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January 9, 2018

BY EMAIL

British Columbia Utilities Commission
410 – 900 Howe Street
Vancouver, BC V6Z 2N3

Attention: Mr. Patrick Wruck, Commission Secretary and Manager, Regulatory Support

Dear Sirs/Mesdames:

Re: BC Hydro and Power Authority (BC Hydro) – Waneta 2017 Transaction Application (the Application) – Project No. 1598933

INTRODUCTION

We are counsel for FortisBC Inc. (**FBC** or the **Company**) in the above-noted Application.

We write further to the Commission's letter dated January 4, 2018 (Exhibit A-8) and in response to BC Hydro's letter of December 20, 2017 (the **BCH Proposal Letter**, which is Exhibit B-4). Exhibit A-8 provides:

> The Panel requests FBC to provide written submissions responding to BC Hydro's December 20, 2017 letter on access to redacted information. In addition, FBC is requested to comment on whether FBC lawyers should be allowed to access the redacted information, subject to signing the Commission's Confidentiality Declaration and Undertaking Form, and if such access should be allowed or ordered, any procedural matters that could result from this.

We organize our submission below as follows:

PART A is our response to the BCH Proposal Letter, in which BCH proposes that an unredacted copy of what BC Hydro refers to as "confidential" material be provided to two lawyers for FBC but to no one else at FBC. The proposed access would be for the initial purpose of determining whether FBC should continue to pursue access and, if it does so, for the purpose of the lawyers arguing why each redacted passage should be made available more broadly. In the course of Part A we address the concept of the lawyer-only access on signing the Commission's Confidentiality Declaration and Undertaking Form.

In **PART B** we deal with procedural matters that could result if access is allowed or ordered only to FBC lawyers.

PART A – RESPONSE TO BCH PROPOSAL LETTER

BC Hydro's proposal should be rejected, for the following reasons: (1) lawyer-client divides should be confined to exceptional circumstances that do not exist here; (2) BC Hydro's proposal reverses the burden of proof; and (3) the BCH Proposal Letter confirms that the confidential treatment sought by BC Hydro in this case is not warranted.

1. Lawyer-Client Divides Should Be Confined To Exceptional Circumstances That Do Not Exist Here

An order limiting access to legal counsel could *only* be suitable in extraordinary circumstances that do not exist here. The courts have said that "a 'counsel's eyes only' order should only be granted in very unusual circumstances" and that "[t]he onus is on the moving party [which in this case is BC Hydro] to establish the need for such a restriction on ordinary disclosure".[1] This is because:

- Lawyers have a legal and ethical obligation to disclose information to clients related to the matter for which retained.[2] The B.C. Code of Professional Conduct provides: "When advising a client, a lawyer ... must inform the client of all information known to the lawyer that may affect the interests of the client in the matter."[3] Requiring a lawyer not to disclose information to a client is contrary to that basic principle.

- Even if a client agrees at the outset to relieve the lawyer from his or her obligation to disclose (allowing the lawyer to enter into an undertaking not to disclose information to the client), the resulting information differential drives an undesirable wedge between lawyer and client.[4] As the Supreme Court of Canada has said, "[t]he concern is not that...counsel would intentionally violate their undertakings or the court order; rather, it is that *respecting* the undertakings and the court order would, at best, strain the necessary relationship between...counsel and their...clients".[5] Constantly remaining on guard not to reveal information to a client "would by its very nature 'preven[t] frankness and fette[r] the free flow of information between lawyer and client', and otherwise impair the solicitor-client relationship".[6] Even if a client consents to his or her lawyer undertaking not to provide information to the client, "[o]nce the information is in the hands of their counsel, the consent freely given beforehand might understandably be viewed by the [client] as given without choice. And consent thought to have been given without choice, even if not repudiated, is bound to be resented".[7]

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1 *Deprenyl Research Ltd. v. CanGuard Health Technologies Inc.* (1992) 41 C.P.R. (3d) 228 (F.C.T.D.).
2 *R. v. Basi*, 2009 SCC 52 at paras. 45-47.
3 Rule 3.2-2.
4 Though BC Hydro suggests some form of communication between lawyer and client, it is to be "general" and "only" to take instructions as to whether to go before the Commission for further process (BCH Proposal Letter, p. 2).
5 *Basi, supra* note 2 at para. 45.
6 *Ibid.* at para. 46.
7 *Ibid.* at para. 47.

