



Our File No.: 1010-003
November 23, 2011

VIA EMAIL

Ms. Alanna Gillis
Acting Commission Secretary
British Columbia Utilities Commission
Sixth Floor – 900 Howe Street
Vancouver, British Columbia 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 Project (DCAT)
Adjournment Application – WMFN Reply Submissions**

West Moberly First Nations makes the following submissions in Reply to BC Hydro's November 21, 2011 submissions on WMFN's adjournment application.

WMFN maintains and reiterates the legal argument for an adjournment set out in its November 9, 2011 submissions, and the factual foundation therefore, and submits that its application for an adjournment is made out both in fact and law in those submissions.

WMFN disagrees with the presentation of the evidentiary record and conduct of the parties set out in BC Hydro's Response to the Adjournment Application, dated November 21, 2011 (BC Hydro's Submissions), and devotes the majority of this Reply to correcting the same, concluding with a discussion of the legal obligations of the parties in relation to the conduct of a study, in this matter. WMFN will establish that the legal authorities relied upon by BC Hydro to argue that a study is not a pre-condition to a First Nations' identifying its concerns and interests, and that it does not have a legal duty to fund a study, are of limited precedential value, as the law on consultation is highly contextual. What is required to uphold the honour of the Crown is specific to each case and must be assessed in that light.

WMFN's Consultation Obligations

At the outset, prior to delving in detail into its Reply on BC Hydro's portrayal of the evidentiary record, relevant facts, and the legal argument, WMFN vigorously denies BC Hydro's allegation that it has not upheld its reciprocal obligations in respect of the consultation process. Further, WMFN denies with equal force that it has ever, expressly or impliedly, refused to engage with BC Hydro until a study is complete, or that it has withheld information in its possession from BC Hydro. BC Hydro has cited no

evidentiary basis on which it grounds the claim that WMFN is withholding information from BC Hydro in this process.

In its submissions opposing the adjournment application, BC Hydro makes the following assertions:

- WMFN says that it has no obligation to provide relevant information in its possession about Treaty rights impacts by the DCAT development until the study is completed;
- Despite BC Hydro's best efforts to solicit information, WMFN has not been responsive and claims it has no ability to provide BC Hydro or the BCUC any information as to its members' exercise of Treaty rights in the DCAT area; and,
- WMFN has refused to share the location of the areas identified for potential future reserves in the Treaty Land Entitlement (TLE) process, and the basis for their identification.

These assertions are not in fact correct, or supported on the evidence before the BCUC.

WMFN does not deny its obligations in the consultation process. WMFN maintains that in response to BC Hydro's requests, it has provided all of the relevant information in its possession to BC Hydro. See:

June 3, 2010 meeting between WMFN and BC Hydro at which WMFN "asked questions related to BC Hydro's plans for river crossings and for utilizing the existing Right of Way, and identified concerns related to potential impacts to wildlife (fragmentation, wildlife corridors, and a wetland area used by moose." [WMFN IR 1.7.1 Attachment 1, p 2]

February 8, 2011 meeting between BC Hydro and WMFN at which Bruce Muir of WMFN advises that the proposed line is an adverse impact on Aboriginal treaty rights. [Exhibit 14-3, Confidential Attachment #5, p 171]

June 21, 2011 WMFN letter "DCAT Project area includes lands that are subject to ongoing use by its members for exercise of treaty rights." [Exhibit 14-3, Confidential Attachment #5, p 433-434]

July 18, 2011 WMFN letter - DCAT is in preferred Treaty Territory, and WMFN is engaged in Treaty Land Entitlement negotiations with the provincial and federal governments and is in the process of finalizing land selections for future reserves. In addition, WMFN advised that the East Pine area is important to WMFN members, that their members continue to exercise their rights in that area, and WMFN has identified lands for future reserves in that area. [Exhibit 14-3, Confidential Attachment #5, p 453-463]

WMFN agrees with the legal propositions cited by BC Hydro on this point, in particular:

The description in *Haida Nation* of the reciprocal duty on First Nations in the consultation process to "outline their claims with clarity, focusing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements." [*Haida Nation v. British Columbia*, 2004 SCC 73 at para 36]; and,

The duty to "consult in good faith by whatever means are available to them." [*Halfway River v. British Columbia*, 1999 BCCA 470 para. 161].

