



Hwlitsum First Nation

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July 24, 2009

Ms. Erica M. Hamilton
Commission Secretary
British Columbia Utilities Commission
Sixth Floor - 900 Howe Street
Vancouver, BC V6Z 2N3

By email

Dear Ms. Hamilton:

Re: British Columbia Utilities Commission (BCUC) Project No. 3698545/G-30-09: Inquiry in British Columbia's Long Term Transmission Infrastructure (the Inquiry): Hwlitsum First Nation's Written Submission dated July 24, 2009 in response to the Commission's Letter of June 30, 2009.

Please find attached the written submission of the Hwlitsum First Nation in response to the Commission's letter of June 30, 2009.

Yours truly

A handwritten signature in black ink that reads "Magdalena A K Muir". The signature is written in a cursive, slightly slanted style.

Magdalena A K Muir

The Hwlitsum First Nation respectfully makes the following written submission.

It is important to note that the Hwlitsum First Nation makes this submission on its own behalf, and does not speak for other First Nations.

Part 1: Duty to Consult with First Nations and Accommodate with Respect to Determinations of the Long Term Transmission Inquiry?

1. On June 24, the Hwlitsum First Nation provided written comments and oral submissions on the BCUC's independent duty to consult in the Section 5 Inquiry (written comments are Exhibit C89-3). The Hwlitsum First Nation continues to adopt and support these written comments and oral submissions.
2. At this time, the only additional comment that the Hwlitsum First Nation will make with respect to the BCUC's duty to consult concerns the implied breadth of the duty to consult.
3. The Terms of Reference identify matters that the Commission must assess, consider, have regard to and make determinations upon.
4. Despite the early nature of the Inquiry, the Commission and the reports of its staff have already recognized the need to consider demand, generation and transmission in an integrated way; for example, in the BCUC staff discussion paper (Exhibit A-12) and the BCUC's letter dated July 10, 2009- Order G-86-09 (Exhibit A-18).
5. Therefore, the Hwlitsum First Nation submits that the duty of the Commission to consult and accommodate First Nations extends to all relevant issues in the Inquiry for First Nations, and should not be restricted to determinations.

Part 2: How could this Duty 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?

6. The Hwlitsum First Nation submits that it is important to have a collaborative and reiterative sharing of information, issues and concerns. It urges the Commission to provide funding for community consultation, legal and technical staff, and expert reports.
7. This full and open communication within the context of the Section 5 Inquiry will permit the BCUC, the utilities and other participants to the Inquiry to fully understand historic and future adverse impacts of electricity generation and transmission on First Nations. It will also explore possible means to cost, compensate and mitigate infringements on First Nations' section 35 rights.
8. The BCUC must deeply consult with First Nations in the Section 5 Inquiry, as the Inquiry is a long term high level planning exercise resulting in determinations of transmission needs.¹

Additional Processes for First Nations within the Section 5 Inquiry

9. The BCUC needs to change its consultation process, or to supplement its existing process with other processes and approaches.² There is no rigid format or requirements for consultation processes, but the processes must allow for meaningful consultation with First Nations.³ The BCUC cannot rely on a consultation forum for the general public to discharge its consultation obligations towards First Nations.

¹ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, *Brown v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, *Dene Tha' First Nation v. Canada (Minister of Environment)* 2006 FC1354, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, *Taku River Tlingit First Nation v. British Columbia*, 2004 SCC 74. Within the transcript for the June 24th Prehearing Conference, Mr. Feldberg counsel for BCTC characterized the Section 5 Inquiry in the following way: "Second, I thought it might be useful to remind participants what we are embarking on, and that's effectively -- it's a long-term transmission planning exercise. It's, in my submission, of necessity high-level. It's to look at the big picture, and it's going to be something where the Commission is looking at a long period of time and the entire province, and what the Commission will come out of it with is broad determinations of need with respect to transmission over that period. So I think the two concepts that need to be borne in mind is that this is a relatively high-level planning exercise and it's over a long-term period. And that's -- what I want people to bear that in mind for is when we get into the details of scoping, I think it's relevant to bear in mind what we're trying to achieve at the end of the day, and what we're trying to achieve is that long-term outlook or plan." (Transcript Volume 2 - Pre-Hearing Conference June 24, 2009, p. 124, ll. 1-19).

² *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 at para. 104, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 64, *Chicot v. Canada (Attorney General)* 2007 FC 763 at para. 121, *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999) 178 D.L.R. (4th) 666 (B.C.C.A.) at para. 177.

³ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at paras. 42 and 46, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, at paras. 54, 64 and 69.

10. The Terms of Reference and the *Utilities Commission Act* establish a review and decision-making process for the BCUC in the Section 5 Inquiry. However, these documents but do not explicitly or extensively discuss how consultation with First Nations should occur. First Nations who rights are affected are entitled to have input into the review and decision-making process.⁴

11. The Hwlitsum First Nation submits that the current process for First Nation consultation within the Section 5 Inquiry is deficient. The BCUC cannot rely solely on a deficient process to meet their consultation obligations towards First Nations, as the BCUC consultation duties flow from constitutional obligations. A variety of measures are discussed under “Further Processes and Tools for the Section 5 Inquiry” to address this deficiency.

12. The key measure that has been discussed among certain First Nations is the formation of an Advisory Panel that will advise the BCUC, and oversee the model of First Nation engagement being implemented by the BCUC. While further discussion and input are required, the Hwlitsum First Nation would support the establishment of an independent First Nation Advisory Panel, with the task of advising the BCUC and also ensuring that First Nation consultation and accommodation is appropriately implemented for the Section 5 Inquiry.

13. Other key measures are:
 - The development of First Nations scenario that address First Nations’ perspectives in their own words and language,
 - An independent and expert cost and benefit analysis, and
 - First Nation community discussion forums that include the BCUC, the utilities and all interested stakeholders.

⁴ *Dene Tha’ First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 at paras. 107-110.

Adequate and Timely Capacity Funding for the Section 5 Inquiry

14. There are important capacity funding issues in the Section 5 Inquiry. First, the Commission must provide adequate capacity funding for First Nations.⁵ The BCUC must recognize that First Nations have a unique and constitutionally protected role in this Inquiry.
15. The Hwlitsum First Nation submits that the Participant Assistance/Cost Award Guidelines established under Order G-72-07 is not an appropriate mechanism for First Nation funding for the Section 5 Inquiry. First Nations, unlike other stakeholders, have a unique and constitutionally protected right to consultation and accommodation whenever they assert that their section 35 rights may be adversely impacted.
16. The Hwlitsum First Nation submits that the Order does not contemplate advance and secure funding for First Nations, funding for capacity building and First Nation community consultation, funding for First Nation staff participation in Inquiry processes, or financing expert reports on First Nations scenarios and cost and benefit analysis, all matters that will be required for the Section 5 Inquiry.
17. The Hwlitsum First Nation would also submit that the process for reviewing applications for costs in Order G-72-07, and as implemented so far by the Commission in this Inquiry, gives rise to a breach of natural justice and procedural fairness.
18. No utility is making an application in this Inquiry. They, like all other parties, are simply interested parties. Why then should they be allowed to review and provide comments on First Nations' applications for costs? The Hwlitsum First Nation would submit that this is not appropriate for the Section 5 Inquiry.
19. Disclosure of the application for costs to other interested parties allows those parties to gain knowledge and insight into First Nations legal strategy that could prejudice First Nations in this and subsequent proceedings. The right of reply for First Nations provided by the BCUC in its correspondence of June 26 2009 (Exhibit A-14) does not address these concerns.

⁵ The British Columbia Supreme Court recognized the importance of capacity funding in *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 at para. 1138, when it stated: "It must be borne in mind that it is a significant challenge for Aboriginal groups called upon in the consultation process to provide their perspectives to government representatives. There is a constant need for adequate resources to complete the research required to respond to requests for consultation. Even with adequate resources, there are times when the number and frequency of requests simply cannot be answered in a timely or adequate fashion."

Further Processes and Tools for the Section 5 Inquiry

20. The BCUC has the ability to control and modify its process, and the Terms of Reference provide additional options. The BCUC has a tradition of using alternative dispute resolution processes and negotiated settlement approaches in its proceedings and inquiries.⁶ Section 10 of the Terms of Reference also authorize the BCUC to use its powers under the *Utilities Commission Act*, as well as workshops, mediations, dispute resolution mechanism, pre-hearing conferences, working groups and oral and written hearings.
21. For the Section 5 Inquiry, the Hwlitsum First Nation respectfully requests that the BCUC consider the following options, with certain of these matters being discussed more extensively below:
- Appointment of a First Nation Advisory Panel
 - Developing a consultation protocol which could be implemented by the First Nation Advisory Panel.
 - Appointing a senior BCUC staff member or external consultant to act as a focal point and coordinate First Nation participation.
 - That BCUC require and fund the development of First Nation scenarios, which will be collaboratively developed by First Nations.
 - That the BCUC require and fund a cost and benefit analysis of the impact of historic and projected generation and transmission facilities on First Nations.

