cuts and things like that. You know, so you have to look at it in isolation but you also have to look at it as kind of a package deal as well.
Page 559, line 19	

Examination of Chief Willson by Mr. Miller, DCAT Hearing Transcript, July 10, 2012, Vol. 2, page 559, lines 12 to 19

210. There is clearly a problem with a consultation process that does not permit for meaningful study and dialogue concerning the context of future developments that are all but guaranteed to take place in WMFN's territory should the project before the Commission proceed. Indeed, there is something wrong with a process that allows the Crown to justify its project on the basis of such future developments, yet deny an affected First Nation to enter into a substantive dialogue on the potential adverse impacts that are certain, to arise upon completion of the Project, if not sooner.

211. In sum, BC Hydro failed to engage in a meaningful dialogue or substantive consultation with WMFN on:

    a. the nature and scope of its rights and potential impacts of the proposed DCAT Project on those rights;

    b. the project alternatives to the proposed DCAT Project;

    c. the serious concerns WMFN has raised with respect to cumulative impacts, future development and specific impacts on moose and moose habitat.

212. BC Hydro has breached its obligation to consult WMFN in relation to the proposed DCAT Project and its CPCN Application cannot proceed until meaningful consultation has taken place. The process of reconciliation – the ultimate goal of consultation – is not achieved by approval of a project when the consultation process in relation to that project is devoid of substantive dialogue between the Crown and the affected First Nation and disregards the serious concerns raised by that First Nation, as in this case.

Issue 4: BC Hydro's Conduct: An Overall Pattern of Bad Faith

213. WMFN submits that while BC Hydro attempts throughout its submissions to cast aspersions on WMFN, it is, in fact, BC Hydro that has demonstrated a consistent pattern of bad faith conduct.

214. The courts have made it clear that, throughout the consultation process, the Crown must conduct itself in a manner that reflects its intention to substantially address First Nations' concerns about impacts on their Treaty or Aboriginal rights:

> Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.
>
> ***Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at para. 168, cited with approval in *Mikisew, supra* at para 130 and *Haida, supra* at para. 40**

215. If "good faith" requires the Crown to consult "with the intention of substantially addressing the concerns of the aboriginal peoples", then it follows that "bad faith" includes conduct

that shows that the Crown has no intention of addressing the concerns of the affected First Nation. WMFN submits that this is precisely the nature of BC Hydro's conduct in this case. Indeed, BC Hydro's actions strongly suggest that BC Hydro pre-determined the outcome of the consultation process at the outset, resulting in meaningless, as opposed to meaningful, consultation with WMFN.

216. WMFN has serious reservations about BC Hydro's conduct in light of the fact that, as BC Hydro has admitted, it failed to consult Treaty 8 First Nations prior to proceeding with the Peace River Distribution Line Crossing Project. BC Hydro admitted it failed to consult and stated an intention to [redacted] lines of communication going forward. Yet BC Hydro's conduct in relation to the proposed DCAT Project again shows a failure to meet its constitutional consultation obligations to WMFN.

CONFIDENTIAL BC Hydro and West Moberly First Nations consultation log, Exhibit B-33, Tab 43, July 3, 2012 letter from Chief Willson to Steward Dill, attaching April 12, 2012 BC Hydro letter concerning failure to consult on Peace River Distribution Line Crossing Project.

BC Hydro's Conduct indicates it had pre-determined the outcome of consultation at the outset

217. BC Hydro started with the assumption, based on an inadequate preliminary assessment, that the impacts on WMFN's Treaty rights was on the low end of the spectrum and, as a result, determined that a low level of consultation was owed.

218. Perhaps taking the view that low level consultation did not warrant a study in the nature proposed by WMFN, BC Hydro then delayed negotiations on the IAS by failing to provide a substantive response to WMFN's Aasen Proposal for almost nine months – finally starting a substantive dialogue on the scope and nature of the study only on the eve of filing its CPCN Application.

