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July 24, 2009

British Columbia Utilities Commission
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Vancouver, BC, V6Z 2N3
Attn: Erica Hamilton, Secretary
By Web Posting

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Dear Madam:

Re: Long Term Electricity Transmission Requirements Inquiry,
BCUC Orders No. G-30-09, G-47-09, BCUC Project # 3698545
Submissions on First Nations Issues (Exhibit A-16)

This is on behalf of the participants B.C. Sustainable Energy Association (BCSEA), the Sierra Club of British Columbia (SCBC), Forest Ethics, West Coast Environmental Law Association, The Pembina Institute, Dogwood Initiative and Canadian Parks & Wilderness Society – B.C. Chapter (CPAWS-BC), collectively, BCSEA, *et al.*

The purpose of this letter is to provide submissions on First Nations Issues, in accordance with Exhibit A-16. The contents are as follows:

The questions to be addressed	1
Interests of BCSEA, <i>et al</i> in First Nations Issues	2
Key points.....	2
Endorsement of previously stated views	3
Inquiry is a quasi-judicial function	4
Conclusion	10
List of Authorities.....	11

Attached to this submission is a copy of an excerpt from McCabe, J. Timothy S. *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples.* (LexisNexis Canada Inc. 2008). The locations of other authorities referred to are provided in the List of Authorities at the end of this letter.

The questions to be addressed

The questions on which the Inquiry Panel has invited submissions are as follows:

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?

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?¹

The Panel adds:

Additionally, the Inquiry Panel is prepared to allow Participants to address any sub-categories of these questions that Participants may identify.²

Interests of BCSEA, *et al* in First Nations Issues

It is clear that the Inquiry involves various substantial First Nations issues. BCSEA, *et al* have the following *interests* in the Commission's handling of First Nations issues in this Inquiry:

1. BCSEA, *et al* support the paramount objective of reconciliation between the interests of the Crown and the interests of First Nations. BCSEA, *et al* have an interest in the Inquiry process fostering, and not impeding, the reconciliation process.
2. The member groups of BCSEA, *et al* have unique, ongoing working relationships with First Nations groups in a wide variety of contexts. BCSEA, *et al* highly value these relationships and actively work to strengthen them. BCSEA, *et al* have a very strong interest in ensuring that the Inquiry process as a whole contributes positively to their respective working relationships with First Nations groups, including those that are participants in the Inquiry and those that are not.
3. BCSEA, *et al* have interests in their procedural and substantive rights within the Inquiry proceeding, and corresponding interests in ensuring that such rights are not curtailed unnecessarily or without legal justification by Commission decisions regarding First Nations issues.
4. BCSEA, *et al* are aware that there are unresolved alleged infringements, historic and ongoing, of First Nations' title and rights, established and yet-to-be-established, related to the construction and operation of existing transmission and generation infrastructure in B.C. BCSEA, *et al* are of the view that in order to determine the *future* needs for transmission infrastructure in B.C. it is necessary to reach a firm understanding of how the outstanding claims regarding existing infrastructure will be resolved.

Key points

BCSEA, *et al* respectfully make the following points in response to the Panel's questions:

1. In response to the Panel's first question, the Provincial Crown has a constitutional duty to consult and if necessary accommodate First Nations' interests regarding the determinations of the Transmission Inquiry because the Provincial Crown has knowledge, real or constructive, of existing³ or potentially existing⁴ First Nations' rights

¹ Ex. A16, p.2.

² *Ibid.*

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

⁴ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74.

and title that may be adversely affected by the Inquiry determinations. The foundation of the Provincial Crown's constitutional duty is the honour of the Crown. The goal is reconciliation of the interests of the Crown and the interests of First Nations.⁵

