

**BRITISH COLUMBIA UTILITIES COMMISSION**  
**IN THE MATTER OF THE UTILITIES COMMISSION ACT**  
**S.B.C. 1996, CHAPTER 473**

**and**

**An Inquiry into British Columbia's Electricity  
Transmission Infrastructure and Capacity Needs for the  
Next 30 Years**

**Vancouver, B.C.**  
**August 19, 2009**

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**PRE-HEARING CONFERENCE**

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**BEFORE:**

<b>L. A, O'Hara,</b>	<b>Chairperson</b>
<b>D.A. Cote,</b>	<b>Commissioner</b>
<b>M. Harle,</b>	<b>Commissioner</b>
<b>R.K. Ravelli,</b>	<b>Commissioner</b>
<b>K. Anderson</b>	<b>Commissioner</b>

**VOLUME 4**

G.A. FULTON, Q.C. P. MILLER	Commission Counsel
P. FELDBERG	British Columbia Transmission Corporation
C. GODSOE K. DUKE	British Columbia Hydro and Power Authority
R.J. McDONELL	FortisBC Inc.
P. DIMITROV	First Nations Energy and Mining Council
W. J. ANDREWS	B.C. Sustainable Energy Association (BCSEA), Sierra Club of British Columbia Chapter (SCBC), Forest Ethics, West Coast Law Environmental Law Association, Pembina Institute, Dogwood Institute and David Suzuki Foundation
D. BURSEY	Joint Industry Electricity Steering Committee (JIESC)
B. STADFELD B. GAERTNER	Shishalh First Nation, Tahltan Central Council, Nlaka'pamux Nation Tribal Council and Okanagan Nation Alliance
J. QUAIL E. KUNG	B.C. Old Age Pensioners' Organization, Council Of Senior Citizens' Organizations, Tenant Resource Advocacy Centre, B.C. Coalition of People With Disabilities, Active Support Against Poverty, Terrace Anti-Poverty Group and End Legislated Poverty (BCOAPO)
C. WEAVER	Commercial Energy Consumers of British Columbia (CEC)
L. BERTSCH	Energy Solutions for Vancouver Island Society (ESVI), Okanagan Environments Industry Alliance (OEIA), Island Transformation Org (ITO) and rental Owners and Managers Society of BC (ROMS BC)
D. AUSTIN	Independent Power Producers Association of British Columbia (IPPBC)
S. LEBOURDAIS	Splats'In First Nation, Secwepemc Nation, Shuswap Arrow Lakes Division
R. HEASLIP	Sto:lo Tribal Council
J. GRIFFITH	Haisla Nation and Weiweikei Nation (Cape Mudge Indian Band)
M.A.K. MUIR R. WILSON	Hwlitsum First Nation

M. KIRCHNER

Squamish Nation, Carrier Sekani Tribal Council and  
Lakwólams Indian Band

D. CHRIST

Tokwat Nation

C. DEVLIN

Treaty 8 Tribal Association

A. RANA

T. THIELMANN

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**CAARS**

**VANCOUVER, B.C.**

**August 19<sup>th</sup>, 2009**

**(PROCEEDINGS RESUMED AT 8:38 A.M.)**

THE CHAIRPERSON: Please be seated.

Mr. Fulton -- good morning, everybody.

MR. FULTON: Good morning, Madam Chair, Commissioners.

There is one preliminary matter. Mr.

Bursey has an extract from the *Oil and Gas Commission Act* which he wishes to provide to the Panel. The Hearing Officer has been provided with copies.

THE CHAIRPERSON: Thank you.

MR. BURSEY: Good morning. And I promise I won't speak in Latin today, even though I'm quite fond of doing that recreationally.

Yesterday I referred to the *Oil and Gas Commission Act* in my reply, and I referred to Section 2 in particular. And I said at that time I didn't have a copy of that section with me, because it came up in the arguments in chief. So I've just provided the Commission with a copy. But I would also note that it's cited in the cases that are on the record, and also cited in BCTC's submission -- written submission. But for completeness, I thought I should put it in front of the Commission. Thank you.

THE CHAIRPERSON: Thank you, Mr. Bursey.

