

June 11, 2009

Via E-mail

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

Attention: Erica Hamilton,
Commission Secretary

Dear Ms. Hamilton:

Re: British Columbia Utilities Commission
Project No. 3698545/Order G-30-09
Inquiry into British Columbia's Long-Term Transmission Infrastructure

We provide these submissions on behalf of the Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance, the shíshálh Nation, and the Tahltan Central Council (collectively the "First Nations").

1. Application to intervene

We enclose applications for intervenor status on behalf of three of the above noted First Nations. shíshálh Nation is already an intervenor before the Commission. While the deadline for intervenor applications has passed, we see no prejudice to any party arising from the late registration of these three First Nations. In light of the significance to these First Nations of the matters to be addressed by the Commission, and the absence of prejudice, we respectfully ask that the intervention applications be accepted. In the event any party wishes to contest the applications, we request that the Commission provide us an opportunity to provide more detailed submissions.

2. Primary comments

The matters to be addressed by the Commission pursuant to the December 2008 Provincial Terms of Reference ("TOR") have the potential to significantly affect the constitutionally protected title and rights of each of these First Nations. The development of a province-wide strategic long term plan, with accompanying determinations and recommendations, on the broad range of topics set out in the TOR, engages the Crown's duty to consult with and accommodate the First Nations. While the precise nature and scope of the Commission's duties relating to Aboriginal peoples arising in this inquiry being held pursuant to s. 5 of the *Utilities Commission Act* (the "Inquiry") will require further considerations and

submissions, recent Court of Appeal judgments¹ clarify that the Commission must ensure that the Crown's constitutional obligations are fulfilled as a necessary element of the fulfillment of its statutory processes. In this Inquiry the Commission is executing a policy mandate delivered directly from the Provincial Crown through a broad inquiry process that is procedurally and substantively different from an EPA or CPCN adjudication. This unique role creates the potential that the Commission must itself execute and fulfill the Crown's duties of consultation and accommodation to Aboriginal peoples. Our comments on this point are preliminary in nature, and will be further developed as we gain a better understanding of the nature of the Commission's purpose and powers in this Inquiry.

For purposes of providing initial comments on the scope of the Inquiry, we respectfully submit that the Commission must ensure that the Crown's duties of consultation and accommodation are met as part of the Commission's conduct of and consideration of matters arising through the Inquiry. This will require separate and distinct processes to address the constitutional rights and interests of the First Nations.

Distinct from the non-First Nation intervenors, the First Nations possess constitutionally protected rights that entitle them to a separate process of engagement with the Crown regarding proposed Crown actions. It is possible that elements of the Crown's obligations to the First Nations can be addressed within the Commission's process, as long as the Commission proceeds on a clear understanding that the process must be tailored to fulfill the Crown's duties. Our clients are not at this time seeking a separate inquiry process; rather they are seeking a process designed to ensure their constitutional rights and interests are addressed in accordance with the law.

An understanding of the potential types of outcomes and the potential implications to these First Nations' interests is essential to determining the scope and process required for this Inquiry. Notwithstanding the discussion paper produced by Commission staff, it is our view that the Commission's scoping of its mandate, including the potential determinations and recommendations the Commission will make, has not progressed to a sufficient point to enable our clients to fully advise the Commission on how their Title and rights may be affected as well as the particular procedural elements that will be required. This is a novel, unprecedented process with potentially wide ranging implications and infringements for our clients. Before commencing the process, it is necessary to obtain a better understanding of the potential types of outcomes so that our clients may better assess the nature of their participation and the Crown's duties.