The means currently available to WMFN to consult with BC Hydro on the proposed DCAT Project are limited. Substantively, WMFN has only the knowledge at hand of the WMFN leadership, to provide BC Hydro with the information it can, relevant to the exercise of Treaty rights in the DCAT Project area and potential adverse impacts on those rights. The study requested by WMFN (or any study) has not been completed, and WMFN has not identified in its possession any existing traditional land use, impact

assessment studies or information gathered for the area that could be used to inform the consultation process between WMFN and BC Hydro, and which could be used as a basis to determining any appropriate mitigation and accommodation measures. Practically, WMFN's finite resources are extraordinarily taxed trying to support consultation activities on innumerable projects within Treaty 8, and WMFN's traditional territory.

WMFN has maintained for over a year that it requires further support, or "means", (i.e. the capacity funding for consultation activities negotiated in the CFA, and the impact assessment study), to engage in consultation, outline its interests, concerns, and potential adverse impacts with the clarity and particularity required. WMFN acknowledges its responsibility to advise of the treaty rights it asserts would be infringed, however maintains that it requires assistance of further "means" in order to do so. There is nothing in the case law that suggests a First Nation will necessarily have sufficient information with respect to rights and impacts "at hand". BC Hydro's claim that if WMFN is able to identify that Treaty rights are exercised in the area, then it must know in some degree the details of the land use, is BC Hydro's *opinion* on what knowledge WMFN possesses, and is directly contrary to the advice directly from WMFN on what information it *does* possess.

Prior to filing the CPCB application BC Hydro had been advised by WMFN of capacity problems for consultation, for example:

"a lot of large-scale assessment occurring this summer, in addition to the innumerable referrals from the oil and gas, forestry, mining, wind, et cetera." [WMFN email of July 12, 2010, Exhibit 14-3, Confidential Attachment #5, p 6]

"indicated lack of resourcing and capacity to handle volume of information coming in due to high number of projects in the area, including oil and gas, Site C, etc." [Exhibit 14-3, Confidential Attachment #5, p 171]

With respect to TLE land selection, the evidence does not support BC Hydro's erroneous claim that WMFN has "refused to share the location of these lands and the basis for their identification." Firstly, BC Hydro has never requested WMFN share the basis on which WMFN has identified potential land selections in the relevant area. [See BC Hydro September 8, 2011 letter, Exhibit 14-3, Confidential Attachment 5, p 536-538.] Secondly, WMFN actual response to BC Hydro's actual request to identify "the locations and boundaries of the land selections for future reserves in the East Pine area and along the proposed route" highlighted the sensitive and confidential nature of the information requested and expressed WMFN's willingness to work with BC Hydro to overcome these issues:

"Accordingly, the potential disclosure of the location of WMFN reserve land selections is a sensitive issue that will require further discussion with you in relation to both the specificity required and the appropriate confidentiality measures to be implemented." [WMFN October 17, 2011 letter, Exhibit B 14-3, Confidential Attachment 5, p 709-713]

Factual Basis for Argument is Made Out

It was not, and is not WMFN's intent to provide a summary of the entire consultation record for the purposes of this application. In its submissions WMFN chose to provide reference to the relevant points in the record rather than provide a summary of the communications on which its application relied. However, the record represented in BC Hydro's Submissions is incomplete, and is, in WMFN's view, not an objective representation of the record, and thus requires supplementation by WMFN. WMFN does not propose to provide a complete synopsis of the consultation record, but rather limits its

comments to those additions and corrections necessary to provide the BCUC with an accurate portrayal of events for the limited purposes of this adjournment application. WMFN encourages the BCUC to refer to the primary source documents when possible, rather than relying on BC Hydro's summaries.

