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June 24, 2009

Commission Secretary
British Columbia Utilities Commission

Hand delivered at the Procedural Conference

Re: British Columbia Utilities Commission (BCUC) Project No. 3698545/G-30-09: Inquiry in British Columbia's Long Term Transmission Infrastructure (the Section 5 Inquiry): Hwlitsum First Nation's Brief on the Section 5 Inquiry's Independent Duty to Consult First Nations for the Procedural Conference on June 24, 2009

Please find attached the Hwlitsum First Nation's brief re the Section 5 Inquiry's independent duty to consult First Nations for the Procedural Conference on June 24, 2009.

Yours truly

Magdalena A K Muir

Written Brief of the Hwlitsum First Nation

> *We are all here to stay. We agree to a new government-to-government relationship based on respect, recognition and accommodation of aboriginal title and rights. Our shared vision includes respect for our respective laws and responsibilities. Through this new relationship, we commit to reconciliation of Aboriginal and Crown titles and jurisdictions.*
>
> *We agree to establish processes and institutions for shared decision-making about the land and resources and for revenue and benefit sharing, recognizing, as has been determined in court decisions, that the right to aboriginal title "in its full form", including the inherent right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is constitutionally guaranteed by Section 35. These inherent rights flow from First Nations' historical and sacred relationship with their territories*.

Introduction

British Columbia through its commitment to a "New Relationship", and the Supreme Court of Canada are both committed to the principle that First Nations' relationship with Government starts from a place of recognition and respect for their asserted section 35 rights.

On June 18, 2009, BCUC counsel asked participants to prepare briefs on whether the BCUC has an independent duty to consult with First Nations. He specifically requested that participants pay particular attention to the comments of the British Columbia Court of Appeal in two recent cases: *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*[1] [2009] B.C.C.A. 68 ("*Kwikwetlem*") and *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*.[2]

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[1] *Kwikwetlem First Nation v. British Columbia (Utilities Commission),* [2009] B.C.C.A. 68 ("*Kwikwetlem*") at paragraph 14.

[2] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* [2009] B.C.C.A 67 at 56.

The Hwlitsum First Nation would respectfully submit that the BCUC has the independent duty to consult with First Nations in the inquiry into British Columbia's long term transmission infrastructure.

It is extremely important to note that the views expressed here are only the views of the Hwlitsum First Nation. The Hwlitsum First Nation does not speak for any other First Nation.

Finally, the Hwlitsum First Nation encourages each Commissioner to ask all counsel here one succinct question: If not now, when will the duty to consult in a meaningful way with First Nations be triggered?

Background

1. On February 27, 2007, the Province of British Columbia announced "The BC Energy Plan: A Vision for Clean Energy Leadership" (Energy Plan).

2. The *Utilities Commission Act* provides that other public utilities, in planning for the construction or extension of generation facilities and energy purchases, must consider the Government's goal that British Columbia be electricity self-sufficient by the 2016 calendar year and maintain self-sufficiency after that year. To achieve this goal, the government estimated that it needed to generate an additional 3,000 gigawatt-hours (GWh) of supply per year from electricity generating facilities within the BC as soon as practicable but no later than 2026.

3. The *Utilities Commission Amendment Act, 2008* required the British Columbia Utilities Commission (the Commission) to consider the BC Energy Plan objectives and principles in long-term plans, project approvals and energy supply contracts. The Commission has a role where it reviews energy-related matters referred to it by Cabinet. These inquiries usually involve public hearings, followed by a report and recommendations to Cabinet. Section 5(4) was enacted in 2008 under the *Utilities Commission Amendment Act* to require the BCUC to implement aspects of the BC Energy Plan of 2007.

4. On July 17, 2008, Mr. Greg Reimer, the Deputy Minister of Minister of Energy, Mines and Petroleum Resources, wrote to Mr. Robert Hobbs, then Chair and Chief Executive Officer of the British Columbia Utilities Commission (BCUC), to inform him that the Minister of Energy. Mines and Petroleum Resources intended to provide terms of reference for the inquiry by the BCUC pursuant to section 5 of the *Utilities Commission Act.*

5. Section 5 of *Utilities Commission Act* requires the Commission to conduct an inquiry to make determinations with respect to British Columbia's infrastructure and capacity needs for electricity transmission for the period twenty years after the inquiry began, or for an alternative period that may be specified under terms of reference. Section 5 also permits the Minister responsible for the administration of the *Hydro and Power Authority Act* to specify, by order, the terms and references requiring and empowering the Commission to inquire into BC's infrastructure and capacity needs, including terms of reference regarding the manner in which and the time by which the Commission must issue its determination. [3]

[3] *Utilities Commission Act* {RSBC 1996] Chapter 473, section 5(4), 5(5) and 5(6).

