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October 27, 2008

VIA EMAIL

British Columbia Utilities Commission
Sixth Floor, 900 Howe Street
Box 250
Vancouver, British Columbia
V6Z 2N3

Attention: Ms. Erica Hamilton
Commission Secretary

Dear Sirs/Mesdames:

Project: 3698513/Order No. G-121-08
Application for Approval of the Sale and Disposition of Utility Assets of Central Coast Power Corporation to Boralex Ocean Falls Limited Partnership

We enclose the Final Argument of Central Coast Power Corporation and Boralex Ocean Falls Limited Partnership dated October 27, 2008.

Yours truly,

Karl E. Gustafson

Karl E. Gustafson, Q.C.
for **Lang Michener LLP**

KEG/iab
Encl.

CENTRAL COAST POWER CORPORATION AND BORALEX OCEAN FALLS LIMITED PARTNERSHIP APPLICATON FOR APPROVAL OF THE SALE AND DISPOTION OF THE UTILITY ASSETS OF CENTRAL COAST POWER CORPORATION TO BORALEX OCEANS FALLS LIMITED PARTNERSHIP PROJECT NO. 3698513/ORDER NO. G-121-08

FINAL ARGUMENT OF CENTRAL COAST POWER CORPORATION AND BORALEX OCEAN FALLS LIMITED PARTNERSHIP

This is the Final Argument of Central Coast Power Corporation ("**CCPC**") and Boralex Ocean Falls Limited Partnership ("**Boralex LP**") in regard to the Application of CCPC and Boralex LP for approval of the sale and disposition of the utility assets of CCPC by CCPC to Boralex LP. This Final Argument is filed pursuant to the British Columbia Utilities Commission's (the "**Commission**" or "**BCUC**") procedural Order G-212-08.

This Final Argument is organized into five primary parts.

1. Background
2. Statutory Framework
3. Issues Raised in Information Requests
4. Response to Heiltsuk Submission
5. Summary and Conclusions

1. Background

(a) The Application

By Application dated August 1, 2008 (the "**Application**"), CCPC and Boralex LP (together, the "**Applicants**"), applied to the Commission for an Order:

> (a) pursuant to section 52(1) of the *Utilities Commission Act* (British Columbia) (the "**Act**") approving the sale and disposition by CCPC to Boralex LP of certain assets as set forth in an agreement dated June 3, 2008 between CCPC and Boralex LP (the "**Purchase Agreement**"); or alternatively,
>
> (b) pursuant to section 2.(e) of BCUC Order No. G-40-86 dated July 4, 1986 (the "**1986 Order**"), approving the said sale and disposition.

The Applicants also applied for the continuation of the exemption set out in the 1986 Order applicable to CCPC.

(b) The Utility

CCPC generates electricity and supplies electricity to just 27 account holders who reside in Ocean Falls (approximately one quarter of whom hold multiple accounts) and to 32 account holders whose primary residence is outside of Ocean Falls. In addition to these

accounts, CCPC has one industrial customer (Marine Harvest Canada Ltd.) in Ocean Falls and an Electricity Purchase Agreement with BC Hydro in Bella Bella (the individual account holders, Marine Harvest Canada Ltd. and BC Hydro being referred to herein collectively as the "**Utility Customers**").

(c) Boralex LP

Boralex LP is a limited partnership under British Columbia's *Partnership Act.* The partners of Boralex LP are Boralex Inc. (Limited Partner, holding 99.9% of the Partnership's Capital Units) and Boralex Canadian Energy Inc. (formerly known as Boralex B.C. Development Inc.) (General Partner, holding 0.1% of Capital Units). Boralex B.C. Development Inc. is a wholly owned subsidiary of Boralex Inc. Boralex Inc. is one of Canada's largest and most experienced private corporations in the development and production of renewable energy. It currently operates 21 power generation sites with a total installed capacity of 351 MW. Boralex Inc. was a pioneer in the production of renewable energy, which is the core business of almost all of its operations.