- "Lawyers only" orders "represent a serious inroad into the right that an opposite party ordinarily has of seeing all documents that [contain] evidence of relevance to the issues in the dispute."[8]

- Where the proceeding (like the one presently before the Commission) relates to specialized factual subject matter, lawyers may well not have the subject-matter expertise to evaluate the information provided. Therefore, confining either initial or longer-term access to them may effectively amount to not having provided access at all: "In litigation involving highly technical or scientific information, information made available to counsel by virtue of a court order will often be of little or no use if counsel cannot consult with her or his client with respect to the information. In such circumstances, the court order would be effectively frustrated. This Court should not lightly contribute to such a result."[9] Here, subject matter expertise (that the FBC lawyers do not have) is required to evaluate and quantify such matters as the impact of a partial or complete loss of transmission access; the impact of the transaction on FBC portfolio optimization and operations under the Canal Plant Agreement (a very complex, dynamic agreement); and financial impacts on FBC and its ratepayers.

- The message that a tribunal communicates by granting lawyers-only access is that participants should hire lawyers. This is not a message that a tribunal that makes efforts to welcome (and has benefited from the participation of) unrepresented participants should be quick to convey. Without doubt lawyers tend to have certain characteristics that make them good candidates for receiving confidential information (such as secure offices, experience in dealing with confidential information more generally, etc.). However, these characteristics are not exclusive to lawyers. They are shared, for example, by a member of a utility's regulatory department (Ms. Martin, FBC's Manager, Regulatory Affairs) or by employees who on a daily basis are entrusted with maintaining a utility's power supply from a secure location (Mr. Egolf, FBC's Senior Manager, Power Supply & Planning, and Mr. King, FBC's Power Supply Operations Manager). Presumably these characteristics are also shared by the non-lawyer members of Commission staff to whom BC Hydro felt comfortable in disclosing all the material it filed in unredacted form.

  The notion in the BCH Proposal Letter that either BC Hydro or the Commission are not already familiar with Ms. Martin and Messrs. Egolf and King, all of whom deal with BC Hydro and the Commission regularly, is not correct. Ms. Martin, Mr. Egolf and Mr. King are well known to BC Hydro, the Commission and Commission staff through numerous instances of staff interaction and Commission proceedings; collectively they are in-house experts on the regulatory, financial, contractual and technical aspects of power supply, system operation, transmission, rates and customer impact to which this proceeding relates; and there can be no suggestion that they are untrustworthy.

On p. 2 of the BCH Proposal Letter, BC Hydro characterizes its proposed lawyer-client divide as part of a "process" (potentially involving the further steps set out in Part B of this letter) that could ultimately lead to release of some material to the client. However, while a possibility of broader dissemination at the end of the process (though whether realistic here given the lack of opportunity for meaningful client

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8 *Glaxo Group Limited v. Novopharm Ltd.*, 1998 CanLII 7667 at para. 2 (F.C.A.).

9 *Zeneca Pharma Inc. v. Canada (Minister of National Health and Welfare)*, [1994] F.C.J. No. 543 at para. 19 (T.D.).

input on technical subject matter) is arguably one factor that may be taken into account in considering whether an initial "lawyers only" order is appropriate, that is certainly nowhere close to being a sufficient basis to grant it.[10] Further, we underline that the material at issue has already been filed by BC Hydro as part of the evidentiary record in a live proceeding, and active steps are being taken in the proceeding where it was filed. This is not, for example, a question about the existence or extent of the right of a given party to "discover" documents that are otherwise simply in the possession or control of the other party (but not of the decision-maker), or a scenario involving a freedom-of-information request made to see if documents exist as the basis for making a complaint or bringing a future proceeding.