Appointment of a First Nation Advisory Panel

22. The First Nation Advisory Panel would advise the BCUC, and oversee the model of First Nation engagement being implemented by the Commission. First Nations could appoint members to this advisory panel. It could also include a senior BCUC staff member, and high level representatives of the utilities and the BC government who are engaged and knowledgeable on aboriginal issues.

⁶ For example, the BCUC has a negotiated settlement process. Guidelines outlining the Negotiated Settlement Process were issued by the Commission in January 1996 and updated in October 2000. Please also see the paper, *Alternative Dispute Resolution (ADR) and the B.C. Utilities Commission* by Kenneth M. Duke (March 1995) and the *BCUC Negotiated Settlement Process: Policies, Procedures and Guidelines* (January 2001), both posted on the website of the BCUC, www.bcuc.com.

Development of a First Nations Consultation Protocol

23. One tool that could be useful for the BCUC in the Section 5 Inquiry is a consultation protocol. In keeping with the approach of leaving the Crown with discretion in establishing the consultation process, neither the Crown nor First Nations may compel the other to enter into a consultation protocol. However, the courts have recognized that consultation protocols can facilitate further consultation.⁷
24. Even if there is no legal requirement for a consultation protocol, a protocol may be useful in the Section 5 Inquiry if it clarifies the parameters of the discussion, manages expectations about the process, sets timelines for the consultation process, and clarify the roles.

Development of First Nation Scenarios

25. The Hwlitsum First Nation submits that it is important to develop First Nation scenarios for impacts of existing and proposed transmission facilities, as well as impacts of generation and demand on First Nations' section 35 rights. These scenarios will be developed collaboratively by First Nations. They will also draw upon analysis and scenario development separately undertaken by the Commission and the utilities to address electricity demand, generation and transmission in the Section 5 Inquiry.
26. First Nation scenario building is important. It allows an exploration of the consequences of various options from the perspective of First Nations in their own words and language, and the development of shared understanding of First Nation issues and concerns by all participants to the Inquiry. It is envisioned that First Nation scenario development exercises would be structured processes based on dialogue with a focus on ideas rather than positions, and that would allow the neutral exploration of future consequences for First Nations of different options for electricity demand, generation and transmission in the province.⁸

⁷ In *Ahousaht First Nation v. Canada*, 2007 FC 567 at para. 66., *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] 3 C.N.L.R. 181 (Ont. S.C.J.) at para. 188.

⁸ Van der Heijden, K, 2005. *Scenarios: The Art of Strategic Consultation*, 2nd ed. Chicester, England: John Wiley & Sons, Ltd.

First Nations Cost and Benefit Analysis

27. Despite the constitutional based section 35 rights, and the long standing infringement, the cost of historic and projected generation and transmission facilities in British Columbia on First Nations has never been comprehensively explored or assessed.
28. First Nations' rights can be viewed as akin to a constitutional protected property right. There are adequate and appropriate means to assess the value of and loss occasioned by these infringements. Similarly, it is important to understand the costs of accommodation to reduce or compensate for these infringements. Precedents for this economic valuation of First Nations impacts and rights exist in other regions of Canada and internationally.
29. The Hwlitsum First Nation proposes to work collaboratively with other First Nations and the BCUC to develop the terms of reference for a First Nation Cost and Benefit Analysis, to jointly nominate and choose appropriate experts, and to assist in the implementation of this analysis.

Specific Issues and Accommodations raised by the Hwlitsum First Nation

30. Finally, while the Hwlitsum First Nation recognizes that it would be premature to define and scope all the First Nation issues at this time, the Hwlitsum First Nation would request that the BCUC consider the following issues in the context of the Inquiry:
 - First Nation environmental stewardship, and the First Nation role in monitoring and mitigation of adverse impacts of existing and proposed generation and transmission.
 - Measures to monitor and restrict environmental, social and cultural impacts on First Nations of existing and future electricity generation and transmission.
 - Restrictions on future generation and transmission such as areas precluded from development.
 - Specific accommodations such as province-wide revenue sharing of generation revenues.