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November 21, 2011

Ms. Alanna Gillis
Acting Commission Secretary
British Columbia Utilities Commission
Sixth Floor – 900 Howe Street
Vancouver, BC V6Z 2N3

Dear Ms. Gillis:

RE: Project No. 3698640
British Columbia Utilities Commission (BCUC)
British Columbia Hydro and Power Authority (BC Hydro)
Application for a Certificate of Public Convenience and Necessity (CPCN) for the Dawson Creek/Chetwynd Area Transmission (DCAT) Project
Response to West Moberly First Nation's (WMFN) Application for an Adjournment

On November 9, 2011, the West Moberly First Nation (**WMFN**) filed an application requesting that the British Columbia Utilities Commission (**BCUC**) exercise its power and discretion, pursuant to section 74(e) of the *Utilities Commission Act*[1] to adjourn the Dawson Creek/Chetwynd Area Transmission (**DCAT**) Project proceedings "until such time as a study outlining the impacts of BC Hydro's proposed DCAT Project on WMFN is completed".[2]

On November 14, 2011, the BCUC provided BC Hydro the opportunity to provide written submissions on the proposed adjournment by noon, Monday November 21, 2011.[3] These are BC Hydro's submissions on the proposed adjournment.

BC Hydro opposes the granting of the proposed adjournment. It is BC Hydro's position that:

- The evidence currently before the BCUC does not support the factual assertions made by WMFN;
- The focus of the BCUC's inquiry in respect of the application should properly be whether consultation with the WMFN has been adequate up to the point of its decision, not whether negotiated studies have been completed;

1 RSBC 1996, c. 473.
2 Exhibit C5-13, 1.
3 Exhibit A-19.

- While the Crown has a duty to provide timely notice and sufficient information about the contemplated conduct, the First Nations have a reciprocal duty to share any relevant information it has on the scope and nature of the Aboriginal rights they assert and on the alleged infringements;

- There is no requirement at law that the First Nation's reciprocal consultation obligation to articulate their specific interests in the project area and possible alleged infringement is conditional upon the Crown funding studies; and

- The prejudice to BC Hydro's right to have its application heard in a timely manner outweighs the WMFN interests especially in light of the delaying in bringing the application.

As a result of the above, BC Hydro submits that the balance of the interest of the parties to ensure the fairest possible result supports not granting an adjournment of the DCAT proceedings for the reasons sought by the WMFN.

1. Factual Foundation of the WMFN's Argument is Unsubstantiated

Before addressing the merits of the WMFN's submission supporting an adjournment, a more fulsome consideration of the factual evidence as to the consultation that took place is required. While BC Hydro has set out a comprehensive review of the record in respect of the engagement between the parties on the issue of a study, it also draws the BCUC's attention to Exhibit B-6-1 which contains BC Hydro's Confidential Response to WMFN IR 1.5.1.

The foundation of the WMFN's argument for adjournment is grounded in the following facts:

- BC Hydro has failed to provide capacity funding to meet with BC Hydro and to discuss the terms of reference for the study;[4]

- BC Hydro failed in almost 9 months to raise any substantive concerns with the study, beyond budget, until immediately prior to filing the CPCN application;[5]

- BC Hydro has acknowledged the necessity of a study to ensure consultation has been adequate;[6] and

- Absent such a study, WMFN has no ability to provide either BC Hydro or the BCUC any information as to its members' current exercise of Treaty 8 rights in the DCAT area, and consequently potential impacts on those rights.

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4 Exhibit C5-13, 4.
5 Exhibit C5-13, 4.
6 Exhibit C5-13, 2-3.

It is BC Hydro's position that the above version of the facts is not supported by the consultation record.[7]

Firstly, as to WMFN's submission that BC Hydro failed to provide capacity funding, the record shows that as early as June 14, 2010, BC Hydro provided initial capacity funding in the amount of $10,000 to WMFN to assist with their capacity to engage on the DCAT Project.[8] On July 10, 2010, BC Hydro emailed WMFN and expressly provided that the initial funding could be used to initiate a Traditional Use Study (**TUS**) contemplated in the draft Capacity Funding Agreement (**CFA**).[9] On July 12, 2010, WMFN responded that it would proceed with commencing any study once the CFA was signed by the parties.[10] Further, at no point did WMFN request further funds to enable them to continue to meet with BC Hydro, nor did it express that it could not continue consultation on the DCAT Project because of a lack of funds.