2. To emphasize, it is the *Provincial Crown* that has the duty to consult with First Nations and accommodate with respect to determinations of the Long-Term Electricity Transmission Inquiry.
3. In response to the Panel's second question, the Provincial Crown is responsible for ensuring that its duty to consult and accommodate is fulfilled. Three emanations of the Provincial Crown are relevant to the Provincial Crown's fulfillment of its duty to consult and accommodate:
 - a. BC Hydro, carrying out consultation with First Nations on behalf of BC Hydro and BCTC at the request of the Deputy Minister of Energy, Mines and Petroleum Resources [Ex. B2-4];
 - b. the Commission Inquiry Panel, carrying out the Inquiry pursuant to s.5(4) of the *Utilities Commission Act (UCA)*; and
 - c. the Minister of Energy, Mines and Petroleum Resources, issuing Terms of Reference for the Inquiry under *UCA* s.5(6), and potentially considering issuing a 'cast in stone' regulation under *UCA* s.5(7) [see Ex. B2-4].
4. For its part, the Inquiry Panel has an obligation under the *UCA* to hear evidence and submissions from First Nations participants in the Inquiry regarding, among other things, the potential effect of any Inquiry determinations on First Nations' interests, established or yet-to-be-established, constitutional or non-constitutional. Further, the Inquiry Panel has an obligation to give serious consideration to such evidence and submissions.
5. In making Inquiry determinations under subsection 5(4) of the *UCA*, the Inquiry Panel is carrying out a quasi-judicial function. This is a point of crucial interest to BCSEA, *et al* and it is addressed in detail below.
6. While the Panel is required to comply with the principles of natural justice applicable to its quasi-judicial role, the Inquiry Panel has a variety of flexible procedures available to it under the *Act* and the Terms of Reference, section 10, that might usefully enhance the ability of the Panel to understand the potential impact of its determinations on First Nations' interests and the ability of the several First Nations to communicate their interests to the Panel.

Endorsement of previously stated views

BCSEA, *et al* endorse the following statements by counsel on their behalf at the June 24, 2009 Procedural Conference:

Regarding the First Nations issues, my clients [take] the position that the Commission Panel, in exercising its jurisdiction to undertake this inquiry under Section 5 of the *Act* is acting as a

⁵ McCabe, J. Timothy S. *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples*. (LexisNexis Canada Inc. 2008), pp.92-103.

quasi-judicial tribunal and that informs the question of whether the Commission Panel has an obligation to consult and, if necessary, accommodate first [nations] regarding possible infringement of aboriginal rights and [title].

Secondly, that if and when the Commission is asked to make a determination regarding the adequacy or inadequacy of the efforts that have been made to meet the Crown's obligation in this regard, then the Commission ought to deal with its jurisdiction to do that at the time, and to deal with the substance of the matter at the time. Of course, it appears prospectively that the Court of Appeal has established that the Commission does have that jurisdiction, but I endorse the sentiments of previous counsel along the lines that the Commission should avoid making decisions on matters that it doesn't have to in this complicated area.

But I would also emphasize that it's important that the Commission very clearly make decisions where it is asked to, with a view to creating a record that will be of assistance if these matters are later reviewed by the courts.⁶

Inquiry is a quasi-judicial function

In this section of the submission, counsel elaborates on the argument that in making Inquiry determinations under subsection 5(4) of the *Utilities Commission Act (UCA)*, the Inquiry Panel is carrying out a quasi-judicial function.

Making “determinations” is the core function of the Inquiry Panel. Subsection 5(4) states:

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 for the period ending 20 years after the day the inquiry begins or, if the terms of reference given under subsection (6) specify a different period, for that period. [underline added]

For present purposes, references to “the Commission” and to “the Inquiry Panel” are interchangeable. The Inquiry Panel is a division of the Commission. Subsection 4(3) of the *UCA* authorizes the commissioners to sit as a division:

- (3) The commissioners must sit
 - (a) as the commission, or
 - (b) as a division of the commission.

⁶ T2:194 line 22 to 195 line 22. Transcript errors are shown corrected in square brackets.

Being a division of the Commission, the Inquiry Panel has the jurisdiction and powers of the Commission. Subsection 4(4) of the *UCA* states:

(4) If commissioners sit as a division

(a) 2 or more divisions may sit at the same time,

(b) the division has all the jurisdiction of and may exercise and perform the powers and duties of the commission, and

(c) a decision or action of the division is a decision or action of the commission.

Subsection 2(4) of the *UCA* makes specified sections of the *Administrative Tribunals Act (ATA)* applicable to the Commission. Subsection 2(4) states in material part:

2 (4) Sections 1 to 13, 15, 18 to 21, 28 to 30, 32, 34 (3) and (4), 35 to 42, 44, 46.3, 48, 49, 54, 56, 60 (a) and (b) and 61 of the *Administrative Tribunals Act* apply to the commission,...

The Commission is a “tribunal” within the meaning of the *ATA*, because the Commission meets the definition of “tribunal” in s. 1 of the *ATA*, which is made applicable to the Commission by s.2(4) of the *UCA*. The *ATA*, s.1, defines “tribunal” as follows:

“tribunal” means a tribunal to which some or all of the provisions of this Act are made applicable under the tribunal's enabling Act.