6. Pursuant to amendments to the *Utilities Commission Act*, the BCUC had a statutory obligation to begin the Section 5 Inquiry by March 31, 2009. The Ministerial communication of July 17, 2008 provided the BCUC with the additional notice that they would be receiving explicit direction from the Minister for the Section 5 Inquiry.

7. On December 17, 2008, Deputy Minister Greg Reimer forwarded the signed terms of reference of Minister Richard Neufeld to the BCUC. These terms of reference specify that this inquiry consider the next thirty years (the Determination Period); that the Commission must assess generation resources in the province that will potentially be developed within the Determination Period; and that the Commission must make determinations respecting the need for and timing of additional transmission infrastructure and capacity within this Determination Period (the Terms of Reference, and the Section 5 Inquiry). The Commission is also required to produce a draft report containing its determinations and its reasons for the determinations on or before July 30, 2010.[4]

8. The Terms of Reference specify that for the purpose of conducting the Section 5 Inquiry, the Commission must invite and consider submissions, evidence and presentations from any interested person, including, without limitation, First Nations.[5]

9. On May 22, 2009 the BCUC gave the Hwlitsum First Nation permission to participate in the Inquiry.[6]

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[4] Terms of Reference signed by the Honourable Richard Neufeld, Minister of Energy, Mines and Petroleum Resources, dated December 11, 2008, sections 2, 3 4, and 13.

[5] Terms of Reference, section 10(a).

Discussion of the Independent Duty of the BCUC to Consult with First Nations in the Section 5 Inquiry

What is the Trigger for Consultation in British Columbia?

10. The trigger for the Crown's duty to consult is articulated clearly by Chief Justice McLachlin in *Haida Nation*:

> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that **the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it**: see Halfway River First Nation v. British Columbia (Minister of Forests), [1997] 4 C.N.L.R. 45 (B.C.S.C), at p. 71, per Dorgan J.[7] [emphasis mine]

11. There are two key aspects to this test to trigger the Crown's duty. First, there must be either an existing or potentially existing Aboriginal right or title that might be affected adversely by Crown's contemplated conduct. Second, the Crown must have knowledge (either subjective or objective) of this potentially existing right or title, and contemplate conduct that might adversely affect it.[8]

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[6] "Erica M. Hamilton, Commission Secretary, BCUC, Vancouver, to Magdalena A. K. Muir, Legal Counsel, Hwlitsum First Nation (May 22, 2009).

[7] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 35.

[8] For further discussion, see K. Bergner, "The Crown's Duty to Consult and Accommodate" paper presented to Canadian Institute's 2nd Annual Conference on Aboriginal Consultation: Best Practises and Leading Edge Strategies for Managing Aboriginal Consultations, Vancouver, BC (June 2006) at 3; M. Morellato, "The Crown's Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights" Research Paper for the National Centre for First Nations' Governance (February, 2008) at 24.

Is there a possibility that the Inquiry's determinations to the Minister of Minister of Energy, Mines and Petroleum Resources might adversely impact First Nations' section 35 rights?

12. Electricity generation and transmission projects have the potential to affect section 35 rights in a number of ways. First, they have major impacts on the ground, altering the landscape and waterways, and compromising natural resources such as wildlife, wildlife habitat and water.

13. Second, electricity generation and transmission projects have a negative impact on section 35 harvesting rights: the constructions sites, the waste disposal sites, the roads and bridges leading to project or transmission lines[9]; work camps associated with the projects, the transmission lines and generating plants all reduce the land base available for harvesting and cause disruption to wildlife, wildlife habitat, and potentially fish and fish habitat.[10] Electricity generation and transmission projects also eliminate or reduce important plant areas and reduce opportunities for plant gathering (i.e., berry picking or medicinal plant gathering).

14. Third, electricity generation and transmission projects have the potential to interfere with the First Nation people exercising their constitutional right to earn a "moderate livelihood" from the commercial harvesting or exploitation of resources within their traditional territories. For example, the Court's decision in *Tsilhqot'in Nation v. British Columbia*[11], which has been described as "one of the most significant trial judgments on aboriginal title

[9] Forest Practise Board, *Fish Passage at Stream Crossings*, 2009.