The submission that for 9 months BC Hydro failed to provide any substantive feedback on a proposed study is not supported by the record. The topic of a study was first discussed at a meeting between the parties on June 3, 2010.[11] On July 29, 2010, BC Hydro emailed WMFN a draft CFA and requested WMFN's feedback on it and on a proposed Terms of Reference (**TOR**) for a TUS.[12] On September 10, 2010, BC Hydro emailed WMFN another copy of the draft CFA, but this time complete its own draft TOR for a TUS as it had not received a response from WMFN.[13] More substantive discussions regarding a study occurred in October 2010 as part of a meeting that was scheduled on October 22, 2010 to negotiate a CFA. Just prior to the meeting on October 20, 2010, WMFN emailed BC Hydro its comments and edits on a revised CFA which included draft TOR for such a study. Attached to that email was also a letter from Wendy Aasen to Chief and Council that discussed what Ms. Aasen believed to be the "inappropriateness" of the draft TOR and a possible approach for a community based study (the **Aasen Proposal**).[14] The Aasen Proposal is a distinct document from the draft TOR, but is related in that the Aasen Proposal provided feedback on the draft TOR. During the October 22, 2010 meeting, the parties discussed the issue of a study and how some of the suggestions provided for in the Aasen proposal could be incorporated into the draft TOR. The relevant action item arising from the meeting was that BC Hydro

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7 In BC Hydro's discussion of the facts below, it has referred to a number of Confidential Exhibits filed with the BCUC. To be clear, BC Hydro position continues to be that these exhibits should continue to be held in in confidence as between BC Hydro, the WMFN, and the BCUC.

8 Exhibit B-14-3, Confidential Attachment #5, 3-4.

9 Exhibit B-6-1, WMFN IR 1.7.1, Confidential Attachment #1, 2.

10 Exhibit B-6-1, WMFN IR 1.7.1, Confidential Attachment #1, 2.

11 Exhibit B-14-1, Confidential Attachment #1, 103-105.

12 Exhibit B-14-3, Confidential Attachment #5, 7-24.

13 Exhibit B-6-1, WMFN IR 1.7.1, Confidential Attachment #1, 2.

14 Exhibit B-14-3, Confidential Attachment #5, 67-92.

would endeavour to define the scope of work it was willing to fund, and propose a draft budget breaking down which funds would be allocated to a study.[15]

BC Hydro followed up on the action items arising from the October 22, 2010 meeting. By way of email dated November 12, 2010, BC Hydro provided the WMFN a memo outlining the progress that had been made on the action items.[16] With respect to the above noted action item, the memo provided that BC Hydro was not prepared to support the current funding request and that further discussion would be required in respect of the additional scope and project overview information proposed by WMFN. With respect to next steps, BC Hydro and WMFN agreed to schedule a conference call to discuss the comments on the draft CFA and also the Aasen Proposal. BC Hydro proposed November 16 or 18, 2010 as possible dates. No response was received from WMFN until January 26, 2011.[17]

By way of email dated December 17, 2010, BC Hydro provided WMFN its edits and comments on the draft CFA (as previously reviewed by WMFN). With respect to the draft TOR, the cover email provided that BC Hydro had revised Appendix C of the draft CFA (which was the draft TOR) to reflect the parties' discussions around limiting the scope of the TUS to the potential adverse impacts of the line between Dawson Creek and proposed Sundance Substation.[18]

No response was received from the WMFN on BC Hydro's comments and edits on the draft TOR, but the matter was discussed at a meeting between the parties on February 8, 2011. The meeting notes show that during that meeting, BC Hydro enquired as to whether WMFN intended to take any further action with the CFA and/or had any further thoughts regarding a revised scope and budget for a TUS.[19] In response to this enquiry, WMFN advised that it had not yet taken any further action with the CFA. Further, the parties again discussed how to come to a mutually agreeable scope of study and WMFN requested that BC Hydro consider which aspects of the Aasen Proposal that it would be willing to fund within the TUS provided for in the draft CFA. In particular, WMFN requested that BC Hydro provide a revised budget for the TUS setting out distinct tasks with the goal of developing an impact assessment report guided by the community interviews suggested in the Aasen Proposal. The parties went on to discuss the key elements of a basic TUS for the purpose of determining potential adverse impacts arising from the DCAT Project. Amongst the action items arising from the meeting were that BC Hydro was to consider revising its budget for a basic TUS as informed by the discussion at the meeting.