Capacity Funding was Lacking

While WMFN acknowledges receipt of initial capacity funding of \$10,000 in June 2010, WMFN maintains its position that it has made its best effort to engage with BC Hydro on consultation in this matter, *in absence of capacity funding to do so*. The reference to lack of capacity funding refers to the fact that the capacity funding for consultation activities, such as meetings with Chief and Council, negotiated in the Capacity Funding Agreement (CFA) has not been provided, because of the CFA was tied to agreement on the Terms of Reference (TOR) for a study, meaning that unless WMFN agreed to BC Hydro's TOR, it would receive no capacity funding for *consultation activities* such as meetings and review of documents beyond the initial funding.

With respect to the use of the \$10,000 provided, WMFN notes that these funds were initially provided as "an advance on the total amount of capacity funding to be provided through a negotiated Capacity Funding Agreement, in order to assist West Moberly's participation in consultation activities while an Agreement is concluded." [BC Hydro letter, June 14, 2010, Exhibit 14-3, Confidential Attachment #5, p 2-3.] These funds were never meant to be the entirety of the capacity funding for consultation activities. See Appendix A to the CFA attached to the emails of May 5 & 6, 2011 for the most recently approved budget for the following consultation activities: Document Review, Meetings with BC Hydro, Crown Tenure Review, First Nations Internal Meetings, and Legal Review. [Exhibit 14-3, Confidential Attachment #5, p 369-370] WMFN has not included the budget in these submissions, as it understands BC Hydro considers this information confidential.

BC Hydro correctly identifies that its July 10, 2010 suggests part of the initial funds could be used to initiate a study, however, omits a key section of WMFN's response when paraphrasing WMFN's July 12, 2010 email. WMFN responded that it would be premature to commence a community study prior to the CFA being agreed upon, and "[A]s previously discussed, the initial funding of \$10,000 is directed towards setting up the file and associated costs (e.g. storage) and legal fees relating to working on the draft agreement, not for carrying out activities relating to community studies." [Exhibit B14-3, Confidential Attachment #5, p 6, emphasis added]

WMFN acknowledges its reciprocal legal obligation to engage in consultation with the Crown on proposed developments. However, practically speaking, WMFN's ability to do so is limited by a documented lack of resources, exacerbated in this case by the lack funding to support WMFN's capacity to consult on the DCAT Project. Contrary to BC Hydro's assertion, WMFN, through its negotiation of the CFA, did request further funds to assist in its capacity to engage in consultation activities and meetings with BC Hydro.

BC Hydro failed to provide Meaningful Feedback on WMFN's Proposed Study

Notwithstanding BC Hydro's Submissions, WMFN maintains its position that BC Hydro did not provide a substantive response to the Aasen Proposal until June 29, 2011, immediately prior to the filing of the CPCN Application, and that this position is supported on the evidence before the BCUC. The synopsis of the consultation record on this point contained in BC Hydro's Submissions, which WMFN does not consider to be an accurate reflection of the dialogue between the parties, nonetheless, fails to identify meaningful feedback on the methodology and process in the Aasen Proposal, first circulated by WMFN in October 2010, until June 29, 2011, a period of almost 9 months. By meaningful, substantive

feedback, WMFN refers to the lack of a reasoned response to the study outline, its methodology, timelines, components and objectives, and, any objection BC Hydro had to conducting the study or any elements thereof, incorporating its elements in their entirety into the TOR, and the reasons behind those objections.

The following communications identified by BC Hydro do not constitute a substantive response to the study outlined in the Aasen Proposal.

November 12, 2010 email from BC Hydro - This email states, in part:

“West Moberly submitted a proposal to conduct a “Community Based Study”

Action: BC Hydro is not prepared to support the current funding request. Further discussion is required following a review of the additional scope and project overview information.”

December 17, 2010 email from BC Hydro – While, as identified by BC Hydro, the covering email does indicate that Appendix C (the draft TOR) had been revised to an “impact assessment report”, a review of the email and its attachments in their entirety reveals that the “revisions” to Appendix C are limited to the name of the study, which was changed from “Traditional Use Study” to “Impact Assessment Report”. Furthermore, no draft TOR or any other type of substantive response to the Aasen Proposal is attached to the email. Appendix C is blank except for the title “Impact Assessment Report-Terms of Reference” and the words “See attached”, however no TOR for the Impact Assessment Report are attached to the revised CFA or the December 17, 2010 email.