Boralex Inc. is publicly traded on the Toronto Stock Exchange and has a total market capitalization of approximately $540 million. It has over 300 employees and assets of approximately $514.7 million with annual revenues from energy sales of approximately $162.8 million. Boralex Inc. also holds a 23% interest in the Boralex Power Income Fund, for which Boralex Inc. manages 10 power stations with a total installed capacity of 190MW. These power stations include seven hydroelectric power stations for a total installed capacity of 96.4 MW. Boralex Inc. has considerable experience in all aspects of hydroelectricity generation and electricity delivery that will be available to supplement the experience and expertise it will acquire through CCPC.

(d) The Transaction

The assets to be sold by CCPC pursuant to the Purchase Agreement comprise CCPC's property, licences, permits, privileges and rights used to generate, transmit and distribute electricity (the "**Utility Assets**"). The Utility Assets comprise the "**CCPC System**" as that term is used in the 1986 Order. In addition, Central Coast Hydro Ltd. ("**CCH**") a corporation wholly owned by Tony Knott, a principal of CCPL, is also a party to the Purchase Agreement. CCH owns certain rights respecting potential hydroelectric projects located at or near Atnarko River and Bella Coola Valley (the "**CCH Rights**"). The Purchase Agreement contemplates that CCH will sell the CCH Rights to Boralex LP.

The Purchase Agreement provides that all services required to operate and manage the CCPC System will continue to be provided by CCPC and Tony Knott for an initial term until December 31, 2010, with certain rights to renew. Pursuant to an Operation and Management Agreement with Boralex LP, CCPC will be engaged to continue to operate and manage the CCPC System in a similar fashion to that which existed prior to the closing date. In addition, Tony Knott has agreed to provide a wide range of consulting,

development and operational services for the benefit of the Utility Assets until December 31, 2010.

The Utility Assets comprise all the assets currently used by CCPC to generate and supply electricity to the Utility Customers.

Upon completion of the transaction, Boralex LP will own the Utility Assets and will assume and be responsible for the continued operation of the CCPC System (as that term is used in the 1986 Order) for the continued provision of service to all the Utility Customers, in the same manner as it has been operated previously.

Under the operation of Boralex LP, the CCPC System will enjoy the benefit of Boralex Inc.'s substantial experience in management and ownership of regulated integrated electric utilities and hydroelectric generating facilities.

(e) Stakeholder Consultation Process

Following the announcement of the Purchase Agreement, representatives of Boralex LP and CCPC contacted all relevant stakeholders of CCPC. Tony Knott personally met with every permanent residential customer of CCPC to discuss the Application. Remarkably, the Application has received written letters of support from all 27 account holders who permanently reside in Ocean Falls. Several of the non-resident customers of CCPC have also provided letters of support.

The only industrial customer of CCPC, Marine Harvest Canada, Ltd., has agreed to a transfer to Boralex LP of its contract with CCPC. BC Hydro has approved the transfer of the electricity purchase agreement to Boralex LP.

None of the Utility Customers has expressed any concern with or opposition to the Application.

2. Regulatory Framework

CCPC is a "public utility" as defined in the Act and is within the jurisdiction of the BCUC. Section 52 of the Act requires BCUC approval for the disposition or sale of CCPC's property, franchises, licences, permits, concessions, privileges and rights related to the operation of its utility business. In addition, the 1986 Order (Order G-40-86) contemplates that, if and when the utility assets of CCPC are sold, the sale will require the permission of the BCUC.

Neither section 52 nor the 1986 Order sets out the criteria by which the Commission will determine whether to approve the transfer of the assets. If the transfer of the utility operations was effected by the sale of shares, section 54 of the Act would apply to guide the Commission. The Applicants submit that the Commission should be guided by, and should apply, the same standards in considering the Application as would be applicable if Boralex LP was seeking to acquire a "reviewable interest" under section 54(9) of the Act.