As noted above, s.5(4) of the *UCA* requires the commission to “conduct an inquiry to make determinations...” A “determination” is within the definition of “decision” in section 1 of the *ATA*, which states:

“decision” includes a determination, an order or other decision. [underline added]

The members of the Inquiry Panel are required to perform their Inquiry duties impartially. Section 30 of the *ATA*, made applicable to the Commission by *UCA* s.2(4), states:

Tribunal duties

30 Tribunal members must faithfully, honestly and impartially perform their duties and must not, except in the proper performance of those duties, disclose to any person any information obtained as a member. [underline added]

The sections of the *ATA* made applicable to the Commission by *UCA* s.2(4) clothe the Commission, and hence the Inquiry Panel, with the powers and responsibilities of a quasi-judicial tribunal.

Subsection 11(1) of the *ATA*, made applicable to the Commission by *UCA* s.2(4), confirms that the Commission has the authority to control its own processes and to make rules respecting practice and procedure. Subsection 11(1) states:

General power to make rules respecting practice and procedure

11 (1) Subject to this Act and the tribunal's enabling Act, the tribunal has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

The word “just” in the phrase “the just and timely resolution of the matters before it” explicitly confirms that achieving *justice* is a central feature of the Commission’s mandate. This is another indication that the Commission’s function is quasi-judicial.

Similarly, *UCA* s.75 requires the Commission to make its decisions “on the merits and justice of the case”: a characteristic of a quasi-judicial tribunal. *UCA* s.75 states:

Commission not bound by precedent

75 The commission must make its decision on the merits and justice of the case, and is not bound to follow its own decisions. [underline added]

The *UCA* contains other provisions granting quasi-judicial powers to the Commission, for example:

- *UCA* s.43(1)(a) requires a public utility to answer all questions posed by the Commission, and s.43(1)(b)(i) requires a public utility to provide to the Commission the information the Commission requires.
- *UCA* s.72 grants the Commission jurisdiction to inquire into, hear and determine an application based on (a) a complaint or (b) a request for Commission direction or approval.
- *UCA* s.73(1) authorizes the Commission to issue mandatory orders requiring a person to do something the person is required to do within the jurisdiction of the Commission. *UCA* s.73(2) authorizes the Commission to issue restraining orders forbidding a person from doing something within the jurisdiction of the Commission.
- *UCA* s.74 authorizes the Commission to enter on and inspect property and to require the taking of depositions.
- *UCA* s.76 authorizes the Commission to exercise its jurisdiction over a receiver or other official appointed by a court.
- *UCA* s.78 authorizes the Commission to appoint a person to conduct an inquiry, with powers under the *ATA*.
- *UCA* s.79 is a privative clause regarding findings of fact by the Commission.
- *UCA* s.80 relieves the Commission from being legally bound by a finding of fact by a court.
- *UCA* s.81 confirms that the Commission is not deprived of its jurisdiction by the existence of a court proceeding regarding the same question of fact.

Numerous sections of the *ATA*, made applicable to the Commission by *UCA* s.2(4), impart to the Commission, and hence to the Inquiry Panel, specific powers, responsibilities and privileges that are characteristic of a quasi-judicial tribunal. Examples include the following:

- *ATA* s.33(3) and 33(4) grant the Commission extensive powers to order the attendance of witnesses and the production of documents, as well as the authority to apply for a court order directing a person to comply with a Commission order to attend or to produce.

- *ATA s.48* grants the Commission authority to make orders to maintain order at a hearing, including the right to call for assistance from a peace officer, who is granted authority to “use such force as is reasonably necessary.”
- *ATA s.49* provides that the refusal or failure of a person to comply with Commission orders regarding attendance as a witness makes the person “liable to be committed for contempt.”
- *ATA s.56* grants civil immunity to members of the Commission acting in the course of their duties.
- *ATA s. 61* exempts from disclosure under the *Freedom of Information and Protection of Privacy Act* Commission records created in the course of a proceeding.

Some of the above *ATA* provisions are applicable in the context of an “application” as defined in the *ATA*. With respect, it is important to note that the Transmission Inquiry is an “application” as the term is used in the *ATA*, even though the Inquiry was not *initiated* by an “application” as the term is used in the *UCA*.

The term “application” has a different and broader meaning in the *ATA* than in the *UCA*. *ATA s.1* defines “application” inclusively as follows:

“**application**” includes an appeal, a review or a complaint but excludes any interim or preliminary matter or an application to the court;

The *ATA* uses the term “application” in the same context as the *UCA* uses the terms “hearing” or “proceeding.”