February 8, 2011 meeting - BC Hydro’s meeting minutes show Bruce Muir from WMFN enquiring whether BC Hydro has reviewed the letter from Wendy Aasen, clearly indicating that no substantive response from BC Hydro has been received and that this remained WMFN’s preferred study methodology. The meeting minutes referenced by BC Hydro do not support an assertion that meaningful feedback on the components and objectives of the Aasen Proposal was provided by BC Hydro at that meeting. [February 8, 2011 meeting minutes, Exhibit 14-3, Confidential Attachment #5, p 171]

March 11, 2011 email from BC Hydro – This email attaches draft TOR for a study, which in WMFN’s view did not incorporate elements from the Aasen Proposal, and did not constitute any type of meaningful response to thereto. [Exhibit 14-3, Confidential Attachment #5, p 178-179]

The communications of May, 2011 summarized on page 5 of BC Hydro’s Submissions do not constitute substantive response to the study outlined in the Aasen Proposal. As noted by BC Hydro, the TOR and the study were not the focus of these communications. However, WMFN notes that the summary provided in BC Hydro’s Submissions omits the May 2, 2011 email from WMFN’s legal counsel attaching a revised TOR, crafted to reflect and incorporate the study outlined in the Aasen Proposal, as well as the May 25, 2011 response from BC Hydro rejecting the revised, expanded TOR. The only explanation provided for the rejection is that “the budget for the IAS has not been revised.” The reasons provided by BC Hydro are not in response to, or a comment on, the Aasen Proposal, but rather refer to BC Hydro’s assessment of the factors which it claims should limit the scope of consultation. [Exhibit 14-3, Confidential Attachment #5, p 356-358, and p 387]

The summary contained in BC Hydro’s Submissions also omits BC Hydro’s attempt, at the 11th hour, to scrap the DCAT impact study entirely, and instead use the results from the Site C TLUS to inform the consultation on the DCAT Project. This proposal was rejected by WMFN, as the DCAT Project area was not in fact within the Site C project footprint, the information being gathered did not cover the DCAT Project area, and because of the risks raised by Dr. Craig Candler of the Firelight Group (the consultant leading the Site C TLUS) that this would unquestionably compromise the scientific validity of

the data collection for both studies. [Exhibit B-14-1, Confidential Attachment #1, p 124-126; WMFN June 21, 2011 letter, Exhibit 14-3, Confidential Attachment #5, p 433-434; WMFN July 18, 2011 letter, Exhibit 14-3, Confidential Attachment #5, p 455] WMFN notes that Dr. Candler's comments were not documented in the draft meeting notes of the June 14, 2011 meeting, prepared by BC Hydro and disclosed during these proceedings.

When questioned at the June 14, 2011 meeting by WMFN on the basis for its rejection of the Aasen Proposal, BC Hydro agreed that "budget was an issue, but not the only issue." However, BC Hydro did not advise WMFN what the other issues were. [Exhibit B-14-1, Confidential Attachment #1, p 124-126; WMFN June 21, 2011 letter, Exhibit 14-3, Confidential Attachment #5, p 433-434]

WMFN is Willing and Interested in Meeting with BC Hydro

Lastly, BC Hydro has made much of its attempts to meet with WMFN Chief and Council since August 4, 2011, attempts which it claims were not reciprocated by WMFN. A review of the record indicates that WMFN at no point refused or expressed an unwillingness to meet with BC Hydro, but rather, consistently expressed its interest in meeting with BC Hydro, while at the same time, explaining that booking a meeting would be difficult due to the extraordinary workload currently facing WMFN, which has taxed its finite resources in the extreme. [See WMFN August 16, 2011 email (attached as it is not included in the communications submitted by BC Hydro in response to BCUC IR 2.29.2); Exhibit 14-3, Confidential Attachment #5, p 584, 586, 705-708, 712,] BC Hydro also fails to note that a meeting between the parties was scheduled for October 20, 2011, which unfortunately had to be cancelled by WMFN due to a scheduling conflict that arose by the time BC Hydro has confirmed the meeting. WMFN then proposed rescheduling the meeting for the following week, October 27 & 28, 2011; however BC Hydro was unavailable on those dates. [Exhibit 14-3, Confidential Attachment #5, p 584, 586, 705-708]