As the Supreme Court of Canada has said, within a proceeding the "presumption of openness ... should only be displaced upon proper consideration of the competing interests at every stage" (underlining in the original).[11] Thus to use the Supreme Court of Canada's formulation in the *Sierra Club* case – enunciated even under a set of procedural rules that on their face expressly contemplate the granting of confidentiality orders and even solicitors-only access – the questions remain whether:

- the restriction on access that is presently sought is "necessary" to prevent a "serious risk" (that is "real and substantial", in that "the risk is well grounded in the evidence" and "poses a serious threat") to "an important interest" (which if it is a "commercial interest", "cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality") "because reasonably alternative measures will not prevent the risk" [12]; and

- "the salutary effects" of the requested restriction on access "outweigh its deleterious effects."[13]

BC Hydro has not established in the BCH Proposal Letter that the deleterious effects (on the solicitor-client relationship, procedural fairness, the presumption of openness, and, as set out in Part B, the efficient conduct of the proceeding) of restricting access to lawyers are somehow outweighed by a "serious" threat from providing access to three FBC non-lawyers that cannot reasonably addressed by means short of denying them access, such as providing access to them on undertakings.

Though BC Hydro asserts on p. 2 of the BCH Proposal Letter that processes such as it proposes "are regularly employed by tribunals dealing with confidential information", any tribunal that "regularly" [14] grants "lawyer only" access in circumstances like this would likely be doing so in error.

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10 *Ibid.* at paras. 14, 17. We note as well that another factor referred to in *Zeneca*, which is worded in respect of a good faith concern regarding disclosure, would need to be read in light of the objective and rigorous analysis in *Sierra Club, infra* note 12.

11 *Re Vancouver Sun*, 2004 SCC 43 at para. 39. The facts of that case involved access to a judicial investigative hearing, a preliminary step under the *Criminal Code*. The undersigned was counsel for *The Vancouver Sun* in that appeal.

12 *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at paras. 53-57.

13 *Ibid.*

14 We note that in the course of preparing this submission we have come across a process where the Commission recently restricted access to legal counsel filing undertakings: the BC Hydro Inquiry of Expenditures SAP Program. We are not aware of this being a regular occurrence and, further, the situation appears to be distinguishable. Arguably it concerned a different kind of information and set of issues than found in this case, we understand that at least one non-lawyer has obtained access to the record, and the proceeding appears to have unfolded in a different manner and with different arguments.

Rather than treating "lawyers only" access as a last resort, BC Hydro proposes to limit to lawyers' eyes material that is ***at best*** on the very borderline of confidentiality, including names of BC Hydro employees or consultants ("Document Owners", members of the "Waneta Operating Committee" [see p. 56 of 90 in Appendix N]) and financial information that BC Hydro contends is already known to one or more Fortis companies.[15]

Not only is there no justification in these circumstances for driving the lawyer-client wedge against which the Supreme Court of Canada has warned, but BC Hydro's attempted attachment of "lawyers only" status even to information that it suggests FBC should or does otherwise know makes this approach even more fraught than otherwise. For any line to be drawn between lawyers and their clients to whom information cannot be disclosed, as a practical matter it must at the very least be possible to distinguish information that must not be discussed from information that can be. This is not the case here: according to BC Hydro there is at best a blur from the outset.

2. BC Hydro's Proposal Reverses The Burden Of Proof

BC Hydro's proposal should also be rejected because it reverses the burden of proof applicable in the circumstances.

The construct set out in the BCH Proposal Letter presumes that the burden is on FBC to justify why it needs access. BC Hydro envisions (b) *another* round of argument despite all the submissions exchanged to date, and (b) that an *in camera* hearing (itself an unusual procedure, discussed further in Part B) would be about whether disclosure of the information "is properly and fairly needed by FortisBC to advance its legitimate interests in this proceeding" (p. 2).

BC Hydro has again slid into reversing the burden that exists, which is for BC Hydro to justify why information that it believes sufficiently important for the Commission to see in evaluating the Application should be concealed from the public or affected participants. The general legal backdrop is addressed in FBC's letters of December 7 and 18, 2017 (Exhibits C1-2 and C1-3) and, in the context of BC Hydro's burden in attempting to restrict access to lawyers only, in Part A(1) of this letter.

3. The BCH Proposal Letter Confirms The Confidential Treatment That BC Hydro Seeks Is Not Warranted

The contents of the BCH Proposal Letter again demonstrate that BC Hydro cannot meet the burden that it bears to restrict access, certainly by FBC personnel and arguably even by the public.[16]

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15 As returned to below, BC Hydro says in respect of that aspect of access that might relate to FBC "understanding the financial impact of the transaction", that "FortisBC's corporate parent, Fortis Inc., made a binding offer for the two-thirds interest in Waneta and so is more than capable of explaining to FortisBC why it made good business sense to do so" (BCH Proposal Letter, p. 3).