Section 54(9) states that the BCUC may give its approval to the acquisition of a reviewable interest "*subject to conditions and requirements it considers necessary or desirable in the public interest, but the commission must not give its approval under this section [54] unless it considers that the public utility and the users of the services of the public utility will not be detrimentally affected*". [emphasis added]

In our respectful submission, the provisions of the Act raise only two questions for consideration by the Commission in relation to the Application. The first is whether there will be any detrimental effect on the CCPC System or the Utility Customers. The second is whether conditions or other requirements are necessary or desirable in the public interest.

(a) No Detrimental Effect

In determining whether the public utility and the users of the service of the public utility will be detrimentally affected by an acquisition of a "reviewable interest", the Commission has articulated the following criteria:

(i) the utility's current and future ability to raise equity and debt financing will not be reduced or impaired;

(ii) there is no violation of existing covenants, the effect being detrimental to the customers;

(iii) the conduct of the utility's business, including the level of service, either now or in the future, will be maintained or enhanced;

(iv) the application is in compliance with appropriate enactments and/or regulations;

(v) the structural integrity of the assets will be maintained in such a manner as to not impair utility service; and

(vi) the public interest is being preserved.

Based on the criteria applied by the Commission in its earlier decisions under section 54 of the Act, the Applicants submit that its acquisition of the Utility Assets by Boralex LP will not detrimentally affect the CCPC System or any of its customers. There is no evidence on the record of this proceeding to indicate any detrimental affect of any kind. Indeed, although the Act does not require a positive finding by the Commission that the transaction would be in the public interest, the Applicants submit that the record shows that the public interest will be well served by approval of the Application. Specifically, the Applicants submit that the transaction will benefit the CCPC System and its customers.

The Application specifically addressed each of the Commission's approval criteria. During the course of this proceeding, there has been no evidence adduced, and no

argument has been submitted, to challenge or refute the information provided in the Application in relation to the Commission's approval criteria or otherwise to suggest that the sale of the Utility Assets will fail to satisfy any of the criteria. The record demonstrates the following:

(i) there is no evidence before the Commission that the utility's current and future ability to raise equity and debt financing will be reduced or impaired in any way and indeed, the record shows that under Boralex LP's ownership, the utility's ability to raise financing will be enhanced because of the financial strength of Boralex Inc.;

(ii) the proposed acquisition will not result any violation of existing covenants;

(iii) Boralex Inc. has a proven record of successful utility operations and that experience, coupled with Boralex LP's agreement with CCPC and Tony Knott to maintain the continuity of the management and operations of the CCPC System, will enhance the conduct of the utility's business and is likely to improve the level of service;

(iv) the Application is in compliance with all appropriate enactments and regulations;

(v) as disclosed in the Application, and in the responses to Information Requests *[Application: page 4,§5; page 6, §20, 21; page 9, §31.(3); Response to BCUC IR No. 1: page 3, §2.1 and page 5, §7.2]* Boralex LP will continue to implement the capital improvement plans currently in place for the CCPC System such that the structural integrity of the assets will be maintained in a manner that will not impair utility service to the customers; and

(vi) approval of the Application will not only preserve, but will positively benefit, the public interest.

In summary, with respect to the basic question under section 54 of whether the CCPC System or the users of its services will be detrimentally affected by the transaction, the Applicants submit that there is no evidence to support such a conclusion. The evidence is overwhelmingly to the contrary and the record indicates that the CCPC System and its customers will benefit as a result of Boralex LP's ownership of the Utility Assets.

(b) Conditions Not Required by the Public Interest

The second question for consideration by the Commission is whether conditions or other requirements are necessary or desirable in the public interest. In our submission, there is nothing on the record of this proceeding that indicates that conditions or other requirements are called for in relation to Boralex LP's ownership of the shares of the Utility Assets.

As noted above, section 54 of the Act allows the Commission to impose conditions "in the public interest". That power must be read and interpreted in the overall context of section 54 which directs the Commission not to approve a transaction if there is a

detrimental affect on the utility or its customers – that is to say, a result that is not in the public interest. We submit that the power given to the Commission to impose conditions is a means to afford flexibility to the Commission to resolve issues or concerns in a transaction that might harm the public interest while at the same time approving the transaction. Most significantly, there is no issue or concern on the record regarding the transaction that cannot be monitored by the Commission on an ongoing basis in the exercise of its regulatory powers under the Act. In this context, the question for the Commission to determine is whether there is any evidence on the record of this proceeding of some event or circumstance that will result from Boralex LP's purchase of the Utility Assets that has a detrimental affect that, therefore, should be addressed by the imposition of conditions because it cannot otherwise be appropriately managed by the Commission in its ongoing regulation of the CCPC System. We submit that there is no such evidence.

