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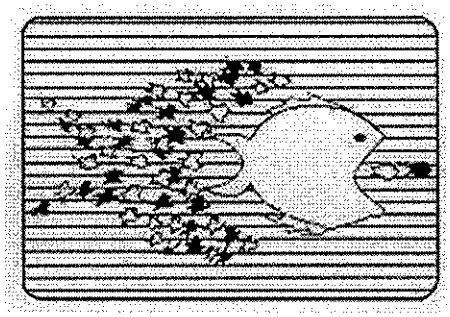

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July 24, 2009 Our File: 7409

Erica M. Hamilton
Commission Secretary
BC Utilities Commission
6th Floor 900 Howe Street
Box 250
Vancouver, BC V6Z 2N3

VIA EMAIL

Dear Mesdames/Sirs:

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

These are the submissions of BCOAPO in response to the Commission's letter dated June 30, 2009 (Exhibit A-16).

General Observations

The Commission has posed two questions:

- What, if any, is the duty to consult with First Nations and accommodate with respect to determinations of the Long-Term Electricity Transmission Inquiry?
- If there is a duty to consult, how would that duty be fulfilled and how can it best be fulfilled such that the Panel can also fulfill its legal requirements to hold an Inquiry and complete its draft report by June 30, 2010?

We submit that these questions need to be addressed within the context of the purpose of the Inquiry. That purpose can be gleaned from section 5 of the *Utilities Commission Act* and from the Terms of Reference. Perhaps most relevantly, those instruments include the following provisions:

> UCA s. 5(4): The commission, in accordance with subsection (5), must conduct an inquiry to make determinations with respect to British Columbia's infrastructure and capacity needs for electricity transmission . . . .
>
> TOR s. 5: In making the determinations referred to in paragraph 4, the Commission may not
>
> (a) make determinations on the merits of specific generation projects; or

(b) make determinations with respect to the specific routing or technological specifications of electricity transmission projects.

TOR s. 6(a)(i): in making the assessment [regarding generation] . . . and the determinations [regarding transmission] . . . the Commission must take a long-term view . . . "

We submit that the underlying purpose of the Inquiry is to provide a framework of strategic analysis for the planning and development of the system. This framework is necessitated by at least two general factors.

First, the planning and development of our energy grid engages a host of complex and critical societal issues, including First Nations impacts, climate impacts, and economic development. Making the right decisions about energy systems in the context of those issues necessarily requires a thought-out process that is the result of careful analysis and planning.

Second, the way BC Hydro and the Commission have applied government policy calling for increased reliance on private sector electrical generation resources has relegated them both to a relatively passive and reactive role: if the 2006 Call is the way of the future, the course of resource development will be driven by the decisions of a host of private sector firms. Generation planning has to some extent been sub-delegated to IPPs and their bankers, and this has tended to pull transmission system planning and expenditures along with it.

The marketplace has been approached as though it only had one active party, namely the vendor. BC Hydro has not fulfilled its appropriate role as the purchaser in that market. The utility should pro-actively determine what resources it should acquire and from where. This absence of over-riding strategic planning on the purchaser's side of the market equation defeats any solutions to the first factor we have described, namely the need to apply analysis and planning to the large contextual issues.

The output from the Inquiry should be a strategic roadmap to guide the development of the system. That necessarily entails incorporating into the analysis a host of driving considerations – the characteristics of the existing system, load projections, geographical and hydrological factors, economic development scenarios, and so forth. To a large extent these are expressly captured in the Terms of Reference.

There are other factors which may not be expressly set out in the Terms of Reference but necessarily arise as key determinants of such questions as the inappropriateness of "certain areas . . . for the development of generation resources" (s. 3(a)(iii)), the "most cost-effective and most probably sequence(s) of development by geographic area . . . of the generation resources" (s. 3(b)), and the determinations referred to in s. 4 regarding development of the transmission grid. One of those factors is the implications of the territorial rights, and of the right of consultation and accommodation, of potentially affected First Nations.

For everyone's benefit, developing a strategy to properly address these issues in the early stages of planning energy projects is highly desirable and the Inquiry presents an opportunity to achieve this.

While the Crown utilities bear the Crown's obligations of consultation and accommodation with respect to First Nations potentially affected by the development of the system, the question for the Commission itself actually rests on a higher level, more centrally integrated to the Inquiry process itself. "Doing it right" in terms of fulfilling the mandate of the Commission entails integrating First

Nations concerns into the development of the strategic roadmap itself. The Commission should not approach First Nations as "stakeholders" in the Inquiry process. Rather, it should develop an Inquiry agenda which incorporates First Nations perspectives as one of the driving considerations. This entails a somewhat different process than the more usual consultation.