16 Though in the BCH Proposal Letter, BC Hydro jumps from the outset into discussion of the provision of information to individuals on undertakings, that is simply FBC's final and least preferred alternative position. In its December 18 letter, FBC prefaced the paragraph in which it listed individual names as follows: "Without conceding that the material at issue in this case requires the degree of restriction on access noted below, if the Commission determines that only individual signatories would obtain access..." (Ex. C1-3, pp. 4-5). Respectfully, the more that BC Hydro says about its arguments, the more basis the Commission would have to lift the confidential treatment sought more generally.

First, BC Hydro submits that the process it suggests "can facilitate settlement discussions between the parties regarding its use and disclosure [that is, the use and disclosure of information that BC Hydro characterizes as 'confidential']" (underlining added). In other words, BC Hydro would be willing to provide some use and disclosure of the information it presently seeks to withhold.

As the Supreme Court of Canada said in *Sierra Club*, the test for an order restricting access requires the decision-maker "to consider not only whether reasonable alternatives are available, but also to restrict the ban [or other restriction on access] as far as possible without sacrificing the prevention of the risk".[17] As BC Hydro itself is open to some use and disclosure, clearly it has not advocated for the least restrictive of reasonable options even from its own perspective.

The BCH Proposal Letter is simply putting hurdles in the way of access being obtained, and seeking – in the referenced "settlement discussions" – that FBC trade away something for obtaining access that should be available to it in any event.

Second, BC Hydro states with respect to that aspect of access that might relate to FBC "understanding the financial impact of the transaction", that "FortisBC's corporate parent, Fortis Inc., made a binding offer for the two-thirds interest in Waneta and so is more than capable of explaining to FortisBC why it made good business sense to do so" (BCH Proposal Letter, p. 3). In this regard, if as BC Hydro suggests the redacted information is the same as FBC (and presumably other bidders in the competitive sale process noted in Exhibit B-1[18]) already has or can access, again there is no basis for keeping it confidential from FBC. The information is either not confidential or there is in any event no risk in disclosing it. BC Hydro would need to establish (among other elements of the test in cases like *Sierra Club*) a "real and substantial" risk from any incremental disclosure of information that is not already known.[19] It has not done so.

BC Hydro's statement reinforces why restrictions on access are unwarranted and at the same time should not deflect attention from the importance to FBC and its ratepayers of the opportunity to participate fairly in the Application, without being left to guess at what information BC Hydro filed for the Commission to see. Among other things FBC is seeking to evaluate the impact of the proposed BC Hydro transaction on FBC customers, and the extent to which BC Hydro's purchases would have made "good business sense" is not the standard for that evaluation. Nor is FBC's interest limited to "financial impact" given the assets and arrangements impacted by the Application.

Third, BC Hydro makes clear that the prospective negotiations between FBC and BC Hydro in which it believes FBC might use confidential information are ones necessitated by the relief BC Hydro seeks in the Application. BC Hydro states on p. 3 of the BCH Proposal Letter: "*the Canal Plant Agreement will require amendments in order to accommodate BC Hydro's undivided interest in the Waneta Dam after*

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17 *Supra* note 12 at para. 46.

18 Exhibit B-1, p. 1-13.

19 *R. v. Gingras*, 2012 BCSC 230 at paras. 30-31, 48, 57, leave to appeal to the Supreme Court of Canada refused 2012 CanLII 5505 (SCC). The B.C. Supreme Court in *Gingras* cited *R. v. Mentuck*, 2001 SCC 76 at para. 45 regarding the concept of "incremental risk": as stated in *Mentuck*, "[i]t is the incremental effect of the proposed ban, viewed in light of what has already been published before, that must be evaluated in this appeal." The undersigned was counsel for *The Vancouver Sun* in *Gingras* and in *R. v. O.N.E.*, 2001 SCC 77, which was the companion case to *Mentuck*.

the transaction closes. FortisBC is a party to that (unregulated) agreement, and can be expected to make the most of whatever competitive information it has in the forthcoming discussions regarding its amendment" (emphasis added). BC Hydro's statements again reinforce that access should be granted to FBC. In this regard:

- The existence, nature and content of potential contractual amendments resulting from the transaction are relevant to whether the Commission should approve the transaction. This was clear from the Commission's approach in approving the earlier Waneta transaction in 2010. A section of the Commission's reasons for Order G-12-10 dealt specifically with the "Waneta Partial Sale Canal Plant Agreement Amending Agreement" (2.1.3.2). Though noting that the Canal Plant Agreement was exempt from regulation and that it had no jurisdiction over the amendments themselves, the Commission specifically said in the course of its review of the transaction that it "considers the amendments to the CPA to be appropriate" and directed BC Hydro to file a copy of the amending agreement after its execution (p. 21).