1 MR. FULTON: We're now on the reply cycle for questions 3  
2 and 4, so I'll begin with B.C. Hydro.

3 **REPLY BY MR. GODSOE:**

4 MR. GODSOE: Good morning, Madam Chair, Commissioners.  
5 I'll be very brief.

6 B.C. Hydro strongly agrees with and adopts  
7 BCTC's counsel's submissions found at transcript  
8 Volume 3, page 626, beginning at line 22 and  
9 concluding at page 628. In particular, page 626, I  
10 adopt BCTC's counsel's submission that by arguing  
11 about the quasi-judicial status of the tribunal, no  
12 one here, the utilities, no one, is debating or  
13 denying Section 35 rights of First Nations. I think  
14 everybody's here on good-faith efforts, and I think  
15 we'll find in response to questions 7 and 8 that we  
16 will display our good-faith intention to make the  
17 process work.

18 Thank you.

19 THE CHAIRPERSON: Thank you, Mr. Godsoe.

20 MR. FULTON: FortisBC?

21 MR. McDONELL: No reply to question 3 and 4, thank you.

22 MR. FULTON: First Nations Energy and Mining Council.

23 MR. DIMITROV: No reply.

24 MR. FULTON: Joint Industry Electricity Steering  
25 Committee.

26 MR. BURSEY: No further comment.

1 MR. FULTON: BCSEA *et al.*

2 MR. ANDREWS: No reply.

3 MR. FULTON: BCOAPO *et al.*

4 **Proceeding Time 8:41 a.m. T2**

5 **REPLY BY MR. QUAIL:**

6 MR. QUAIL: Good morning. With respect to my friends, in  
7 my submission there were some very unhelpful  
8 contributions made to the discussion yesterday on  
9 questions 3 and 4, in that there was a lot of ducking  
10 the question that was actually put to people.

11 Question 3 and 4, the point of departure is  
12 a scenario where it is established that the Commission  
13 has an independent duty to consult. That's the  
14 starting point of it. And questions are about how to  
15 provide a fair process within that context. And with  
16 respect, my friends Mr. Godsoe, Mr. Bursey and Mr.  
17 Andrews essentially, their response was essentially it  
18 can't be done, or said that these were irreconcilable  
19 alternatives. In my submission that's very unhelpful.

20 In the scenario that underlies questions 3  
21 and 4, consultation with First Nations by the  
22 Commission is an obligatory part of the process.  
23 We're already there. That rests on a constitutional  
24 determination.

25 In contrast, the rights of other parties,  
26 including my clients in this process, the right to

1 fairness is a very important right, but it rests on  
2 the common law and on statute. It's on a different  
3 level, but the two need to be reconciled, and to say  
4 it can't be done, in my submission, is not helpful.  
5 It's sort of categorical and unhelpful.

6 So instead of being positional or avoiding  
7 the question, we need to look at how best to fashion a  
8 process that satisfies the constitutional imperatives  
9 and provides the fairest possible process to everyone.  
10 And the law, including the *Baker* case, makes it clear  
11 that the content of the notion of fairness is highly  
12 contextual. It depends on a host of factors including  
13 the nature of the tribunal, the nature of the issues,  
14 the nature of the parties and so on. And of course  
15 one other contextual issue is implications of  
16 constitutional imperatives. So that's the world we're  
17 walking around in in questions 3 and 4. So again it's  
18 not useful to adopt positional stances if the end  
19 result is not just going to survive judicial scrutiny.  
20 In that scenario we need to get real and decide how we  
21 can fashion the best process.

22 In my submission, the solution is first of  
23 all, a key thing is to look at both of these issues,  
24 both how to consult and how to be as fair to everybody  
25 else as possible concretely and not as abstractions or  
26 formulas. What exactly, what is involved in the



1 collides with the duty to be fair. First of all, I  
2 say that that isn't the case, and that it would be  
3 imperative to develop a fair process, and that that  
4 could be done and people should abandon their  
5 positions and roll up their sleeves and design the  
6 best process instead.

7 That's all I have to say, subject to any  
8 questions you might have.

9 THE CHAIRPERSON: Thank you, Mr. Quail.

10 MR. FULTON: Commercial Energy Consumers Association of  
11 British Columbia.

12 MR. WEAVER: No reply, Madam Chair.

13 MR. FULTON: ESVI.

14 MR. BERTSCH: No, no reply.

15 MR. FULTON: Sto:lo Tribal Council.

16 MS. HEASLIP: No reply.

17 MR. FULTON: Shuswap Arrow Lakes Division.

18 MS. LEBOURDAIS: No reply.

19 MR. FULTON: Treaty 8 Tribal Association. Oh, pardon me.  
20 Hwlitsum First Nation.

21 MS. MUIR: No reply.

22 MR. FULTON: Thank you. Now the Treaty 8 Tribal  
23 Association.

24 **REPLY BY MS. RANA:**

25 MS. RANA: Good morning, Madam Chair, Panel members.

26 I just have two points in reply on behalf

1 of Treaty 8. I would first like to adopt Mr. Quail's  
2 reply submissions with respect to the ducking of  
3 questions 3 and 4 yesterday. Well said, and well  
4 appreciated.