WMFN further notes that the timeline for completion of this deliverable, "Provid[ing] an opportunity to meet with Chief and Council to present project information" set in the CFA is October 1, 2011. As the meeting is currently set for November 25, 2011, WMFN submits that this is only a slight extension on the original timeline imposed by BC Hydro. [See Appendix A to the CFA attached to May 5 & 6, 2011 emails, Exhibit 14-3, Confidential Attachment #5, p 369-370.]

As identified by Chief Roland Willson's letter of November 9, 2011, the DCAT Project is only one of the roughly 30 significant developments currently being proposed to WMFN, along with its participation in approximately 10 large scale projects – all of which is on top of the general administration and governance of the Nation. [See attachment to WMFN's November 9, 2011 submissions, Exhibit C5-13] Despite BC Hydro's insistence, WMFN cannot cast aside its commitments on these other projects, in order to leap frog the DCAT Project to the top of the priority list. Doing so would inevitably result in similar claims by other project proponents that WMFN is frustrating the process and failing to meet its reciprocal consultation obligations.

In light of the above, WMFN contends there is more than sufficient factual basis on which its adjournment application of November 9, 2011 can rely.

Consultation is Incomplete: Further Information Gathering and Assessment is Required

The Need for an Impact Assessment Study

BC Hydro asserts that completion of a study is not a pre-condition:

- to the BCUC process;

- to a First Nation's opportunity to identify their specific interests in the project area and concerns on potential adverse impact on those interests.

WMFN submits that BC Hydro is not entitled to make this type of blanket statement on the requirements, duties, and content of the consultation process.

What is required to uphold the honour of the Crown depends on the relevant context and circumstances and cannot be distilled down to the sweeping proclamation proposed by BC Hydro. On this point, the Supreme Court of Canada has held that "every case must be approached individually" [*Haida Nation*, para 45]

WMFN agrees that a study will not always be required to uphold the honour of the Crown for every proposed development with potential adverse impacts on a First Nations' rights. The determination of what is required in any given case depends on the circumstances. In these circumstances, WMFN has established that a study of the nature requested by WMFN is required to ensure meaningful consultation. WMFN has raised serious general concerns (see *infra*, p 8) that require further information-gathering before impacts can be assessed.

Furthermore, the only authoritative statement/evidence on the necessity of a study before the BCUC is that of Wendy Aasen, Adjunct Professor/Lecturer in the First Nations Studies Program at the University of Northern British Columbia. Professor Aasen has over 20 years direct experience with First Nations in the sub-arctic, and has been a qualified court expert as a socio-cultural anthropologist specializing in the culture of Aboriginal People of the western sub-arctic. In Professor Aasen's opinion, in this case:

"it is only after a Community Study is conducted and baseline information collected that WMFN can demonstrate (on paper and by map) any concerns that the leadership, elders, and active land users may have related to that proposed development." [Wendy Aasen letter, October 14, 2010, p7, attached as Schedule A to WMFN's IR 2, Exhibit C5-8]

As to the timing of consultation in relation to the proposed development, *Mikisew* held that in order to be meaningful, consultation must take place prior to the decision/action that will potentially impact the First Nations' rights. Concerns should be addressed at the early planning stage of the project. Although BC Hydro claims it will continue to engage with WMFN throughout the construction of the project and into the monitoring phase, after the decision is made, consultation cannot be seen as conducted with the genuine intention of allowing the First Nations' concerns to be integrated with the proposal. [*Mikisew First Nation v. Canada*, 2005 SCC 69, para 67, citing trial decision, paras 154, 157]

BC Hydro relies on a particular quote from *Mikisew* in an attempt to summarize the required content of the consultation process. However, as noted above, it is not as simple as identifying a quote summarizing what was required of the Crown in any given case and claiming the requirements of the Crown in that case necessarily transfer to an entirely different set of facts and circumstances. The circumstances in *Mikisew* do not mirror those of the present case.