[10] *2009 Spring Report of the Commissioner of the Environment and Sustainable Development*, Chapter 1: Fish Habitat.

and rights since the *Delgamuukw* case",[12] reinforces the importance of the Crown's obligation to consult and potentially accommodate First Nations in respect of their claims of aboriginal title and rights. Of particular interest to this Inquiry, the Court determined that the Tsilhqot'in have aboriginal rights to hunt, trap, and trade in furs to sustain a moderate livelihood, throughout the Claim Area.[13]

15. Finally, electricity generation and transmission projects may interfere with section 35 cultural rights. Cultural rights would include the right to pursue spiritual and cultural activities on the land and to preserve and use sacred sites. If a First Nation has a deep cultural attachment to a particular area of land, and engages in cultural practices on that land, a power generation or transmission project stands to interfere with this relationship with and use of the land. This interference may be extremely disturbing to the First Nation and disruptive to its culture. While these impacts are less tangible than infringements of Aboriginal title or harvesting rights, they are just as real to the First Nation and constitute an infringement of s. 35 rights.

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[11] *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700.
[12] Morellato, "The Crown's Constitutional Duty to Consult" at 53.

[13] Other First Nations in British Columbia also enjoy commercial harvesting rights. For example, in 1997, the Supreme Court of Canada found that the Gladstone brothers, as members of the Heiltsuk First Nation, had a commercial right to harvest and sell herring spawn-on-kelp. *R. v. Gladstone*, [1997] 2 S.C.R. 723 [*Gladstone*]. The Nisga'a and Tsawwassen acquired commercial harvesting rights through treaty.

Did the Crown have knowledge that the Inquiry's determinations could potentially adversely impact First Nations' section 35 rights?

16. The explicit reference to First Nations in the Terms of Reference for the Section 5 Inquiry confirms that the Crown, whether represented by the Minister of Energy, Mines and Resources or the BCUC, had knowledge that the Inquiry's determinations could potentially adversely affect First Nation section 35 rights.

Does the Crown have a Duty of Early Engagement?

17. The Government of British Columbia, which is a partner in the tri-partite BC Treaty Process, is cognizant of the fact that First Nations in British Columbia have asserted aboriginal title claims that collectively covers 100% of the land mass.

18. The duty to consult applies not only to decisions or conduct which will have an immediate impact on lands and resources, but also to **strategic, higher level decisions**, such as the transfer of a tree farm licence to a new owner,[14] the approval of a multi-year forest management plan for a large geographical area,[15] or the establishment of a review process for a major gas pipeline.[16] On this basis, British Columbia's development of a comprehensive 30 year energy plan including electricity security, additional generation facilities and adequate transmission capacity throughout the province would require the Crown to consult with First Nations.

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[14] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.
[15] *Brown v. Sunshine Coast Forest District (District Manager*), 2008 BCSC 1642.

Who Holds the Duty to Consult?

19. It is the Crown's responsibility to ensure that one or more officials, ministries, or agencies ultimately discharge the Crown's duty to consult. In *Dene Tha'*, the Court found that no entity held a mandate to consult with and, if appropriate, accommodate, the Dene Tha' First Nation with respect to the proposed Mackenzie Gas Project. The Federal Court ruled this to be as a breach of Canada's consultation obligations.[17]

20. The British Columbia Supreme Court stated in *Hupacasath First Nation v. British Columbia (Minister of Forests)* that the Crown must be internally clear on who is responsible for discharging the Crown's consultation obligations and communicate its intentions in this regard to First Nations:

> …it is incumbent on the Province to do its best to ensure that the mandate of the specific Ministry or agency with which a First Nation is interacting is made clear, and to ensure that responsibility for consultation and accommodation is not lost in the complexity of (sometimes shifting) governmental structures. The Crown's duty is to carry on a process that is as transparent as possible.[18]

21. As discussed above, it is also well established that consultation must begin early on in the Crown's decision-making process, starting when the Crown contemplates conduct that might adversely affect it. This means that where there is a series of decision-makers, consultation should begin early and cannot begin at the final decision-making stage.