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15 Exhibit B-14, Confidential Attachment #5, 121.
16 Exhibit B-14-3, Confidential Attachment #5, 93-95.
17 Exhibit B-6-1, WMFN IR 1.7.1, Confidential Attachment #1, 4.
18 Exhibit B-14-3, Confidential Attachment #5, 108-160.
19 Exhibit B-14, Confidential Attachment #1, 121-123.

By way of email dated March 11, 2011, BC Hydro provided WMFN a revised CFA which offered an increase in the capacity funding tied to the TUS and Impact Assessment Report and revised draft TOR which took into consideration some of the aspects of the Aasen Proposal that BC Hydro would be willing to fund as part of the study.[20] The parties subsequently discussed BC Hydro's proposed revised CFA and draft TOR by telephone on March 14, 2011. From that point until the end of May legal counsel for the WMFN and BC Hydro exchanged several emails and telephone calls regarding revisions to the draft CFA. Their primary focus was the other elements of the draft CFA and not the draft TOR. Exchanges regarding the draft TOR were centred on trying to engage to develop a mutually agreeable scope, timeline and cost. It is evident from the emails exchanged at the beginning of May that there remained a lack of agreement on the draft TOR and that it was to be the focus of further discussions between the parties towards the end of May 2011.[21] See for instance, BC Hydro's email of May 3, 2011 wherein WMFN was asked to confirm whether everything in the draft CFA was acceptable, subject only to agreement on the study.[22] These discussions continued through to June.

By way of letter dated June 21, 2011, the specifics of the study outlined in the Aasen Proposal resurfaced. This was the first direct discussion of the Aasen Proposal since the February 8, 2011 meeting as after that date the parties had focused on reaching an agreement on the draft TOR and accompanying budget.[23] BC Hydro responded to this letter on June 29, 2011. It noted the several attempts made since October 22, 2010 to reach mutually agreeable TOR and budget for a study and identified issues the parties needed to discuss further in order to come to an agreement (namely, study area, interviews, objectives and deliverables).

From this point onward, the record is full of attempts by BC Hydro to engage the WMFN on these issues in order to find a solution to the study issue.[24] WMFN provided they would not be able to meet until late August. No meeting was held in late August. As throughout the consultation process, BC Hydro wrote WMFN on September 8, 2011 again asking for them to provide any information they held regarding the exercise of Treaty 8 rights in the project area.[25] No information was provided in response. Subsequent to the letter, BC Hydro again made several attempts to get WMFN to meet face to face to discuss the remaining issues between the parties. These attempts were unfruitful. Following the BCUC's Procedural Conference, BC Hydro received a letter

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20 Exhibit B-14-3, Confidential Attachment #5, 174-179.
21 See for instance Exhibit B 14 3, Confidential Attachment #5, 359 360, 379 381, & 382-383.
22 Exhibit B-6-1, WMFN IR 1.7.1, Confidential Attachment #1, 6.
23 Exhibit B-14-3, Confidential Attachment #5, 432-434.
24 See for instance Exhibit B 14 3, Confidential Attachment #5, 528-530, 536-583.
25 Exhibit B-14-3, Confidential Attachment #5, 536-583.

from WMFN dated November 9, 2011 which proposed a meeting between the parties on November 25, 2011.[26] BC Hydro accepted the proposed meeting date.

In sum, contrary to the WMFN's submission, the factual record clearly shows that:

- BC Hydro provided initial capacity funding to WMFN and offered that it be used to support consultation efforts and/or to commence a study and at no time did WMFN indicate it lacked the necessary funds to engage in consultation.

- After the initial sharing of the Aasen Proposal in October 2010, it was discussed again in a February 8, 2011 meeting, but thereafter the parties' efforts were spent trying to reach a mutual agreeable draft TOR and accompanying budget and neither party raised the issue of the Aasen Proposal until WMFN's letter of June 21, 2011. During this period, BC Hydro provided its substantive comments and edits on the draft CFA and TOR including in respect of scope, timing, and budget of the contemplated study.

- BC Hydro has consistently been willing to fund and support a WMFN study provided it is appropriate to the DCAT Project. It has engaged significant time and money to reach a mutual agreed upon TOR and budget for such a study, but unfortunately no agreement has been reached.

- While BC Hydro understands the importance of such a study to WMFN, at no time did it agree that the study was a "necessity" or that the failure to conduct such a study would render consultation inadequate.