- Whether those amendments affect the rights and obligations of other parties to the agreements (and, if so, how) is also a relevant consideration for the Commission in determining whether or not to grant the relief that BC Hydro seeks in the Application. In its reasons for Order G-12-10, the Commission noted that "Teck and BC Hydro have agreed to amendments to the CPA which do not affect the rights or obligations of any other parties to this agreement" and that "[t]he other parties to the CPA accept" the amendments (2.1.3.2). This time, given that BC Hydro contemplates an active negotiation pertaining to amendments, evidently the rights and obligations of other parties will be affected by them.

- BC Hydro suggests that if FBC had the information, different amendments would or could be negotiated as in BC Hydro's view FBC would or could use the information in that negotiation (again, BC Hydro states on p. 3 of the BCH Proposal Letter that FBC "*can be expected to make the most of whatever competitive information it has in the forthcoming discussions regarding its [the CPA's] amendment*" (emphasis added)).

- All the information that BC Hydro has filed, including all those portions to which FBC now does not have access, will be available to the Commission in determining (as it did in relation to the 2010 transaction) whether "the amendments to the CPA" are "appropriate".

- Given BC Hydro's linkage of the negotiations to the very transaction at issue, this is not a situation where FBC would get a windfall in a negotiation unrelated to the Application before the Commission. Rather, this is a situation where the information would or could equip FBC in a negotiation necessitated by the Application and in a hearing where it should be able to safeguard its present position. That is not an objectionable use of information. Correspondingly, the use against which undertakings are intended to protect is use outside the proceeding, not within. The Commission's Confidentiality Declaration and Undertaking Form (see also Rule 24.03) provides that signatories undertake "(a) to use the information disclosed under the conditions of the Undertaking exclusively for duties performed in respect of this proceeding" and "(c) not to

reproduce, in any manner, information disclosed under the conditions of this Undertaking except for purposes of the proceeding" (underlining added).

BC Hydro's invocation of a zero-sum "competitive playing field" between BC Hydro and FBC (BCH Proposal Letter, p. 3) in relation to contractual negotiations associated with the very transaction of which it seeks Commission approval is troubling. That coupled with BC Hydro's claim of confidentiality over filed information would put the Commission (which oversees both utilities and the interests of their respective customers) in an impossible situation of being asked to approve a transaction knowing that amendments less harmful to FBC could have been negotiated if FBC had received access to the information that the Commission had.

The only other potential negotiations to which BC Hydro points relate to the Capacity and Energy Purchase and Sale Agreement (the **CEPSA**). However, the CEPSA is not an agreement between FBC and BC Hydro. Rather, as BC Hydro states on p. 3 of the BCH Proposal Letter, it is between FBC and Powerex. BC Hydro's reference to the CEPSA only raises further concerns, suggesting for example that the CEPSA, and the potential for its continuation, are potential casualties of the transaction of which BC Hydro seeks Commission approval. That further points to the importance of FBC access in this proceeding.

PART B: PROCEDURAL MATTERS THAT COULD RESULT IF ACCESS IS ORDERED OR ALLOWED ONLY TO FBC LAWYERS

BC Hydro's suggested lawyer-client divide raises numerous procedural issues. It would trigger a multi-layered and complex process that would not only present the ethical and other issues set out in Part A but would also drive up costs in terms of fees, effort and time. It is not necessary or appropriate to impose such a process when:

- BC Hydro has arguably not even met its burden to restrict access to the public; and
- in any event, if undertakings are used, the Commission's ordinary process can unfold with access to both client representatives and legal counsel and without further ado. The Commercial Energy Consumers Association of British Columbia (**CEC**) appears already to have sought to engage that ordinary process, filing undertakings from both a non-lawyer, David Craig (Exhibit C4-2), and a lawyer, Chris Weafer (Exhibit C4-4).