219. BC Hydro then attempted to scrap the IAS altogether by 'piggybacking' interviews on DCAT on the TLUS being conducted in relation to the Site C Project, a process totally rejected by WMFN on the basis that it would compromise the results of both studies.

220. Finally, BC Hydro agreed to the terms of reference for the IAS, and the IAS delivery date, but then proceeded to push for a hearing date on the CPCN Application that guaranteed insufficient time to assess the results of the IAS. To clarify, BC Hydro agreed: (1) that the purpose of the IAS was to inform the design of the DCAP Project and to avoid or mitigate potential adverse impacts of the Project on WMFN's Treaty rights; (2) that the objective of the IAS was to identify the potential impacts of the proposed DCAT Project on WMFN's Treaty rights; and (3) that the final report for the IAS would be delivered on July 5 (the date agreed-to at the May 2 Procedural Conference).

221. Yet, BC Hydro pushed for a hearing date immediately following the IAS delivery date, giving it little to no time to seriously consider and respond to the concerns raised by WMFN in the IAS. This suggests that BC Hydro had no intention of considering the results of the IAS. This is not good faith consultation.

222. Indeed, one of BC Hydro's own witnesses suggests in his testimony that he did not have sufficient time to fully digest the contents of the IAS:

	...
Page 598, Lines 3 to 6	MR. SANDERSON: Q: Have you had a chance to review that impact assessment report? MR. SLANEY: A: I've looked at it as thoroughly as I could in the time available.

Examination of Mr. Slaney by Mr. Sanderson, DCAT Project Hearing Transcript, July 10, 2012, Vol. 2, p. 598, lines 3 to 6

223. Further, BC Hydro's witnesses state that the IAS did nothing to change BC Hydro's assessment of the seriousness of WMFN's concerns.

Examination of the BC Hydro Panel by Mr. Miller, DCAT Project Hearing Transcript, July 10, 2012, Vol. 2, p. 663, line 8 to p. 664, line 7

224. WMFN notes the concerns of affected land owners Gary and Marilyn Robinson, who have indicated in their submissions that BC Hydro has not taken their concerns regarding adverse impacts of Option 1 on the enjoyment of their property into account and has failed to give the Robinsons a good reason as to why the Bear Mountain Terminal expansion is to be located on their land. This, WMFN submits, suggests a general pattern of bad faith conduct with respect to the public at large that reflects the pattern of conduct experienced by WMFN with respect to the proposed DCAT Project.

Submissions of J. Darryl Carter, Q.C. on behalf of Gary and Marilyn Robinson, dated July 30, 2012.

Non-responsiveness

225. The pre-determined nature of BC Hydro's "consultation" is further demonstrated by its non-responsiveness to WMFN's expressions of serious concern about project impacts. For instance, BC Hydro did not respond to the concerns raised in Mr. Muir's July 12, 2011 email with respect to, among other things, the need to provide WMFN with a preliminary

assessment and the need for a cumulative effects assessment. BC Hydro responded by stating that, [redacted]

BCUC IR 2.29.2 CONFIDENTIAL Attachment 5, pp. 442-444
BCUC IR 2.29.2 CONFIDENTIAL Attachment 5, pp. 464-467

Patching Up to save "broken" consultation

226. BC Hydro has engaged in a recent effort to "patch up" its shoddy consultation. This is demonstrated by its actions in meeting with WMFN on June 22, 2012 and then taking concerns raised at that meeting and attempting to take last-minute steps to put on the appearance of addressing WMFN's concerns. This is evident in the last-minute filing of the "desk top" moose study, presumably filed in order to tick off the 'moose box' on the consultation record, as opposed to engage in any meaningful dialogue with WMFN.

227. Indeed, the fact that BC Hydro did not tell WMFN that it planned to do this study, did not elicit WMFN's input on the study design, and provided WMFN with the study through the Commission's filing process in this proceeding, indicate that this study was a rush, patch-up job rather than a good faith effort at addressing WMFN's concerns regarding potential impacts on moose and moose habitat.