In the *UCA*, the term “application” refers to the *method* by which a proceeding is *initiated*, not to the proceeding itself. While some Commission proceedings are initiated by an “application,” in the *UCA* sense of the term, many other types of Commission proceeding are not initiated by an application.

For example, a s.45 CPCN proceeding is initiated by an “application” to the Commission by a public utility. However, a s.71 proceeding, regarding an energy supply contract (ESC), is *not* initiated by an “application” in the *UCA* sense of the term. A s.71 proceeding is initiated by the Commission in response to the filing of an ESC with the Commission. Similarly, the Commission’s proceeding regarding a long-term resource plan filed by a utility under *UCA s.44.1*, for example BC Hydro’s *2008 Long Term Acquisition Plan*, is not initiated by an application. Rather, *UCA s.44.1(6)* requires that the Commission must review such a plan because the Commission is required to accept or reject the plan after reviewing it. A Commission proceeding can also be initiated by a “complaint,” for example under *UCA s. 72(1)*. As with the term “application,” under the *UCA* the term “complaint” refers to the step that *initiates* the proceeding, whereas the *ATA* uses the term “complaint” as an example of a type of “application,” i.e., referring to the proceeding itself.

Under *UCA s.82(1)*, there are two other ways in which a Commission proceeding can be initiated, neither of which is as the result of an application: on the Commission’s own motion, and as required by the Lieutenant Governor in Council. *UCA s.82(1)* states:

Power to inquire without application

82 (1) The commission

- (a) may, on its own motion, and
- (b) must, on the request of the Lieutenant Governor in Council, inquire into, hear and determine a matter that under this Act it may inquire into, hear or determine on application or complaint.

Again, it is evident that the *UCA* uses the term “application” to refer to one particular method by which a proceeding can be initiated, rather to refer to the proceeding itself.

This brings us to *UCA* s.82(2), which states:

82 (2) For the purpose of subsection (1), the commission has the same powers as are vested in it by this Act in respect of an application or complaint. [underline added]

UCA s.82(2) confirms that the Commission’s powers are the same in a proceeding that is *not* initiated by an application as they are in a proceeding that *is* initiated by an application. This is important in two respects. First, it confirms that those *ATA* provisions referenced by *UCA* s.2(4) that apply on their terms in the context of what the *ATA* refers to as an “application” are intended to apply to Commission proceedings, such as the Transmission Inquiry, that were not initiated by what the *UCA* refers to as an “application.”

Second, *UCA* s.82(2) is an answer to the suggestion to the effect that the Transmission Inquiry is not a quasi-judicial process because it was not initiated by an application and there is no “applicant.” *UCA* s.82(2) confirms that the Commission’s powers in a proceeding such as the Transmission Inquiry are the same as the Commission’s powers in a proceeding initiated by an application, such as a CPCN proceeding.

One substantial indication that the Transmission Inquiry is a quasi-judicial proceeding is that the Commission’s Inquiry determinations are protected by a statutory privative clause. *UCA* s. 105 states:

Jurisdiction of commission exclusive

105 (1) The commission has exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act.

(2) Unless otherwise provided in this Act, an order, decision or proceeding of the commission must not be questioned, reviewed or restrained by or on an application for judicial review or other process or proceeding in any court.

The Inquiry Panel has *exclusive jurisdiction* to make the determinations it is required to make under s.5(4). This confirms that the Inquiry determinations are not mere ‘recommendations’ or ‘policy advice.’ Notably, because the Inquiry determinations are within the Commission’s exclusive jurisdiction, the Minister has no authority to accept, vary or reject the Inquiry determinations. Consistent with this legal structure, *UCA* s.5(7) authorizes the Minister only to declare that the Inquiry determinations cannot be changed later *by the Commission itself*.

There is judicial support for the conclusion that the Commission is a quasi-judicial tribunal. In the *Carrier Sekani Tribal Council* case, Mr. Justice Donald states unequivocally:

[15] The Commission is a quasi-judicial tribunal with authority to decide questions of law. ...⁷

In the companion *Kwikwetlem* case, Madam Justice Huddart also refers to the Commission as a “quasi-judicial tribunal.”⁸

~~It has been argued that while the Commission may have a quasi-judicial function in s.71 (ESC) and s.45 (CPCN) proceedings the Commission’s role in the Transmission Inquiry is different and may not be not quasi-judicial. In this regard, it is said that the role of the Inquiry is as “a long-term planning exercise,”⁹ “strategic high-level planning,”¹⁰ “policy advice to government,”¹¹ and “a higher-level policy approach.”¹²~~