Regardless of whether there is legal validity of the WMFN's requested adjournment (discussed below), the factual foundation for its argument is not supported by the evidentiary record.

2. Completion of the Study not a Pre-condition to the BCUC Process or a Finding that Consultation has been Adequate up to the point of the BCUC's decision

At the core of the WMFN's application for an adjournment is the fact that, despite endless efforts by the parties, no agreement on a study has been reached and as such, no study has been completed. As a result of this, WMFN submits that proceeding now would require the BCUC "to evaluate a process which has not yet taken place."
In response, it is BC Hydro's position that the focus of the BCUC's determination in respect of the CPCN application is not whether a study has been completed, but whether BC Hydro's actions have maintained the honour of the Crown.[27] As found by the BC Court of Appeal in *Kwikwetlem First Nation v. British Columbia (Utilities*

[26] Exhibit C5-13, Attachment #1, 1.
[27] *Haida Nation v. British Columbia,* 2004 SCC 73, para 45. ("*Haida Nation")*

Commission), "[t]he question the Commission must decide is whether the consultation efforts up to the point of its decision were adequate."[28]

As to the specific engagement required of the Crown to ensure it acts honourably, BC Hydro agrees that as per *Halfway River First Nation v. British Columbia,* in the present case, BC Hydro has a positive obligation to ensure that the WMFN have been provided with all necessary information in a timely way so that WMFN has an opportunity to express its interests and concerns, and to ensure that its representations are seriously considered and if possible, demonstrably integrated into the DCAT Project.[29]

In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* the Supreme Court of Canada stated the following in respect of what is required to ensure honourable conduct of the Crown:

> [t]he duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on surrendered lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights.[30] [Emphasis added.]

The commonalities between the articulations in *Halfway River* and *Mikisew* are (1) timely notice about the project, (2) adequate information about the proposed activity to enable the First Nation to assess potential impacts, (3) direct engagement, (4) an opportunity for the First Nation to communicate its interests and possible impacts, (5) a willingness on the part of the Crown to listen to those concerns, and (6) where necessary, attempts to minimize any potential adverse impacts.

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28 *Kwikwetlem First Nation v. British Columbia (Utilities Commission),* 2009 BCCA 68, para. 70.

29 *Halfway River First Nation v. British Columbia,* 1999 BCCA 470, para 60. ("*Halfway River*")

30 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69, para. 64. ("*Mikisew*")

BC Hydro submits that none of the reasons presented by WMFN for delaying the DCAT proceedings challenge whether BC Hydro has met these individual obligations. Nowhere in its submissions has WMFN argued that they were (1) not provided timely notice of the DCAT Project, (2) not given adequate information about the DCAT Project, (3) not engaged directly by BC Hydro, (4) not provided an opportunity to communicate its interests and possible impacts, (5) faced with an unwillingness on the part of BC Hydro to listen to their concerns, or (6) faced a refusal from BC Hydro to minimize any identified adverse impacts.

WMFN attempts to tie the lack of completed study into the adequacy of BC Hydro's preliminary scope of consultation assessment and ability to take advantage of its opportunity to communicate its interests and possible impacts arising from the DCAT Project to BC Hydro.

With respect to the preliminary scope of consultation assessment, BC Hydro notes that there is nothing in *Haida Nation,* the seminal case on how to properly determine the scope of the duty, to suggest that the Crown must fund a study undertaken by the First Nation before determining the seriousness of the potential impacts arising from the contemplated conduct. In fact, what *Haida Nation* supports is that there is a reciprocal duty on First Nations to "outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements."[31]

With respect to the WMFN's opportunity to communicate its interests and possible impacts to BC Hydro, again *Halfway River, Mikisew* and *Haida Nation* put the onus on the First Nation to identify its interests. As stated in *Halfway River*:

> There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them.[32]

Similarly in *Husby Forest Products Ltd. v. British Columbia (Minister of Forests),* the BC Supreme Court held that it was the responsibility of the First Nation, not that of the Crown, "to delineate clearly the aboriginal right they assert would be infringed".[33] The BC Supreme Court went on to specify that the "delineation of the right must be context specific and must set out the traditions and practices relied on to establish the right (Mitchell)".[34] While traditional use studies and impact assessment studies are useful tools in helping to understand a First Nation's interests and possible impacts, they

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31 *Haida Nation,* para. 36.
32 *Halfway River,* para 161.
33 *Husby Forest Products Ltd. v. British Columbia (Minister of Forests),* 2004 BCSC 142, para. 115. ("*Husby")*
34 *Husby, para. 115.*

are not a pre-condition to the First Nation's opportunity to identify its interests or concerns.