In *Mikisew*, the Crown considered the consultation required in that case fell within the low end of the spectrum. WMFN contends that a higher level/deeper consultation/dialogue is required on the DCAT Project for the following reasons.

Although the majority of the project is on private land, it is an unreasonable conclusion that this necessarily means WMFN does not practice treaty rights in the project area, or on the private lands identified, or that the scope of consultation should be at the low end of the spectrum. As much was admitted by BC Hydro in June, 2011, but it has failed to revise its assessment. [Meeting notes, June 14, 2011, Exhibit B14-1, Confidential Attachment #1, p124]

BC Hydro's assumption that the DCAT Project will have minimal to no impact on WMFN rights is just that, an untested assumption, that is directly in conflict with WMFN's advice that:

- the proposed line will have an adverse impact on Treaty rights; [Exhibit 14-3, Confidential Attachment #5, p 171]
- the Project area includes lands that are subject to ongoing use by members for exercise of treaty rights; [June 21, 2011 letter, Exhibit B-14-3, Confidential Attachment #5, p 433-434]
- WMFN has identified potential future reserves in the area and is in the process of finalizing land selection at the culmination of a decade long Treaty Land Entitlement negotiation; July 18, 2011 letter, Exhibit B-14-3, Confidential Attachment #5, 454-463]
- WMFN has concerns relating to river crossings, the existing Right of Way, and potential impacts to wildlife, including habitat fragmentation, wildlife corridors, and wetland areas used by moose. [WMFN IR 1.7.1 Attachment 1, p 2]

As to the potential adverse impact of the DCAT Project, Chief Willson's July 18, 2011 letter quotes extensively from recent studies to demonstrate that any additional impacts in the area will be negative, and further the already existing significant adverse effects. Exhibit B-14-3, Confidential Attachment #5, 454-463]

BC Hydro has failed to revise its initial assessment of potential impact and the level of consultation required in light of the concerns and interests expressed by WMFN.

With respect to the necessity of a study to inform and enable the consultation process for this project, WMFN position is not that a study is required in every instance which requires consultation between the Crown and First Nations. Indeed, WMFN agrees that this is not the case.

WMFN's position is that the community based impact assessment study, as outlined in the Aasen Proposal, and the May 2, 2011 TOR is required in the circumstances of this case in order to enable WMFN to identify and advise BC Hydro the concerns of WMFN members and specifically land users and elders with sufficient particularity to enable meaningful mitigation and accommodation.

Although the circumstances of *Mikisew* differ from DCAT, WMFN agrees with BC Hydro that certain commonalities can be taken from *Mikisew* and *Halfway River* as a guide to what the basic components of consultation may be, although this will vary from case to case. [see last paragraph BC Hydro submissions, p 7] These components can be grouped into three rough categories:

- Information gathering;
- Assessment and Communication of Impacts;
- Determination of mitigation measures/avoidance/accommodation (if necessary).

Where the consultation falls in either the medium or high spectrum, deeper information gathering is required. It will go beyond simply Crown provision of information to the First Nation, to information gathering on potential impacts. As identified in the *Mikisew* quote relied upon by BC Hydro, the Crown must listen carefully to concerns to gain an understanding of the impacts on the First Nation.

In this case, WMFN submits that the consultation has not progressed past the information gathering stage. Due to the lack of study, WMFN has not been provided with a meaningful opportunity to communicate its interests and possible impacts. (Factor #4 identified by BC Hydro's Submissions, p 8)

Further, those interests and concerns identified by WMFN have not been considered. (Factor #5 identified in BC Hydro's Submissions, p 8) Even if BC Hydro's initial assessment was that the consultation requirement was low and minimal information gathering was required, the process is not

static. As new information comes to light, requirements for information gathering change. As per *Haida Nation*:

Every case must be approached individually. Each must be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. [Emphasis added. At para 45]

In this case, Professor Aasen's statement that WMFN cannot assess impacts without the study is requested is unchallenged. WMFN has made a case that a study is needed to gather the information needed to assess impacts, and is needed prior to the BCUC determination of the CPCN application.