In our respectful submission the Commission should not exercise its powers under the Act to impose conditions except there is an express finding, based on the record of the proceeding, that conditions are "*necessary or desirable in the public interest*". Nothing in the record of this proceeding raises any legitimate or relevant concerns of a detrimental affect resulting from the transaction that must be ameliorated by conditions. Accordingly we submit that the Commission has no jurisdiction to impose conditions unless such a finding is made based on the evidentiary record of the proceeding.

Boralex LP cannot accept a conditional approval of its acquisition of the Utility Assets. A significant investment is to be made to acquire those assets and that investment will not be made in circumstances where Boralex LP's right to own and operate the Utility Assets is made contingent upon compliance with conditions. The imposition of conditions or requirements that are not acceptable to Boralex LP will jeopardize the completion of the transaction and leave the operation of the CCPC System in the hands of owners who do not wish to continue as its owners. We submit that such an outcome would not be in the interests of the CCPC System or of the Utility Customers. Moreover, we submit that the overwhelming expression of support for the transaction by the Utility Customers is powerful evidence that it is in the public interest that this transaction to proceed and for Boralex LP to become the owner and operator of the Utility Assets. Accordingly, not only are conditions or other requirements not necessary or desirable in the public interest, but we submit that they are contrary to the public interest.

(c) Continuation of 1986 Order

The Applicants also applied for the continuation of the exemption set out in the 1986 Order applicable to the CCPC. None of the Utility Customers has objected to or even expressed concern regarding the continuation of the exemption.

The 1986 BCUC Order exempted the CCPC System, equivalent to Utility Assets of this Application, as follows:

(a) the 1986 BCUC Order exempts the CCPC System from the application of the Act, except for Part 2 and sections 30, 44, 47 and 133 (of the 1986

version of the Act). Part 2 (requiring certificates for projects exceeding 20 MW) was repealed in 2003; and

(b) the remaining non-exempt sections – 30, 44, 47 and 133 of the 1986 Act (now numbered 25, 38, 41 and 117) – provide the BCUC with ongoing jurisdiction to respond to any service concerns of the Utility Customers.

The Applicants' reasons for continuing the exemption are as follows:

(a) without the exemption, the CCPC System would become a rate-based utility, with the inevitable result that tolls for customers of the CCPC System would increase substantially above the current tolls that are linked to BC Hydro's tolls;

(b) regardless of the limited exemption, the public interest will be protected since, for example, the BCUC retains the jurisdiction to regulate service standards for the Utility Customers;

(c) the transition provisions of the Purchase Agreement will ensure that the CCPC System will be operated in substantially the same way by Boralex LP;

(d) the limit to the 1986 Order is 6.5 MW, meaning that Boralex LP will be subject to full BCUC regulation if there is an significant increase in generation; and

(e) Boralex LP is supported by Boralex Inc., a sophisticated and experienced operator with substantial expertise and capacity for dealing with a wide range of service standard issues.

The Applicants submit that there is no reason not to continue the exemption and, further, that the continuation of the exemption is in the interests of the CCPC System and the Utility Customers. None of the Utility Customers has expressed any concern with or objection to the continuation of the exemption.