5 First of all, a number of the intervenors  
6 yesterday that raised concerns about the ability to  
7 allow the recognition of the duty to consult to work  
8 with the procedural fairness obligations owing to the  
9 other participants noted that, or characterized the  
10 consultation process that First Nations were asking  
11 for as one that required bilateral behind-closed-doors  
12 meetings. And they referred to several of the  
13 submissions of First Nations, but I wanted to point  
14 out for the Panel's benefit that nowhere in Treaty 8  
15 submissions have they said that any sort of a  
16 constitutional process that meets this duty would  
17 require behind-closed-doors, one-on-one, bilateral  
18 meetings. In fact, Treaty 8's submissions are found  
19 at paragraph 81 of Exhibit C105-2, and they include --  
20 and these were just suggestions. They include the  
21 development of a consultation advisory panel. And  
22 that regard, we've stated:

23 "The Commission should create an inquiry  
24 advisory panel of First Nations'  
25 representatives with appropriate  
26 representation from Treaty 8 First Nations

1           in B.C. to assist in the Commission's  
2           deliberations."

3           We've also suggested community hearings, consultation  
4           sub-hearings, First Nation scenario submissions, First  
5           Nation comment periods, and capacity funding. And  
6           each of these suggestions are described in further  
7           detail in our written submissions.

8                       Then in paragraph 82 we state:

9                       "These are only suggestions. More work will  
10                      need to be done in cooperation with all the  
11                      affected and interested First Nations and  
12                      the Commission itself in order to design  
13                      processes to ensure meaningful consultation  
14                      occurs on issues that might potentially  
15                      adversely affect aboriginal or treaty  
16                      rights."

17   **Proceeding Time 8:48 a.m. T4**

18                      So in that regard we're just setting out  
19                      potential ways we could all meet these challenges  
20                      before us, and in no way has Treaty 8 suggested that  
21                      this is secretive, non-transparent process.

22                      Secondly in response to several of the  
23                      concerns we heard yesterday about an apprehension of  
24                      bias that would be created if the Commission had a  
25                      duty to First Nations that was somehow different than  
26                      what it owed to the other participants. It's

1           instructive to note that the courts have even modified  
2           their processes to recognize the unique role that  
3           First Nations need to play in those processes. And  
4           the courts, we all know, are our ultimate impartial  
5           decision-making body, you know, not even quasi-  
6           judicial. I mean these are the courts. And with  
7           respect, for example, to the Rules of Evidence, the  
8           courts have modified the Rules of Evidence to allow  
9           oral history evidence from First Nations that would  
10          clearly violate the hearsay rules that have been  
11          recognized in courts for many many years.

12                        And I also understand that in the trial for  
13          the *Chilcotin* case, the oral history, some of the  
14          stories that were provided in the oral history could  
15          only be told at night. So the court sat at night to  
16          allow those witnesses to tell those stories in the  
17          right environment. And you know, that's clearly  
18          nothing that we've seen courts do before.

19                        So if the courts can look at their process  
20          and look at the role that First Nations need to play  
21          in order to meaningfully participate in that process  
22          and they can make adequate modifications, there's no  
23          reason why this Commission can't do the same to allow  
24          First Nations to properly participate.

25                        Thank you.

26 THE CHAIRPERSON:    Thank you very much, Ms. Rana.

1 MR. FULTON: Madam Chair, I'm embarrassed to say that my  
2 order left me momentarily and I forgot to call the  
3 Squamish Nation and also the Toquaht Nation, so I'll  
4 call the Squamish Nation first.

5 **REPLY BY MR. KIRCHNER:**

6 MR. KIRCHNER: My friend Ms. Rana just adopted part of  
7 Mr. Quail's submissions. I want to adopt all of Mr.  
8 Quail's submissions. In my submission he's put it  
9 very well.