Nor is there a requirement on the Crown as part of its duty to consult to fund such studies, or to agree to unreasonable studies.[35] In *Saulteau First Nation v. British Columbia (Oil and Gas Commission),* the BC Supreme Court had to consider how the Saulteau First Nation's Treaty 8 rights should be considered and accommodated by the Oil and Gas Commission in respect of a new development.[36] Amongst the arguments presented by the Saulteau First Nation in that case was that the scope of impacts arising from the new development was "not limited to local or direct effects, but include[d] the obligation to consider all relevant effects" because "if approvals are not considered broadly in context, small incremental infringements may threaten treaty rights by 'death by a thousand cuts'".[37] In light of this position, the Saulteau First Nation argued that a cumulative impacts assessment study was required and as that study had not been completed, "the Decision Maker had inadequate information to fully consider all of the factors relating to the activities associated with the Application".[38] As a remedy, the Saulteau First Nation requested that the Oil and Gas Commission hold off deciding whether to grant the Application until it had undertaken a cumulative effects assessment. As the BC Supreme Court put it, the Saulteau First Nation argues "neither the SFN nor the Commission can state with precision what the impact of Vintage's activities will be on the SFN's treaty rights until the assessment and studies sought by the SFN have been completed".[39] BC Supreme Court rejected the "catch 22" argument:

> In my opinion, to accept the petitioner's position on this issue, in light of the above circumstances, would be contrary to the fundamental principles reflected in the authorities. I am satisfied that faced with the evidence available to him, in the absence of any contradictory information from the SFN, the Decision Maker took into account all of the relevant factors: he considered the consultation process; he clearly set his mind to the direct and indirect environmental, cumulative and socio economic effects flowing from the Application; he recognized the importance of the ongoing ability of the SFN to undertake and practice their Treaty 8 rights; he recognized that it was vital to protect the SFN's treaty rights through the establishment of a planning process; and, finally, he imposed conditions on the Well Authorization.
>
> In my opinion, the SFN's insistence that the Commission did not listen to or try to seriously accommodate their legitimate concerns is unfounded. I find that the Commission met its constitutional and fiduciary obligations to the SFN in its

[35] *Liidlii Kue First Nation v. Canada,* [2000] 4 C.N.L.R. 123, para. 69.
[36] *Saulteau First Nations v. British Columbia (Oil and Gas Commission),* 2004 BCSC 92, para. 3; affirmed in 2004 BCCA 286. ("*Saulteau*")
[37] *Saulteau,* para. 4.
[38] *Saulteau,* para. 148.
[39] *Saulteau,* para 150.

> consideration of the Application and the Petition must be dismissed on this issue.[40]

In summary, WMFN has cited no legal authority for the propositions that:

- BC Hydro has a duty to fund a study;
- BC Hydro's refusal to fund the Aasen Proposal is not honourable conduct on the part of the Crown; and
- until BC Hydro has funded the study, WMFN has no obligation to provide BC Hydro all the relevant information it has in its possession about the Treaty 8 rights it claims to be potentially impacted by the DCAT Project.

BC Hydro respectfully submits that authorities for the above propositions do not exist. In any event, BC Hydro submits that there is no evidence on the record from WMFN to effect that absent funding from BC Hydro, WMFN could not fund such a study in its own right.

BC Hydro urges the BCUC not to lose sight of the fact that the information that would ultimately be obtained through any such study comes from WMFN band members themselves. The band and its members are the holders of this information; a key component of the discussed study is the solicitation of this information from band members. WMFN's submission that absent a study they cannot articulate in any degree of depth information regarding their interests in the area is not sustainable for the reasons below.

Firstly, if the WMFN is able to assert that it is currently exercising treaty rights in the area, then it must know to some degree what those uses are. Secondly, the focus of the required information is on band members' current uses of the area. While a study may provide more detailed information, it does not create the interests or uses. In the present case, WMFN has provided that it has identified areas for reserve land for its Treaty Lands Entitlements within the Project area. As WMFN has refused to share the location of these lands and the basis for their identification, BC Hydro can only speculate whether in identifying these lands consideration was given WMFN members' use of them. BC Hydro submits that while confidentiality may be a reasonable concern, there is no evidence that with adequate measures in place, this concern couldn't have been overcome. As found by the Federal Court in *Ka'a'Gee Tu Nation,* where confidentiality or sensitivity of information is an issue, there is a duty on the First Nation to explore possible measures to disclose the information to the Crown or proponent while

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[40] *Saulteau,* paras. 156-157.

protecting its sensitive nature.[41] Absent such efforts, the First Nation will not have grounds on which to advance a claim that their concerns were not taken into account.