3. Issues Raised in Information Requests

(a) Financial Support

The Commission questioned whether the debt and other obligations of Boralex LP would be guaranteed by Boralex Inc *[BCUC IR No. 1, page 1, §1.2]*. The Applicants noted that guarantees are not necessary because of the close relationship between Boralex Inc. and Boralex LP. In particular, Boralex Inc. is financially responsible for its wholly owned subsidiary, Boralex Canadian Energy Inc., which is a partner of Boralex LP. Boralex Inc. has stated *[Response to BCUC IR No. 1: page 10, §12.2]* that it will stand behind future investments if necessary. Boralex Inc. is a publicly traded company and has a very good access to both equity and debt markets, which should not be adversely affected by this

transaction. Currently, the operations of the CCPC System are not supported by guarantees from CCPC's shareholders and CCPC does not have the same access to capital markets. Accordingly, the Applicants submit that the acquisition of the Utility Assets by Boralex LP will enhance the financial integrity of the operation of the CCPC System.

Boralex Inc. stated that it would stands behind all commitments made in the Application.

(b) Maintenance of Service

The Commission asked what actions Boralex LP will take that will maintain or enhance the current level of safe and reliable service for the customers of CCPC *[BCUC IR No. 1, page 3, §7.2]*. The Applicants submit that safety and reliability of service to Utility Customers will be enhanced as a result of the ownership and operation of the CCPC System by Boralex LP. In particular, the Applicants note the following:

(i) Boralex LP has agreed with CCPC to maintain the same service (see Article 2 of the Operation and Management Agreement and Article 2 of the CCPC Consulting Services Agreement, copies of which were provided as part of the Application);
(ii) Boralex Inc. operates its various utilities at a higher level of sophistication and quality control than CCPC. For example, it uses more electronically automated systems, a central control room to provide 24-hour monitoring, and an enhanced emergency response system. This system will be applied immediately to the CCPC system;
(iii) Boralex LP will establish a dedicated communication link to provide real-time operations information to its control centre to allow monitoring of the CCPC System 24 hours / day, 7 days / week and improve the response time to any unplanned event;
(iv) under the control of Boralex LP, the CCPC System will have access to all Boralex Inc. technical services such as mechanical, electrical, civil, instrumentation and control engineering which will support a maintenance program to ensure that the CCPC System will be maintained consistent with good utility practices;
(v) in case of emergency, Boralex LP will have access to Boralex Inc. resources to address problems rapidly, with capacity exceeding that now used by CCPC;
(vi) all current capital projects contemplated by CCPC will be maintained and completed; and
(vii) Boralex LP, with the assistance of CCPC, is investing $3 million to maintain the existing dam. Currently, only one penstock is available to supply water to any of the four units located within the power house. Boralex LP has committed to adding a second penstock in order to obtain redundancy in water supply to the units.

(c) Acquisition Premium

The Commission raised questions *[BCUC IR No. 1, page 3, §8.1 and 8.2 ref]* related to the treatment of transaction fees and the acquisition premium. Boralex LP has confirmed that no acquisition premium, transaction fees, litigation expenses, retention bonuses, termination costs or any other costs related to the sale will be recovered from the utility customers of CCPC or Boralex LP.

(d) Accounting Treatment

The Commission posed questions regarding the appropriate accounting treatment of the purchase price *[BCUC IR No. 1, page 3, §8.5 and BCUC IR No. 2, page 1, §15.1 to 15.5]*. Boralex LP confirmed it will be reporting its acquired utility assets at its purchase cost for regulatory and financial statement purposes.

(e) Maintenance of Rates

The Commission asked whether Boralex LP was committed to maintaining the current rate structures utilized by CCPC *[BCUC IR No. 1, page 4, §9.1 and 9.2]*. Boralex LP confirmed that is committed to maintaining the current rate structures for the Utility Customers. Specifically, the Utility Customers will continue to enjoy rates linked to corresponding BC Hydro rates.

4. Response to Heiltsuk Submission

In its submission dated October 20, 2008 (the "**Heiltsuk Submission**"), the Heiltsuk Tribal Council (the "**Heiltsuk Council**") states that it does not support the proposed sale of the Utility Assets to Boralex LP. The Heiltsuk Council indicates that it believes that the Commission has a duty to "consult with and accommodate" the Heiltsuk. However, it has not provided any argument or authority in support of that position. Accordingly, there is nothing in the record of this proceeding for the Commission to consider, or for the Applicants and other stakeholders to address in evidence or argument, in response to this statement of position.