From a ratepayer perspective, the point is to get these issues on the table and devise a strategy to incorporate solutions to First Nations issues into the development of the system, not only to ensure that all British Columbians (including Indigenous people) are treated justly, but also to avoid expensive surprises for ratepayers arising from inadequately-resolved issues. If we put off dealing properly with these matters in a timely way, British Columbians will wind up paying a much larger price in the future, just as we pay today for short-sighted decisions taken in the past.

The Inquiry cannot provide the resolution to the specific issues facing each community. That kind of site-specific/resource-specific task would be beyond the Inquiry's mandate and capacities. What is needed is to develop an analysis of the way unresolved First Nations issues come into play in the planning process, and to incorporate a protocol for the resolution of the concerns and entitlements of First Nations in the going-forward development of electricity resources.

We further submit that it is not useful to differentiate, in a categorical way, between past infringements and future impacts. Wherever an obligation to consult and accommodate arises, these issues will need to be addressed on a comprehensive basis as the circumstances may require.

Question 1: What, if any, is the duty to consult with First Nations and accommodate with respect to determinations of the Long-Term Electricity Transmission Inquiry?

We would distinguish between the roles of the Commission and the utilities in this respect. The Crown utilities have an ongoing obligation to consult with First Nations regarding undertakings and projects which might affect their rights and interests. That goes without saying. The Court of Appeal has determined that the Commission has a duty, in the normal course of adjudicating applications by the utilities, to satisfy itself that they have fulfilled this obligation up to the date of its decisions. The more meaningful the ongoing relationship is between the utilities and First Nations, and the more prepared utilities are to modify their plans in response to First Nations concerns and input, the less likely we are to wind up with scenarios like the derailed ILM proceeding.

The fact that many elements of the Inquiry Report will not involve final determinations regarding specific generation or transmission projects should not detract from the general obligation to consult, and should not be relied upon to avoid in-depth discussions with First Nations. Also, the utilities cannot know as they engage in consultations today what determinations the Commission will eventually make in its Report. Furthermore, meaningful engagement of First Nations should influence the Report's ultimate determinations. The Commission should reject approaches that create "chicken-and-egg" difficulties.

The Report's assessments regarding generation, and its determinations regarding transmission, will tend to set the course for the development of the system. Otherwise, one might question the point of the exercise. If full engagement of First Nations is postponed until specific projects mandated by the Inquiry are prepared for approval, not only will project approvals be placed at legal risk, but opportunities will have been lost to integrate First Nations concerns into the process, and build a more trusting and healthy relationship which would benefit everyone.
We submit that the way the Commission itself should engage First Nations in this Inquiry would be better characterized as collaborating with them, as well as hearing from other parties, to

determine how First Nations entitlements and concerns can best be integrated into the Inquiry's analysis of the optimal strategy for the development of our electricity infrastructure, rather than as "consultation." First Nations should not be seen as stakeholders standing on the periphery of the process, nor consultation as a checklist-item in project development. The Inquiry will be far more useful to ratepayers and other parties to the extent that the Commission is able to fashion protocols for timely and meaningful First Nations engagement in the planning and development of our energy infrastructures.

Question 2: If there is a duty to consult, how would that duty be fulfilled and how can it best be fulfilled such that the Panel can also fulfill its legal requirements to hold an Inquiry and complete its draft report by June 30, 2010?

Regarding the Commission's own approach to First Nations issues in the Inquiry, we submit that it would be a mistake to approach this question as an exercise in gauging the minimum level of involvement of First Nations that is legally required to avoid a likely reversal on appeal. The Commission does not deal with any of the other major parties that come before it in a manner predicated on minimalism.

Thus, for example, a determination that the Commission does not bear an independent constitutional obligation to consult does not address the problem. It answers the wrong question.

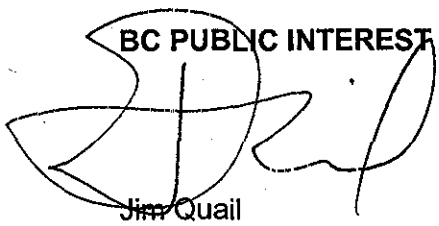
We note that Question 2 asks not only how the duty can be fulfilled but "how it can best be fulfilled." This is the important point. The working relationship between the Commission and First Nations in the Inquiry should be somewhat more than a consultation. The Commission should recognize First Nations concerns and entitlements as driving factors that need to be taken into account in the strategic planning of the system. Any other approach invites an outcome where short-sighted decisions are made that can have serious negative repercussions for ratepayers, as well as for First Nations and utilities, as the grid grows and develops and unresolved issues spark avoidable conflicts.

We submit that the Commission should invite the First Nations intervenors, and potentially also other representative organizations of Aboriginal people in British Columbia, to help design an engagement process which extends beyond the Final Report of the Inquiry. We see this as a parallel undertaking to the consultations that are ongoing between the utilities and those intervenors.

We look forward to exploring these issues further at the Procedural Conference on August 18-19, 2009.

Yours truly,

BC PUBLIC INTEREST ADVOCACY CENTRE



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