Rule 2 of the Commission's Rules of Practice and Procedure notes that "[t]hese rules must be liberally construed in the public interest to ensure the fairest, most expeditious and efficient determination of every matter before the Commission consistent in all cases with the requirements of procedural fairness". BC Hydro's proposed approach veers far from each of these important principles.

With respect to particular procedural matters arising:

1. If despite all the above the Commission considers that it would be appropriate to limit access to FBC lawyers, the Commission should order BC Hydro to provide access if it receives signed undertakings from those lawyers rather than ordering FBC lawyers to provide undertakings.

This "opt in" approach would allow FBC lawyers (a) to take instructions upon receipt and review of the Commission decision; and (b) if instructed (given the issues set out in Part A) not to accept the terms, to decline receipt of the information.

2. If access is provided on undertakings, whether to FBC lawyers or also to the additional FBC personnel identified, it should be on the terms of the Commission's Confidentiality Declaration and Undertaking Form rather than on the modified version for which BC Hydro appears to advocate in the BCH Proposal Letter. The Commission's form states: "I hereby undertake ... to return to the applicant, ___, all documents and materials containing information disclosed under the conditions of this Undertaking, including notes and memoranda based on such information, or to destroy such documents and materials within fourteen (14) days of the Commission's final decision in the proceeding" (underlining added). The option to return "or" destroy is also apparent in Rule 24.03.

   By contrast, BC Hydro suggests in the BCH Proposal Letter that FBC lawyers would have to return to BC Hydro both the documents and any notes or memoranda created by FBC lawyers or those who discuss the redacted information with legal counsel. BC Hydro states: "the obligations on those who enter into the Undertaking include the return of 'notes and memoranda based on such [confidential] information" and "[t]o avoid later misunderstanding BC Hydro also requests that any such notes or memoranda created by Ms. Herbst, or any others at FortisBC who discuss the confidential information with her, be returned to BC Hydro with the hard-copy unredacted confidential information after the matter has been resolved" (BCH Proposal Letter, p. 2; underlining added).

   The proposition that solicitor-client privileged material should be given to BC Hydro, rather than simply destroyed as the Commission's Confidentiality Declaration and Undertaking Form allows, is quite extraordinary. If any material that has so far been discussed should be accorded confidential treatment, it is material subject to solicitor-client privilege. FBC seeks no such material from BC Hydro.

   If the Commission allows for access to both FBC lawyers and other FBC personnel on undertakings, the Commission could require that once the proceeding has concluded all the material, including notes and memoranda based on the initially provided material, be returned by non-lawyers to FBC legal counsel (Ms. Pratch or the undersigned) for destruction.

   For clarity, we also note the following. The Commission's Confidentiality Declaration and Undertaking refers to "access to the confidential information in the record of this proceeding". Therefore, as far as we understand the situation, there is no redacted information that would not be provided to those who provide a signed undertaking.[20]

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[20] We raise this especially because the offer in the form set out at the bottom of p. 1 of BC Hydro's Exhibit B-4 refers to the "Business Case". Though this is the same term that FBC used in its correspondence, if distilled into a Commission order we wish to ensure the participants are understanding the term in the same manner. We have taken the "Business Case", which was the subject of the confidentiality-related discussion at p. 4-2 of Exhibit B-1, to (1) be shorthand for the entirety of the "confidential information" filed and, correspondingly, to (2) include the "proprietary third party market forecast" referred to in the Appendix N-related paragraph of BC Hydro's cover letter for Exhibit B-1.

3. FBC does not object to access being provided via unredacted hard copies of the materials, rather than electronically.

4. If the Commission were to provide for access to FBC lawyers only and FBC lawyers accepted the material on the terms provided, there would need to be an opportunity for them to:

   (a) review the otherwise redacted information;

   (b) attempt by some means to obtain instructions on whether to continue to pursue access to more FBC personnel (or potentially the public) without divulging the information to the client;

   (c) advise BC Hydro and the Commission of the decision on whether or not further access is still sought; and

   (d) attempt by some means to make arguments on access without meaningful client input that do not simply repeat arguments made to date.

5. BC Hydro suggests in order to implement item 4(d):

   (a) that FBC should make an "application" for broader access (BCH Proposal Letter, p. 2). This is a somewhat loaded term. Either it would either need to be understood that the burden remains on BC Hydro even if FBC is the moving party or, rather than requiring a new "application", the Commission should simply adjourn the question of broader access, with the question to be re-set for hearing on notice from FBC.