Accordingly, our clients' respectfully request that the Commission proceed with a two part scoping exercise, as follows:

1. The Commission must determine and inform our clients, based on the Terms of Reference, of the potential determinations it may need to make to fulfill the mandate issued to it by the Province under s. 5 of the *Utilities Act*. It is not yet clear as to the

¹ *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67; *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68

nature and breadth of determinations the Commission intends to make. We request that the Commission hold a procedural hearing conference with respect to first nation issues triggered by the potential scope of this Inquiry. The purpose of that conference is for Aboriginal participants to gain a better understanding of: a) the intended scope and nature of the Inquiry; b) the potential determinations and recommendations that will flow from the Inquiry; and c) the relationship of the Inquiry to the Province's strategic planning and decision-making process around energy policy, infrastructure and future projects. We have no objection to this conference being open to all intervenors; however, this is without prejudice to our clients' ability to request a hearing at any future point.

2. Following the Commission's determination of scope, the Commission invite submissions on two issues: a) how must the Crown's duties to the First Nations be fulfilled through this Inquiry, including whether the Commission must fulfill elements of the Crown's duties; and b) what specific process is required to ensure constitutional obligations may be adequately discharged within the Inquiry.

We appreciate that this may be a proposal of first instance for the Commission. However, this s. 5 Inquiry is a new initiative, recently mandated by the Provincial Crown, with potentially serious implications for our clients' rights and interests. Consequently, it is important that the scope of the Inquiry be understood and the proper process be developed from the outset.

3. Initial Scoping Issues

As a preliminary matter, we identify three issues falling within the scope of this Inquiry:

1. The obligations of the Crown to consult and accommodate Aboriginal peoples at a strategic, land and resource planning level prior to implementing energy policies and decisions.

For example, since 2001, the Government has directed BC Hydro to pursue a generation acquisition policy that relies on independent power producers. The Terms of Reference now add to this policy the potential of increasing export of energy and the needs for the transmission system within the Province to support such expansion. IPP applications within our clients' territories, initiated without any prior consultation by the Province regarding the planning and allocation of the lands, waters and resources affected by these applications, have introduced a myriad of potentials and challenges. We provide this example to illustrate the types of issues which need to be considered, and not to restrict our future submissions on this point.

2. Particular recommendations regarding the means by which the Provincial Crown, including its Commissions and Crown Corporations, will accommodate Aboriginal peoples in relation to energy infrastructure and integrate Aboriginal peoples into the planning and decision making regarding energy policy and infrastructure.

The Commission is being asked for recommendations regarding a long-term energy plan within BC. For example, it must, as it develops these recommendations, consider and address

how the jurisdictional component of Aboriginal title, including management of lands and resources, must be accommodated in relation to energy infrastructure.

3. Territorial areas in which no energy infrastructure should be developed.

The Commission has been mandated to take into account “no go zones” in the Province where energy infrastructure is inappropriate, whether for statutory (i.e. park designation) or other reasons. The Commission must also take into account and make recommendations regarding any particular areas of our clients’ Territories which, for cultural, spiritual, environmental or other Aboriginal title and rights reasons, are inappropriate for energy development.

We confirm that these submissions, and our clients’ participation in this inquiry, are without prejudice to:

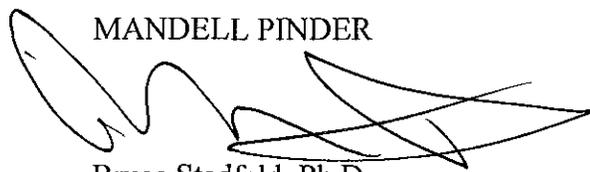
- Their right, pursuant to their Aboriginal title over their Territory, to make decisions on how the land and resources of their Territory are used; including the right to decide if and how their land and resources will be used and developed;
- Their legal and constitutional position that the Province does not have jurisdiction to make decisions regarding how the land and resources of their Territory will be used; and
- Any position that each of the First Nations may assert, now or in the future, that the Province failed to adequately consult with them prior to finalizing their 2007 BC Energy Plan and the December 2008 Terms of Reference for this Inquiry.

In conclusion, we respectfully submit that the Commission should undertake the two stage process identified above so that First Nations and the Commission establish, at the very outset, a clear understanding of the potential scope of this Inquiry and the related requirements for Aboriginal participation.

All of which is respectfully submitted.

MANDELL PINDER

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