In response, with respect, these characterizations of the Inquiry Panel’s role are not determinative of whether the Inquiry Panel is carrying out a quasi-judicial function. Granted, the role of the Commission in carrying out the Inquiry under s.5(4) is *different* than the role of the Commission in determining an application for a CPCN under s.45 or the role of the Commission in reviewing an energy supply contract filed under s.71. However, the fact that the Inquiry Panel’s role is *different* than the Commission’s role under s.45 or s.71 does not make the Inquiry Panel’s role *not* a quasi-judicial function. Again, as noted above, *UCA* s.82(2) confirms that the Commission has the same powers where it is acting on its own motion or at the request of the Lieutenant Governor in Council as it does where it is acting as a result of an application or complaint. These powers are indicia of a quasi-judicial function.

In addition, it is granted that the Inquiry can be accurately described as a *type* of ‘planning process,’ but not the type of planning process that merely produces a non-binding ‘plan’ following public consultation. Rather, the Inquiry is a type of planning process that has at its core a statutory requirement that (a) the Inquiry Panel make legally binding determinations and (b) that these determinations result from a proceeding that utilizes, and complies with, a litany of powers and requirements set out in the *Utilities Commission Act* and the *Administrative Tribunals Act* that are the hallmarks of a quasi-judicial proceeding.

Regarding the suggestion that the role of the Inquiry Panel is to produce “policy advice to government,” BCSEA, *et al* respectfully disagree. As has been emphasized above, the Inquiry is to make legally binding determinations that are within the exclusive jurisdiction of the Utilities Commission. While the government will presumably glean policy information from the Inquiry Panel’s final report, the statutory function of the Inquiry is to produce determinations, not to provide mere policy advice.

In conclusion regarding this point, the Inquiry Panel is carrying out a quasi-judicial function in making Inquiry determinations under subsection 5(4) of the *Act*.

⁷ *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67.

⁸ *Kwikwetlem First Nation v British Columbia (Utilities Commission)*, 2009 BCCA 68, para. 8.

⁹ T2:220 line 16.

¹⁰ T2:220, line 20.

¹¹ T2:243, lines 2-3, 8.

¹² T2:243, line 3.

Conclusion

As stated above, BCSEA, *et al* support the paramount objective of reconciliation between the interests of the Crown and the interests of First Nations. The member groups of BCSEA, *et al* have an interest in ensuring that the Inquiry process as a whole contributes positively to their respective working relationships with First Nations groups. BCSEA, *et al* respectfully assert that the *Provincial Crown* has a duty to consult with First Nations and accommodate with respect to determinations of the Long-Term Electricity Transmission Inquiry. BCSEA, *et al* further assert that the Inquiry Panel is carrying out a quasi-judicial function in making Inquiry determinations under subsection 5(4) of the *UCA*. While the Panel is required to comply with the principles of natural justice, the Inquiry Panel has access to a variety of flexible procedures that might usefully enhance communications between the Panel and the First Nations participants.

All the above is respectfully submitted.

Yours truly,

William J. Andrews



Barrister & Solicitor

cc. Distribution List by email

List of Authorities

	Location
Statutory Instruments	
<i>Administrative Tribunals Act</i> , SBC 2004 c.45	Ex.B2-7 BCH Tab 3
<i>Inquiry Terms of Reference</i>	Ex.B2-7 BCH Tab 2
<i>Utilities Commission Act</i> , RSBC 1996, c.473	Ex.B2-7 BCH Tab 1
Cases	
<i>Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)</i> , 2009 BCCA 67	Ex.B2-7 BCH Tab 7
<i>Haida Nation v. British Columbia (Minister of Forests)</i> , [2004] 3 S.C.R. 511, 2004 SCC 73	Ex.B2-7 BCH Tab 4
<i>Kwikwetlem First Nation v British Columbia (Utilities Commission)</i> , 2009 BCCA 68	Ex. B2-5 Attachment 3
<i>Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)</i> , [2005] 3 S.C.R. 388, 2005 SCC 69	Ex.B2-7 BCH Tab 5
<i>Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)</i> , [2004] 3 S.C.R. 550, 2004 SCC 74	Ex.B2-7 BCH Tab 11
Textbook	
McCabe, J. Timothy S. <i>The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples</i> . (LexisNexis Canada Inc. 2008), excerpt: Title page, table of contents, and Chapter 3, Section D “Consultation and Accommodation,” pp.89-136.	Attached