The Heiltsuk Submission also refers to the Heiltsuk being engaged with the Ministry of Agriculture and Lands, Integrated Land Management Bureau ("**ILM**") and asserts that that consultation "is at a preliminary stage".

The Applicant is aware that the ILM has consulted with the Heiltsuk in relation to the assignment of such things as a statutory right of way and a license of occupation (over which the Commission has no jurisdiction). That consultation process does not include any question as to whether the BCUC should approve the transfer of the Utility Assets pursuant to section 52 of the Act. That is as it should be, since the ILM has no jurisdiction to grant an approval under section 52 of the Act. Equally, the Commission's jurisdiction is limited to matters covered by the Act and does not extend to the subject matter of the consultation with the ILM or any other government agency.

The thrust of the Heiltsuk Submission appears to be of the effect that the Commission ought not to proceed until the consultation has concluded with respect to what the Heiltsuk have described as "this other regulatory process", and further that the Commission ought not to proceed because the Commission itself has not adequately consulted with the Heiltsuk.

The Applicants submit that the Heiltsuk Submission is without merit because:

(i) the jurisdiction of the Commission is limited strictly to matters under the Act;
(ii) there is no obligation of the Commission to consult with the Heiltsuk in these circumstances, since there is no "impact" resulting from the decision of the Commission;
(iii) as a quasi-judicial body, the Commission has no obligation to consult and consultation with the Heiltsuk would itself offend the Commission's obligation to conduct its proceedings fairly and in accordance with the rules of natural justice; and
(iv) if there was an obligation on the Commission to consult, in these circumstances it would be at the low end of the "*Haida Nation* spectrum", and such obligation, if any, has already been met by the established process of the Commission.

(a) Jurisdiction of the Commission is limited to the Act

The Commission is a specialized quasi-judicial body whose jurisdiction is limited to matters specified under the Act. The Commission's jurisdiction as to matters under the Act is exclusive to the Commission.

In this case its jurisdiction comes into play because the Act states that the transfer of the Utility Assets requires the approval of the Commission under section 52 of the Act. The Commission is not a body that can or ought to pass judgment on the adequacy of the consultation carried out and directed by any other government agency with respect to matters beyond the jurisdiction of the Commission. There is no need for the Commission to await other consultation processes that may be going on before making a determination of matters within its own jurisdiction.

(b) No obligation to consult because there is no "impact"

The Application seeks approval of the transfer of ownership of specific assets including a bundle of existing rights. No new rights are being granted, and no asserted aboriginal rights are affected. Nothing is being taken away from the Heiltsuk.

Although the Heiltsuk did not assert any particular aboriginal rights, for the purposes of this submission one might assume that they are asserting aboriginal title and the full range of aboriginal rights over and in connection with the lands that may be affected by

the Utility Assets. However, even with that broad assumption, there is nothing in the Application that has any impact on the Heiltsuk's assumed asserted aboriginal title and rights, nor is there any assertion by the Heiltsuk of any such impact.

The lack of impact in this case is similar to Gerow J's finding in *Heiltsuk First Nation v. BC*, although in that case there was some physical disturbance of the land required to build a commercial fish hatchery and related facilities:

> [74] "I do not agree that the issuance of the licences in question is analogous to the type of situation contemplated in *Delgamuukw* which would require the full consent of the aboriginal nation. There is no evidence that the Province by issuing the four licenses is impacting the right of the Heiltsuk to hunt of fish in the area." [1][emphasis added]

The Supreme Court of Canada has made it clear that an impact on an asserted aboriginal right is a necessary precondition to trigger a duty of consultation.

The Supreme Court of Canada set down the principles of consultation in *Haida Nation* in 2004 [2]. The Court noted that the consultation process is an alternative to the injunction process. It is a process intended to preserve the *status quo* pending a final determination of aboriginal rights. The consultation process provides a means of allowing business to carry on with a minimal impact to asserted aboriginal rights.