228. Other actions, such as the last-minute corrections to the record to insert a mention of moose in the EOA and the "do nothing" slide concerning project alternatives are also indicative of this general pattern of conduct.

Conduct in this Proceeding

229. Some of BC Hydro's conduct during this proceeding is suggestive of the general pattern of attempting to control and spin the information to its advantage in a manner that crosses the line. For instance, the manner in which BC Hydro's panel of witnesses conferred with each other and with their client concerning matters of professional opinion indicates a crafting of answers to serve the client's purposes.

See DCAT Project Hearing Transcript, July 10, 2012, Vol. 2, p. 686, lines 6 to 24

230. Indeed, BC Hydro's characterization of the evidence corroborating its version of the March 29, 2012 telephone call shows a tendency toward sleight-of-hand. BC Hydro states in its

written submissions that the evidence on the record supports its version of the communications between Mr. Muir and Mr. Dill; however, to be fair, the record also contains evidence corroborating WMFN's view of what was said during that telephone call.

231. BC Hydro mischaracterizes this short telephone call as a discussion as to whether "there were any showstopper issues that could potentially have significant impacts on the project" and stated that Mr. Muir had indicated during that call that because the sacred site he had been concerned about was located south of Highway 97 "the proposed DCAT Pine River crossing was not a showstopper". BC Hydro's summary states that Mr. Muir said that "there were no other showstoppers, and any other impacts that might be identified in the IAS could be mitigated with more typical measures."

Exhibit B-34, p. 2 of evidence summary [re: BC Hydro's summary of March 29 telephone call]

232. Mr. Muir testified that his understanding – and what he believed BC Hydro's understanding – of the March 29 telephone call was to deal with the "Oh My God" issue, i.e. the potential that the site where the proposed transmission line is to cross the Pine River may coincide with the location of a sacred rock. Mr. Muir was clear on cross-examination on this point and clearly stated that his intention all along was to ensure that this one potentially very significant issue was addressed early on the in process, as he happened to be aware that this issue might arise. He was equally clear that he did not at any time suggest that this March 29 phone call was to address any potential significant concerns that WMFN may have with respect to the proposed DCAT Project or the location or type of river crossing.

Cross-Examination of Mr. Muir by Mr. Sanderson, DCAT Project Hearing Transcript, July 9, 2012, p. 372, line 18 to p. 374, line 18. [re: Mr. Muir's understanding and intention of the March 29 telephone call]

See also: Examination of Mr. Muir by Ms. Rana, DCAT Project Hearing Transcript, July 9, 2012, p. 312 to p. 318, line 18 [re: Mr. Muir's understanding and intention of the March 29 telephone call]

233. Indeed, Mr. Muir summarized in writing the status of consultation and the nature of the March 29 telephone call in an email to Marianne Navotny of FLNRO, an email on which Mr. Dill himself was copied. In that email, Mr. Muir states that, in the March 29 phone call, he "provided BC Hydro with an update as to whether there was an issue with one of the nation's serious concerns, which at this time, does not seem to be a problem in relation to the DCAT project. Given the sacredness of that particular issue, it was singled out so

that we could get back to BC Hydro quicker." He then goes on to write, "Other issues and concerns are included in the community study and will be reported out on when it is completed."

234. The content of this email, and the fact that Mr. Dill did not correct or note that the email was missing any key information – such as the alleged statement by Mr. Muir that there were no further significant concerns and that any further concerns could be mitigated – supports the accuracy of Mr. Muir's testimony with respect to what he said during that telephone call.

Cross-Examination of Mr. Dill by Ms. Rana, DCAT Project Hearing Transcript, July 10, 2012, Vol. 2, p. 621, line 21 to p. 672, line 24

235. Significantly, the evidence is clear that the purpose of the planned March 29 telephone call was to have Mr. Muir update BC Hydro on the study, after the interviews were completed. Mr. Muir agreed to advise of significant impacts, *as they were identified in the interviews*. The date for the telephone call was selected to coincide with the end of the interview process.