In sum, the record shows that despite BC Hydro's best efforts to solicit this information, WMFN has not been responsive. The fact is that WMFN and its members hold this information and while preference is for more detailed information, failure to reach an agreement as to the scope, timing or funding of a study does not absolve a First Nation of its duty to provide the Crown with any information, regardless of the level of detail. BC Hydro has provided WMFN ample opportunity to provide any information it had regarding its uses and interests in the Project area and potential impacts to them arising from the DCAT Project.

BC Hydro continues to seek resolution of the study issue and any information WMFN has about its Aboriginal rights in the project area. At no point in the consultation process has it revoked its offer of funding or willingness to meet with WMFN to come to a mutually agreeable solution to the study issue. BC Hydro has acknowledged that the completion of a study earlier in the process would have been preferable; however, completion of a study at this stage or later remains useful as decisions on design, alignment modifications, construction and monitoring occurring after such a study is completed can still be informed by the outcome of any such study.

3. Balancing of Interest in this Application for Adjournment Falls in Favour of BC Hydro

Contrary to WMFN's position, allowing the DCAT application to proceed does not remove BC Hydro's incentive to "come to the table in good faith and complete its consultations with WMFN."[42] BC Hydro fully understands and accepts that in all cases, the honour of the Crown "must be met"[43] BC Hydro submits that there is no evidence on the record supporting that once the CPCN is granted, BC Hydro will simply ignore its duty to act honourably. As stated by the Supreme Court of Canada, "it is always assumed that the Crown intends to fulfil its promises."[44]

It is BC Hydro's position that allowing the adjournment would effectively grant the WMFN an injunction on the DCAT Project until such time as BC Hydro agrees to the study as proposed by the WMFN. As stated in *Haida Nation,* there is no "duty to agree"; "what is required is a process of balancing of interests, of give and take".[45] Granting the

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41 *Ka'a'Gee Tu Nation v. Canada (Attorney Genera),* 2007 FC 763, paras 129-130; see also Woodward, *Native Law* (Looseleaf), 5-1980.

42 Exhibit C5-13, 4.

43 *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43*,* para. 63.

44 *R. v. Badger,*[1996] 1 SCR 771, para 41.

45 *Haida Nation,* paras. 42, 48.

injunction disturbs the parties negotiating positions, providing the WMFN leverage in ensuring that BC Hydro agrees to the proposed study.

The WMFN have known about the intended DCAT Project schedule since March 2010.[46] Upon filing the CPCN Application on July 11, 2011, BC Hydro provided WMFN written notice of the CPCN Application and followed up with a copy of the relevant documentation.[47] At this point in time, the WMFN knew that there continued to be a lack of agreement in respect of a study. It also knew that completion of the study prior to the completion of the CPCN process was challenging. Despite this knowledge, WMFN waited over three and a half months to bring this application. It was not brought until November 9, 2011.[48]

As a quasi-judicial body, the BCUC owes a duty of procedural fairness to those participating in its process. As found by the National Energy Board when faced with a similar request for delay:

> […] parties to a regulatory proceeding, including First Nations, are under an obligation to raise issues in a timely way in order to allow the applicant to respond. Furthermore, although the [First Nation] has a right to expect procedural fairness, so do other parties. As such, the Board has to weigh the lateness of this submission against the rights of other parties and, in particular, the right of the applicant to have its application heard in a timely manner.[49]

4. Requested Disposition of WMFN Application

BC Hydro submits that for the reasons outlined above, the stay requested by WMFN should not be granted and its application should be dismissed.

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46 B-1, Appendix G, 10 12.

47 Exhibit B-14-3, Confidential Attachment #5, 440-441.

48 Exhibit C5-13.

49 *Reasons for Decision in Terasen Pipelines (Trans Mountain) Inc.,* OH-1-2006, October 2006, Appendix II, 60.

For further information, please contact Geoff Higgins at 604-623-4121 or by e-mail at bchydroregulatorygroup@bchydro.com.

Yours sincerely,

Janet Fraser
Chief Regulatory Officer

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