The Supreme Court of Canada revisited the *Haida Nation* principles in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* [3]in 2005, at which time it specifically addressed itself to the issue of the necessity of "impacts" on an aboriginal right in order to trigger a consultation obligation. At paragraph 55 of *Mikisew Cree*, the Supreme Court of Canada stated:

> "This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact. The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty. Here the impacts were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question." [emphasis added]

In this Application where there is no evidence (or assertion) that the proposed transfer might have any impact on any asserted right, it follows that there is no duty to consult.

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[1] *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management) 2003 BCSC 1422 (cited with approval in Haida Nation (below) at para 42)*
[2] *Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511 (see paragraphs 12 – 15)*
[3] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) 2005 SCC 69*

Again, this makes sense. The purpose of consultation is to avoid or minimize impacts on asserted aboriginal rights. There is no need for consultation if there is no impact on an asserted aboriginal right.

(c) Quasi-Judicial Body

As a quasi-judicial body, the Commission is obligated to conduct its hearing processes in a fair and impartial manner in accordance with the rules of natural justice. In the Applicants' submission, it would be fundamentally wrong for the Commission to consult privately with any of the interested parties. The integrity of the hearing process demands that all parties have a fair opportunity to know and meet the case against their interest. Private consultation and accommodation cannot be part of such a process. Under the Act, in considering an application such as this, the Commission is to make its decision based on its determination of the public interest. In this case, the question for the Commission to determine is whether the proposed transfer of the Utility Assets prejudice the utility, its customers or otherwise be contrary to the public interest. It must make that decision based upon the evidence on the record as the result of the hearing process it prescribed. If it were to do otherwise, the decision would be subject to judicial review.

(d) If there was a duty to consult, that duty was met

If the Commission did have a duty to consult with the Heiltsuk, then in these circumstances that duty would be at the very low end of the "spectrum" of consultation identified in *Haida Nation*.[4]

The hearing process prescribed by the Commission more than satisfies that duty.

The Heiltsuk had notice of the Application and had a fair opportunity to present evidence and argument to the Commission. The Heiltsuk Council availed itself of that opportunity and submitted its argument in its letter of October 20, 2008.

The duty of an aboriginal group to participate in a consultation process is clear. One of the leading cases involved the Heiltsuk and is set out in *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* which was approved by the Supreme Court of Canada in the *Haida Nation* decision.[5]

In *Heiltsuk Tribal Council* case the court was clear that the aboriginal group has a duty to engage in the consultation process, and it cannot attempt to frustrate the Crown's good faith attempts at consultation.

The recent decision in *Little Salmon,* by the British Columbia Court of Appeal, sitting as the Yukon Court of Appeal, is a good example of what is required for consultation when

[4] *Haida* (*supra*) *at para 43*
[5] *Haida (supra) at para 42*

the circumstances direct that the consultation is at the low end of the *Haida Nation* "spectrum".[6]

In that case notice to the aboriginal group, an opportunity to submit a position by the aboriginal group, and a fair consideration of the submission of the aboriginal group by the decision making body, all within the normal rules of the decision making body, was determined to be adequate consultation.

For the reasons set forth above in this Part 4, the Applicants do not believe that consultation with the Heiltsuk is required or appropriate. Regardless, the Applicants submit that in this Application, the amount of consultation by the Commission and the Heiltsuk that has occurred would easily meet the "low end of the spectrum" consultation requirement referred to in *Haida Nation* and *Little Salmon*, even if any consultation were required.

5. Summary and Conclusion

The Applicants submit that the specific questions relevant to the Commission's jurisdiction under the Act have been fully addressed in the record of this proceeding. The record of this proceeding makes it abundantly clear that the Application should be approved and that there is no proper basis in law or in fact to justify the imposition of conditions or other requirements in approving the Application. The Applicants submit that the public interest is best served by the speedy and unconditional approval of the Application.

All of which is respectfully jointly submitted this 27th day of October 2008.

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Counsel for Central Coast
Power Corporation

Karl E. Gustafson, Q.C.

FRASER MILNER CASGRAIN LLP
Counsel for Boralex
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Waldemar Braul

[6] *Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)* 2008 *YKCA 13*