CONFIDENTIAL BC Hydro and West Moberly First Nations Consultation Log filed July 10, 2012, p. 125, 161, 256 and 259

236. In addition, BC Hydro casts aspersions on Mr. Muir by noting that he has been critical of the environmental assessment process. WMFN notes that Mr. Muir is an academic and, along with other commentators, has engaged in healthy academic critiques of environmental assessment process. WMFN notes that Mr. Muir's articles concerning the environmental assessment process have been peer-reviewed and are published in recognized academic journals. There is nothing inappropriate in Mr. Muir's conduct in this regard; he is contributing to a lively scholarly debate about serious questions of public importance. In any event, the nature of Mr. Muir's academic contribution in this respect is irrelevant; what is relevant are the concerns raised by WMFN. We submit that BC Hydro should focus on addressing these concerns instead of attempting to colour them or denigrate Mr. Muir's evidence or role in this process.

BC Hydro Final Written Submissions, section 8.5, p. 40

Examination of Mr. Muir by Ms. Rana, DCAT Project Hearing Transcript, July 9, 2012, Vol. 2, p. 308, line 16 to p. 309, line 11.[re: Mr. Muir's qualifications.]

Examination of Mr. Muir by Ms. Rana, DCAT Project Hearing Transcript, July 9, 2012, Vol. 2, p. 321, line 26 to p. 327, line 20 [re: Mr. Muir's articles.]

237. WMFN submits that, in pushing for a decision at this stage, when substantive consultation has only just been given the opportunity to begin, BC Hydro is attempting to cut-off the consultation process prematurely; WMFN has no confidence that if the CPCN is granted, BC Hydro will make any attempts to mitigate impacts on WMFN. If it had such an intention, it would not push for a final decision at this stage of the process.

238. Indeed, at the June 22, 2012 meeting, WMFN asked BC Hydro for a reasonable delay to complete the consultation process. BC Hydro refused this request. As BC Hydro's meeting minutes state:

CONFIDENTIAL BC Hydro & West Moberly First Nations Log, Exhibit B-33, Tab 38; BC Hydro Meeting Minutes for Meeting on June 22, 2012

239. At the end of the day, it is clear that while there may have been some meetings, phone calls and letters from BC Hydro to WMFN concerning the proposed DCAT Project, there was minimal substantive engagement and dialogue between them on WMFN's main concerns regarding potential impacts on its Treaty rights. In light of this, WMFN submits that the Commission can take little comfort in relying on BC Hydro's statements that consultation has been adequate. WMFN submits that the BCUC must not sanction the conduct of BC Hydro in this consultation process.

PART VI - ORDER

240. The Commission has the jurisdiction to issue a CPCN subject to conditions as to the exercise of the right or privilege granted by the CPCN, including terms about the duration of the right or privilege. Section 46(3) of the *Utilities Commission Act* provides that:

> (3) Subject to subsections (3.1) to (3.3), the commission may, by order, issue or refuse to issue the certificate, or may issue a certificate of public convenience and necessity for the construction or operation of a part only of the proposed facility, line, plant, system or extension, or for the partial exercise only of a right or privilege, and may attach to the exercise of the right or privilege granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require.

***Utilities Commission Act*, RSBC 1996, c. 473, s. 46(3)**

241. The WMFN seeks an order refusing to issue the CPCN to BC Hydro on the basis that BC Hydro has breached its duty to meaningfully consult and reasonably accommodate WMFN in relation to the proposed DCAT Project.

242. In the alternative, WMFN seeks an order conditionally granting the CPCN subject to completion of consultation that meets constitutional requirements and providing that the parties will report to the BCUC in 180 days as to the status or completion of such consultation.