22. It is probable that the Crown's duty to consult was triggered on February 27, 2007, when BC announced it had an Energy Plan. A key component of this Energy Plan is electricity

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[16] *Dene Tha' First Nation v. Canada (Minister of Environment)* 2006 FC 1354. The trial level decision was affirmed by the Court of Appeal but that decision appears to be unreported.
[17] *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 at paras. 112-113 and 127.

security, and achieving electricity self-sufficiency by 2016 through additional clean generation and adequate transmission facilities.[19]

23. If the duty to consult was not triggered on February 27, 2007, it certainly was on December 11, 2008, when Minister Neufeld signed the Terms of Reference, thereby creating the Section 5 Long-term Transmission Infrastructure Inquiry. The primary role of the BCUC in the Section 5 Inquiry is to develop a plan for future generation and transmission facilities and that plan has the potential to impact First Nations section 35 interests. Therefore, the Section 5 Inquiry has an independent duty to directly consult with First Nations because its determinations and report have the potential to impact areas where First Nations have asserted section 35 interests.

24. Those who would argue that the Section 5 Inquiry has no independent duty to consult First Nations must address the following facts. The Section 5 Inquiry derives all of its authority from the provincial Crown.[20] The Section 5 Inquiry commissioners are appointed by the Crown.[21] The Section 5 Inquiry's purpose is dictated by the Crown either directly or through legislation.[22] In fact, on December 11, 2008, the Honourable Richard Neufeld, Minister of Minister of Energy, Mines and Petroleum Resources, authored the Terms of Reference which defined what role the BCUC would play in the Section 5 Inquiry.[23]

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[18] Hupacasath First Nation v. British Columbia (Minister of Forests), 2008 BCSC 1505 at para. 147.
[19] *The BC Energy Plan: A Vision for Clean Energy Leadership* at p. 12.

[20] *Utilities Commission Act* [RSBC 1996] Chapter 473.

[21] *Utilities Commission Act* [RSBC 1996] Chapter 473, section 2.

[22] *Utilities Commission Act* [RSBC 1996] Chapter 473, section 5.

[23] Terms of Reference signed by the Honourable Richard Neufeld, Minister of Energy, Mines and Petroleum Resources, dated December 11, 2008

25. Therefore, the BCUC role in the Section 5 Inquiry is that of an agent of the Crown, and like the Crown, the Section 5 Inquiry is encumbered with the Crown's duty to consult with First Nations whenever it contemplates conduct that has the potential to have an impact on constitutionally protected section 35 interests. The BCUC should have already begun to engage First Nations in meaningful consultations for the Section 5 Inquiry, not just provided them with an invitation to attend and participate in the Inquiry. If the BCUC continues to proceeds without meaningful consultation for First Nations, it is taking a risky gamble.

26. As discussed above, it is also well established that consultation must begin early on in the Crown's decision-making process. This means that where there is a series of decision-makers, consultation cannot begin at the final decision-making stage. It must occur as soon as the Crown contemplates the conduct.

27. The Section 5 Inquiry must produce a draft report containing its determinations and its reasons for the determinations on or before July 30, 2010.[24] If the Minister declares by regulation that the BCUC may not reconsider, vary, or rescind a determination made under Section 5 Inquiry, the Commission is bound by that determination in its subsequent conduct.

[24] Terms of Reference signed by the Honourable Richard Neufeld, Minister of Energy, Mines and Petroleum Resources, dated December 11, 2008, sections 2, 3 4, and 13.

Has the BCUC complied with its Duty to Consult?

28. The Hwlitsum First Nation submits that Section 5 Inquiry has the potential to generally infringe upon the First Nations' section 35 interests and to specifically infringe on the Hwlitsum First Nation's section 35 interests. Therefore, the BCUC has a duty to engage in meaningful consultation with all BC First Nations, and the Hwlitsum First Nation.

29. *Haida Nation* established that the Crown has a duty to consult before taking any actions that could potentially impact the First Nations' section 35 interests, asserted or proven. [25] For example, the BCUC may have already breached its duty to ensure that meaningful consultations take place because it did not provide First Nations with advance capacity funding.[26]

30. The Supreme Court of Canada cautioned, in both *Haida Nation* and *Mikisew Cree*[27], that meaningful consultation must take place when the conduct is contemplated. Simply put, informing First Nations after the decision making process has begun is unacceptable.

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[25] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, (2004), 245 D.L.R. (4th) 33 ("*Haida Nation*").

[26] For example, The Hwlitsum First Nation would refer to and support the submissions of the Sto:lo Tribal Council with respect to capacity funding to engage in land use planning to determine "no go" zones for electricity generation and transmission infrastructure.