BC Hydro has provided no reasoned or authoritative response to Professor Aasen's statement, or for its refusal to proceed with the study. The BC Court of Appeal in *West Moberly First Nation v. British Columbia* held that consultation cannot be meaningful, if there is no reasoned basis for rejecting the course of action proposed by the First Nation.

To be considered reasonable, I think the consultation process, and hence the "Rationale" would have to provide an explanation to the petitioners that, not only had their position been fully considered, but that there were persuasive reasons why the course of action the petitioners proposed was either not necessary, was impractical, or was otherwise unreasonable. Without a reasoned basis for rejecting the petitioners' position, there cannot be said to have been a meaningful consultation. [at para 144]

In sum, WMFN submits that the consultation in this matter has not yet proceeded past the first, information gathering, stage and that further information gathering is required. It has most certainly not moved on to an assessment of impacts, let alone a consideration of mitigation measures. In this context, WMFN respectfully submits that it would be inappropriate for the BCUC to proceed with the regulatory process because the consultation is clearly incomplete.

Therefore, in the circumstances of this case, WMFN submits the facts and law support the granting of an adjournment, as it would be premature for the BCUC to attempt to assess the adequacy of consultation, when a required element of the consultation process, necessary to the information gathering, has not yet taken place. WMFN maintains that the BCUC cannot fulfill its obligations in assessment of the consultation process absent full information.

Funding of the Impact Assessment Study

BC Hydro claims it is under no duty on the Crown to fund a study, or agree to an unreasonable study. With respect to the latter point, BC Hydro has lead no evidence that the study proposed by WMFN and Professor Aasen is unreasonable, other than its opinion that it is so.

With respect to the duty to fund a study, WMFN again submits that BC Hydro cannot make such a sweeping statement. Funding is an open question. In any given case, funding for consultation or related studies may be required to maintain the honour of the Crown and effect reconciliation. In *Dene Tha' v. Canada*, the Court was to hold a remedies hearing due to failure to consult. One of the remedies under consideration, by the Court's direction, was the "provision of technical assistance and funding to the Dene Tha' to carry out the consultation." [2006 FC 1354, para 134]

If a study is required because a proposed Crown action will impact on WMFN rights, the honour of the Crown requires that the study be funded by the Crown proponent in this case. The issue is not, as BC

Hydro suggests, that some or all of the information from the study is held by and would be obtained from WMFN band members. It is obviously so. Rather, the issue is that time and resources are required to gather the information and assess it as per the study components and objectives, to determine the impact of BC Hydro's project on WMFN's Treaty rights.

BC Hydro's Submissions argue that WMFN has not submitted any evidence to the effect that absent funding, it cannot fund such a study in its own right. This is entirely irrelevant and suggests that WMFN is under a duty to divert its scarce resources from the administration and governance of the Nation and its community to fund a study required due to BC Hydro's proposed project. WMFN has not asked for this transmission line to be constructed on its traditional lands, further disrupting the constitutionally protected traditional ways and rights exercised by its members. BC Hydro has come to WMFN with the project proposal, and now suggests that the Nation bear the brunt of its consequences, both on its rights, and financially. The Crown proponent, BC Hydro, is proposing an action that will impact on WMFN's rights. The Crown has an obligation to gather information, assess impacts, and minimize the impacts. In this case, that obligation requires funding the study requested by WMFN.

Balance of Interests Falls within WMFN's Favour

WMFN will not reiterate the arguments made on this point in its initial submissions, nor those aptly made by other intervenors, namely, BCOAPO, and COPE. The risks to the process of proceeding in absence of the study and adequate consultation and accommodation of WMFN's rights are well catalogued. To this, WMFN adds two points.