243. Both of these orders fall squarely within the Commission's jurisdiction to refuse a CPCN Application or grant a CPCN on terms and conditions, including conditions as to the duration of the rights or privileges granted in the CPCN.

244. In light of BC Hydro's failure to adequately consult WMFN and the bad faith demonstrated by BC Hydro in relation to consultation on this Project, WMFN submits that the Application for a CPCN must be refused. The Commission cannot take any comfort in BC Hydro's submissions that it intends to continue to consult going forward. While BC Hydro must, of course, consult WMFN on an ongoing basis with respect to further steps in the process, consultation with respect to the CPCN stage must be completed prior to the grant of the CPCN.

245. We note that BC Hydro's statements about ongoing consultation seems to WMFN to be an admission by BC Hydro that consultation to-date is inadequate and therefore they will try to fix it in the future.

246. WMFN seeks an Order:

    a. Determining that BC Hydro has breached its duty to consult and accommodate WMFN in relation to the proposed DCAT Project; and
    b. Refusing BC Hydro's Application for a Certificate of Public Convenience and Necessity in relation to the proposed DCAT Project;

247. In the alternative, in the event that the Commission determines that the CPCN should be granted, WMFN seeks an Order:

    a. Conditionally granting the Application for a CPCN to BC Hydro in relation to the proposed DCAT Project, subject to completion of consultation by BC Hydro that meets consultation requirements to the satisfaction of the Commission;

b. Requiring BC Hydro to engage with WMFN to conduct a cumulative effects study with respect to potential adverse effects of the proposed proposed DCAT Project on WMFN's Treaty rights;

c. Requiring BC Hydro to provide adequate capacity funding to permit WMFN to meaningfully engage in the consultation process with respect to the proposed DCAT Project;

d. Requiring BC Hydro to engage with WMFN to conduct wildlife studies with respect to potential adverse effects of the proposed DCAT Project on WMFN's Treaty rights;

e. Requiring BC Hydro to consult WMFN regarding project alternatives considered prior to decision to proceed with the DCAT transmission line, including but not necessarily limited to geothermal, co-generation, Site C and wind power options; such consultation is to include consideration of the points raised by the WMFN IAS with respect to project alternatives;

f. Requiring BC Hydro to consult with WMFN regarding impacts on moose and moose habitat, including consideration of the points raised in the WMF IAS, the July letter from Chief Willson to BC Hydro, and BC Hydro's table top study;

g. Requiring BC Hydro to consult with WMFN with respect to potential future adverse impacts that are reasonably foreseeable should the proposed DCAT Project proceed, including but not limited to the need for tie-ins to carry power from the main transmission line to industrial, municipal and other customers.

h. Providing that should BC Hydro fail to meet the consultation requirements set out in the Order to the satisfaction of the Commission, the CPCN shall be void and of no force or effect;

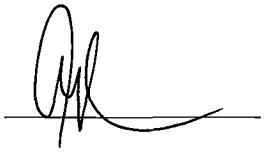
i. Requiring BC Hydro to file an update as to the sufficiency of consultation with WMFN on each of the mandated consultation issues set out in the Order on a date to be determined by the Commission;

j. Requiring WMFN to file a response to BC Hydro's consultation update on a date to be determined by the Commission;

k. Stating that on or after 180-days following the date of the Order, the Commission will review the consultation updates provided by both parties and issue a directive that will either: (1) Confirm that meaningful consultation has been adequately completed

and WMFN's Treaty rights have been reasonably accommodated, the proposed DCAT Project CPCN is valid and that the Project may proceed; (2) Determine that consultation has been inadequate, that the terms of the CPCN have not been met and the proposed DCAT Project shall not proceed; or (3) Determine that consultation has been inadequate, that the terms of the CPCN have not been met and provide further directions to the parties as to how to proceed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of August, 2012.



Allisun Rana

Counsel for the West Moberly First Nations