BRITISH COLUMBIA UTILITIES COMMISSION

**IN THE MATTER OF THE UTILITIES COMMISSION ACT,
R.S.B.C. 1996, CHAPTER 173**

RE: THE COMMISSION'S INQUIRY UNDER SECTION 5(4) OF THE "ACT"RELATING TO BRITISH COLUMBIA'S ELECTRICIY TRANSMISSION INFRASTRUCTURE AND CAPACITY NEEDS FOR THE NEXT 30 YEARS

SUBMISSION OF STO:LO TRIBAL COUNCIL (STC) RE: THE COMMISSION'S DUTY OF CONSULTATION, IF ANY, AND MANNER OF ACCOMMODATING ANY DUTY OF CONSULTATION

24 JULY 2009

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INTRODUCTION

1. These are the STC's submissions regarding whether the Commission has a legal duty to consult and if so, how should this duty be fulfilled. .

2. The Sto:lo indigenous peoples of their ancient homelands and traditional territories in British Columbia, Canada, as represented by the Sto:lo Tribal Council submits the Crown has a constitutional duty to consult and accommodate the aboriginal rights, titles and interests, and that the Commission for the purposes of the Section 5(4) inquiry is acting as an agent of the Crown and must therefore consult and accommodate the aboriginal rights, titles and interests of STC, that may be adversely impacted by the recommendations and findings of the Commission with respect to the Section 5(4) inquiry.

3. STC has been engaged in the British Columbia Treaty Commission process since 1994. STC has presented its traditional territory map as part of its Statement of Intent to enter the Treaty process, and the Crown in Right of Canada and British Columbia are aware of the asserted aboriginal rights, title and interests of STC, and therefore British Columbia has real and/or constructive knowledge of the asserted aboriginal rights, title and interests of STC. This knowledge triggers the constitutional duty to consult and accommodate and the STC submits that the Commission is now acting as agent for the Crown therefore is required to consult and accommodate the aboriginal rights, title and interests of STC.

4. STC's aboriginal rights, titles and interests have been infringed by past Crown activities with respect to energy and hydro development and STC submits that any current projections for energy and/or hydro activity within S'ohl Temexw (STC's traditional territory) which are now within the statutory mandate of the Commission to consider should assess past impacts and current adverse projected impacts and therefore the Commission is required to consult and accommodate and recommend methods for compliance by the Crown.

BACKGROUND

5. On June 30, 2009, the Commission via e-mail invited participants to file by July 24, 2009 written submissions on the following two questions:

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

SUBMISSIONS OF STC

6. The Terms of Reference for the Commission as set out in the letter of December 17, 2008 from Deputy Minister Greg Reimer to the Commission CEO requests "determinations with respect to British Columbia's electricity transmission infrastructure and capacity needs for a 30 year period, commencing from the date of this inquiry begins "the Determination Period"." STC submits that these determinations are distinguishable from binding decisions made by quasi judicial tribunals and therefore the common law respecting the inability of quasi judicial tribunals to "consult" with First Nations is not applicable.

7. STC further submits that these "determinations" if accepted by the Crown under 5(7) of the Act may "…declare, by regulation, that the Commission may not, during the period specified in the regulation, reconsider, vary or rescind a determination made under Section 5(4) of the Act". These "determinations", from STC's perspective are far reaching and have the potential to be tantamount to expropriation of STC's aboriginal rights, titles and interests and as such are unconstitutional in its current formulation.

8. STC submits that in the Supreme Court of Canada decision in *Haida Nation* that the duty to consult and accommodate is "…always at stake in its dealings with Aboriginal peoples….It is not mere incantation, but rather a core precept that finds its application in concrete practices." STC further submits that this consultation and accommodation must be understood "generously" and that the "honour of the Crown infuses the processes of treaty making and treaty interpretation. In making and applying treaties the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing."

> Reference: *Haida Nation v. British Columbia* [2004] 3 S.C.R. 511 para. 16, 17 and 19.

9. STC submits that it has been involved in the treaty making process in British Columbia and has advanced numerous suggestions on interim land, water and resource protection to the Crown, and has identified numerous sacred sites and other "no go" land areas however as STC is not one of the current negotiating tables all of its lands are at risk of infringement and/or expropriation by the Crown and this is tantamount to "sharp dealing" and the current adoption of any scenario by the Commission for Long Term electricity needs in BC will have an irreversible impact on STC's concepts and values respecting its long term vision of land, water and resource sustainability. This current method of land and resource alienation and infringement is unconstitutional, unless the Commission, adopts suitable methods of fulfilling the "honour of the Crown". In Taku River the Supreme Court of Canada stated that "The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by Section 35(1)."

> Reference: *Taku River Tlingit First Nation v. BC* [2004] 3 S.C.R. 550 para. 24.

10. STC submits that any scenario or combination of scenarios that the Commission determines will have an adverse impact on its constitutional rights within its traditional territory and that the flexibility to accommodate STC's interests and concerns will be lost once the Commission makes a determination that is accepted as such by the Crown, and that this flexibility or the ability to negotiate is inconsistent with the honour of the Crown.

Reference: *Mikisew Cree First Nation v Canada* [2005] 3 S.C.R. SCC 69 at para. 34

11. STC further submits any scenario contemplated and recommended by the Commission will have an adverse impact and that STC's concerns and interests must be incorporated into the Crown's decisions to "…ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action." The current Crown process for these "determinations" does not make this possible or at least there is no guarantee that this will occur.

Reference: *Mikisew Cree* at para. 64

12. STC submits that a proper process of consultation and accommodation requires a negotiation with the Crown on process, product and implementation of product and that this current process is devoid of this possibility. STC submits that these "determinations" by the Commission are long-term strategic considerations and fundamentally STC must be involved in those processes. Historically, in other regions of Canada with modern treaties the Crown has agreed to be bound by negotiation of appropriate accommodation measures on hydro and other projects that will have an adverse impact on First Nations and have agreed to incorporate those measures into its "decision documents". As STC is not at that stage of treaty negotiations it is impossible to ask the Commission and certainly beyond the Commission's jurisdiction to recommend the creation of mechanisms to allow STC to acquire equity and other interests in strategic investments in projects that may occur in STC's traditional territory on a mandatory basis as set out in other modern treaties.

Reference: Kluane First Nation Final Agreement (2003)

13. STC submits that as part of its "determinations" it could recommend that STC be given the option to opt into "strategic investments" and secondly to issue joint authorities with the Crown in order to ensure that the negotiated terms and conditions of energy projects with STC's traditional territory is compatible with the long term sustainability vision of STC.

14. STC maintains that its land use plans, once developed and adopted, could form the basis to engage in dialogue with the Crown on the range of possibilities and that one such possibility is to suggest that the Commission as part of its "determinations" require proponents to enter into "accommodation" agreements with First Nations and that the resulting terms, be incorporated into the authorizing document for that energy proponent.

15. STC finally submits that these processes at least from the perspective of STC appear to be backwards as currently advanced by the Crown however this form of treatment is nothing new for STC.

CONCLUSIONS

16. STC submits that the Commission, under its current direction, is acting as agent of the Crown to make certain recommendations and "determinations" on BC's long term transmission infrastructure and capacity needs for the next 30 years and is therefore required to fulfill the "honour of the Crown" by consulting and accommodating the concerns and interests of affected First Nations.

17. STC has recommended some initial considerations and accommodation methods, on a "without prejudice basis", on fulfillment of these constitutional duties that have now been imposed upon the Commission from other modern day treaty solution to similar projects and issues for the consideration of the Commission.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24TH DAY OF JULY, 2009.

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Dave Joe, Counsel for STC