[27] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage*, [2005] 3 S.C.R. 388, 2005 SCC 69 ("*Mikisew Cree*").

Hwlitsum First Nation's Comments on: *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*[28] ("*Kwikwetlem*") and *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission) (Carrier Sekani)*[29]

31. Commission counsel asked parties to comment on two specific paragraphs:

> 1. [56] No one suggests the Commission has a duty itself to consult: *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at 183. The obligation arising from its status as a Crown entity is to grasp the nettle and decide the consultation dispute.[30]
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> 2. [14] As I will explain, I am persuaded the reasons expressed at paras. 52 to 57 for the conclusion reached at para. 51 in *Carrier Sekani* apply with equal force to an application for a CPCN and the Commission erred in law when it refused to consider the appellant's challenge to the consultation process developed by BC Hydro. However, in anticipation of that potential conclusion, the respondents asked this Court to step back from a narrow view having regard only to the Commission's mandate, and to find that, in this case, the Commission both acknowledged and fulfilled its constitutional duty when it deferred consideration of the adequacy of BC Hydro's consultation and accommodation efforts to the ministers' review on the EAC application. In my view, the nature and effect of the CPCN decision obliged the Commission to assess the adequacy of the consultation and accommodation efforts of BC Hydro on the issues relevant to the s. 45 proceeding. The Commission's refusal to consider whether the honour of the Crown was maintained to the point of its decision was based on a misunderstanding of the import of the relevant jurisprudence and was unreasonable.[31]

32. The primary issue in both of these cases is whether the BCUC has a role to play in the duty to consult. The Court determined that the BCUC, as a quasi-judicial decision making body, must at least ensure that proponents appearing before it for approval of their applications have engaged in meaningful consultation with affected First Nations.[32] This

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[28] *Kwikwetlem First Nation v. British Columbia (Utilities Commission),* [2009] B.C.C.A. 68 at paragraph 14.

[29] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* [2009] B.C.C.A 67 at 56.

[30] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* [2009] B.C.C.A 67 at 56.

[31] *Kwikwetlem* at paragraph 14.

[32] *Kwikwetlem First Nation v. British Columbia (Utilities Commission),* [2009] B.C.C.A. 68.

BCUC role is akin to oversight, which requires the BCUC to ensure that both parties, proponent and First Nation, engage in meaningful consultation.

33. As argued earlier, the BCUC has a different role in the Section 5 Inquiry, and that role is as an agent of the Crown whose duties and responsibilities are dictated and circumscribed by the Minister. In fact, the Section 5 Inquiry must deliver its report directly to the Minister. Simply put, different roles give rise to different duties. The Hwlitsum First Nation submits that *Kwikwetlem* and *Carrier Sekani* do not apply to this situation, and have been distinguished.

34. The Hwlitsum First Nation concedes that *Quebec (Attorney General) v. Canada (National Energy Board)* [1994] 1 S.C.R. 159 might have some relevance in cases where the BCUC's role is akin to oversight. However, in the present circumstances, where the question is whether the Section 5 Inquiry has a duty to consult, this decision is superceded by the decision in *Haida Nation* where the Supreme Court of Canada subsequently constitutionally entrenched the duty to consult.

35. Our position is supported by two of the leading scholars on duty to consult, neither of whom includes the case in their analysis on the duty to consult.[33]

[33] See K. Bergner, "The Crown's Duty to Consult and Accommodate" paper presented to Canadian Institute's 2nd Annual Conference on Aboriginal Consultation: Best Practises and Leading Edge Strategies for Managing Aboriginal Consultations, Vancouver, BC (June 2006); M. Morellato, "The Crown's Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights" Research Paper for the National Centre for First Nations' Governance (February, 2008).

If the BCUC has a duty to consult with First Nations in the Section 5 Inquiry, how can their interests be accommodated?

36. The Hwlitsum First Nations submits that the Section 5 Inquiry should explore the issue of revenue sharing to compensate First Nations for adverse impacts on their section 35 interests. There have already been references to revenue sharing in written comment, and in oral remarks at the prior procedural hearing and workshop for this Section 5 Inquiry.

Conclusions

37. In conclusion, the Hwlitsum First Nation would respectfully submit that the BCUC has the independent duty to consult with First Nations in the Section 5 Inquiry into British Columbia's long term transmission infrastructure.