   (b) that "an in camera hearing" be held "before the Commission to review the information", with FBC lawyers making redaction-by-redaction arguments (BCH Proposal Letter, p. 2).

   For the Commission hearing room to be closed to the public and presumably to any individual who had not filed an undertaking (which an in camera hearing would involve)

We understand that this third party report is available to any subscriber to the third party's service rather than being of a sensitivity that undertakings could not address. At 4.1.8 of Exhibit B-1, BC Hydro says: "Market price forecasts for the Waneta 2017 Business Case were obtained from two sources. The first was a report purchased by BC Hydro from the ABB Group for a forecast of long-term spot market prices, including at the mid-Columbia or '**mid-C**' electricity trading hub on the Washington-Oregon border (**ABB Forecast**)....A copy of the ABB Forecast was filed with the Commission in confidence under separate cover." The footnote after "cover" states: "The ABB Forecast was also filed in confidence with the Commission in the F17-F19 RRA proceeding as an attachment to BC Hydro's response to BCUC IR 2.310.1". In responding to IR 2.310.1 (in Exhibit B-14 in the F17-F19 RRA proceeding), BC Hydro said: "The market electricity price forecast for Mid-Columbia electricity trading hub provided by the ABB Group in their Power Reference Case report is the basis of the $36/MWh value. ABB carries out a Western Electricity Coordination Council (WECC) region wide simulation of the development and dispatch of generating units in deriving the forecast. The modeling assumptions and methodology that are used in the simulation can be found in ABB spring 2016 Power Reference Case report. The ABB Group's Power Reference Case report is confidential and provided for the sole use of subscribers. A copy is attached to this response and provided on a confidential basis to the British Columbia Utilities Commission" (underlining added).

is itself unusual, though not unheard of in appropriate circumstances. Even if the information were of a remarkable sensitivity – evidence of which has so far been lacking – it might be possible to conduct a public hearing in which counsel make efforts not to describe aloud the specific information. The form of any hearing might need to be addressed at a future time upon review of the information at issue.

(c) that there should be a submission on whether each piece of redacted information "ought to remain confidential or whether its disclosure is properly and fairly needed by FortisBC to advance its legitimate interests in this proceeding" (BCH Proposal Letter, p. 2). As noted above in Part A(2), this is not a correct statement of the burden or test.

6. If the Commission were to decline, after whatever process were followed to implement item 4(d), to expand access beyond FBC lawyers:

(a) FBC would need to decide whether it would be appropriate to challenge that decision at this stage;

(b) if it did not, FBC lawyers would need the opportunity to formulate information requests on the still-redacted information;

(c) BC Hydro would need to have time to respond to the information requests;

(d) based on BC Hydro's responses, FBC lawyers would need to (i) consider again whether to seek broader access so that the client could review the information provided; and (ii) if the client did not even at that point obtain access, seek to carry through the remainder of the process and formulate final submissions on the still redacted matters without client input.

7. If after the implementation of item 4(d) the Commission granted access to FBC employees beyond FBC lawyers:

(a) FBC employees would need the opportunity to review the information;

(b) FBC employees and lawyers would need the opportunity to formulate information requests on that information;

(c) BC Hydro would need to have time to respond to the information requests;

(d) based on BC Hydro's responses, FBC lawyers would need to determine how to proceed and what to argue.

8. If information is received by all of Ms. Martin, Mr. King, Mr. Egolf, Ms. Pratch and the undersigned on undertakings, it is possible that on actual review of that information it will become apparent that further FBC personnel, other interveners or the public should have access. The Commission process may need to be re-engaged at that point.

CONCLUSION

In all the circumstances, FBC reaffirms its request that if the Commission continues to keep the information redacted on the public record and if it permits access only on individual-specific undertakings, each of Ms. Pratch, Ms. Martin, Mr. Egolf, Mr. King and the undersigned be allowed to file the Commission's Confidentiality Declaration and Undertaking Form in order to obtain access.

Yours truly,

FARRIS, VAUGHAN, WILLS & MURPHY LLP

Per: 

Ludmila B. Herbst, Q.C.

LBH/trw
c.c.: Registered parties
client