Firstly, there has been no undue delay by WMFN in bringing this application for an adjournment. WMFN contends that applying for such relief prior to this stage would have been premature.

BC Hydro has been aware since the day after filing its CPCN application that WMFN objected to proceeding in absence of completing the study, and meaningful consultation with WMFN. Directly following the filing the CPCN application, WMFN emailed BC Hydro to express its concerns in this regard. [Exhibit 14-3, Confidential Attachment #5, p 442]

WMFN registered as an intervenor before the BCUC in an attempt to have its concerns addressed. In response, BC Hydro emailed WMFN the following day, advising it was willing to reconsider its previous position considering WMFN's study, and the consultation and study funding.

However, it has since become apparent to WMFN, through BC Hydro's conduct of itself in these proceedings, its non-responsive answers to IR, and through more recent communications from BC Hydro [see BCUC November 3, 2011, attached to WMFN's November 9, 2011 submissions] that, in WMFN's opinion, BC Hydro is not engaging in good faith, and that WMFN will be prejudiced in the assertion and protection of its Treaty rights should the regulatory process proceed further absent the study, meaningful consultation, and assessment of impacts.

Secondly, WMFN notes that as of November 23, 2011, BC Hydro has asked for an indefinite suspension of the DCAT hearing process to allow it to deal with issues raised in the third round of IR, notwithstanding its concerns with respect to timelines and the overall project in service date. [Exhibit B19]

WMFN submits that if BC Hydro is willing to indefinitely delay the regulatory process in order to conduct its own information gathering process, it is not entitled to raise issues of prejudice in response to WMFN's request for a reasonable adjournment for the same purpose.

For these reasons, WMFN submits that the adjournment request should be granted.

Sincerely,
RANA LAW

Emily A. Grier

Encl.

CC: BCUC Intervenor Distribution List

 Alvin Rana

From: Bruce [landusemanager@westmo.org]
Sent: Tuesday, August 16, 2011 11:23 AM
To: Mullard, Joanna; rwillson@westmo.org
Cc: cassistant@westmo.org; 'cwillson@westmo.org'
Subject: Re: DCAT_Request to meet re proposed study

Je aa haanach'e,

Thank you for the letter. The Nation is interested in meeting with BC Hydro regarding the proposed project.

In this case, I'm writing back on behalf of the Nation given several circumstances. This time of year is very busy for the community. Not only are there the typical vacation times to deal with, which I'm sure BC Hydro and other organizations contend with on an annual basis as well, but there are also culture camps across the landscape. As such, members of C&C and their families are not all around at this time to confirm a meeting date. Perhaps most importantly, the Nation has gone through a very difficult time with the passing of a very respected and influential Elder. This will have long term impacts on the community. Much of our schedules have had to be reworked as a result. In view of all the above, I'll have to get back to you when I'm able to confirm a meeting date. It'll likely be after the long weekend in September; however, that may change depending on the stage of berry picking.

Wuujo aasana laa,
Bruce

Bruce Robert Muir
Senior Environmental Planner / Land Use Manager
Land Use Department, West Moberly First Nations
Post Office Box 90, Moberly Lake, V0C 1X0
P: (250) 788-3676 F: (250) 788-2948 C: (250) 788-5990

"When one tugs at a single thing in nature, he finds it attached to the rest of the world." (John Muir)
"Rights secured by justice are not subject to political bargaining or the calculus of social interests." (John Rawls)

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On 11-08-05 3:57 PM, "Mullard, Joanna" <joanna.mullard@bchydro.com> wrote:

Dear Chief Willson,

I am writing to follow-up on our letter faxed to your office yesterday (attached), and to request meeting with you and your representatives to discuss the proposed study for the DCAT Project. If you would kindly provide some available dates so that a meeting can be scheduled, it would be most appreciated.

Best regards,

Joanna Mullard
Aboriginal Relations and Negotiations, BC Hydro
10th Floor, 6911 Southpoint Dr., BBY, BC, V3N 4X8
Ph: (604) 528-3286 Fx: (604) 528-2822

10/16/2011

 Cell: (604) 817-3050

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