10 We've not -- in my submission, we've not  
11 heard why the Commission cannot remain impartial while  
12 fulfilling the obligation to consult, and my friend  
13 referred to the *Black's Law Dictionary* definition of  
14 "impartial". We've got a concern about that because,  
15 as I said, we're operating in a legal framework where  
16 First Nations do have specific rights that are not  
17 enjoyed by others. They do have -- the Crown has an  
18 obligation specifically to aboriginal people to  
19 consult, and aboriginal people have a specific right  
20 to be consulted and accommodated and that's the legal  
21 framework. So *Black's Law Dictionary*, which is an  
22 American publication that is devoid of any context  
23 around the duty to consult in the legal framework that  
24 we operate in Canada after *Haida*, is quite different  
25 to anything that *Black's* could have contemplated. So  
26 I would urge the Panel not to place any weight on



1 accommodate First Nations through this process, you're  
2 going to have to find the jurisdiction to do so, and  
3 if you find that jurisdiction, then you can't be  
4 impartial. This Commission has been tasked  
5 specifically in your mandate to consider -- to receive  
6 and consider representations of First Nations. Now,  
7 if you can't make determinations within your -- well,  
8 within the determinations you have to make, if you  
9 can't comment on what kinds of accommodations are  
10 necessary for First Nations within that mandate, then  
11 it begs the question, why are you told to receive  
12 submissions from First Nations? We're -- as the court  
13 said in *Mikisew*, the process isn't for First Nations  
14 to come here and blow off steam. The Commissions are  
15 -- and those are Mr. Justice Binney's words. We're  
16 here to make submissions, obviously, to be considered,  
17 and that's what your mandate is. So of course you  
18 have the jurisdiction to consider and make  
19 determinations with regard to the appropriate  
20 accommodations that are necessary.

21 THE CHAIRPERSON: Thank you. Thank you very much, Mr.  
22 Kirchner.

23 MR. FULTON: Toquaht Nation.

24 MR. CHRIST: No reply, again.

25 MR. FULTON: Now, before I go to the Nations, is there  
26 anyone who I have not called yet on the reply list,

1 other than the Nations and the Haisla? Okay.

2 **REPLY BY MR. STADFELD:**

3 MR. STADFELD: Morning. I think it comes as no surprise  
4 that, yes, we do have a reply. I will keep it short  
5 again, best as possible.

6 First of all, I wanted to pick up on --  
7 just quickly a point that my friend Mr. Bursey made in  
8 reply to questions 3 and 4 regarding the *Carrier*  
9 *Sekani* case and whether or not the court there had  
10 determined that it was in fact that the Commission is  
11 "quasi-judicial". I would agree with him that at  
12 paragraph 56 of *Carrier Sekani* the court is citing a  
13 principle. That's what it's doing. It's not making a  
14 determination. It's citing a principle.

15 And more importantly, of course, *Carrier*  
16 *Sekani* was about Section 71 of the *Utilities Act*. It  
17 wasn't about Section 5. And as we've heard for the  
18 last day, a decision on whether quasi-judicial or not  
19 is based on the section that you're referring to.  
20 That's why there's been all the talk about what's in  
21 Section 5, what's in the terms of reference, and what  
22 the facts are.

23 So, there can be no doubt that there was no  
24 determination in *Carrier Sekani* that the Commission is  
25 acting in a quasi-judicial fashion under Section 5.  
26 Because that issue was not before the court.



1 Nation representations went to examples of where Crown  
2 agents are fulfilling the duty to consult, and there  
3 is no problem with balancing interests. You can do  
4 that. And I heard some of the parties say, "Well, the  
5 Forestry Commissioner, the B.C. Oil and Gas, they're  
6 not quasi-judicial, so just ignore those examples."  
7 Well, that was the whole point of the question, was  
8 assuming that you would have the independent duty to  
9 consult and accommodate, and we reiterate that those  
10 are perfect examples that would apply in your  
11 situation.

12 This is what the Crown does all the time.  
13 It's not new. If you find that, yes, you yourselves,  
14 the Commission must consult and accommodate, you don't  
15 have to reinvent the wheel here. You go back and see  
16 what Crown agents do in these situations, and this is  
17 what they do. And I'll go into some more examples of  
18 that.

19 There was quite a bit of discussion  
20 yesterday afternoon, I think BCSEA put it in the sense  
21 that you cannot reconcile the duty to consult with the  
22 duty to be impartial or independent. And based on the  
23 case law, that's clearly not the case. The Crown  
24 balances those kinds of interest all the time. And I  
25 would like just to refer to one paragraph in the *Haida*  
26 *Nation* decision at the Court of Appeal in 2002. This

1 is the decision that went up to the Supreme Court of  
2 Canada and was affirmed by the Supreme Court of  
3 Canada. On this point there was no disagreement that  
4 on the whereof.

5 At paragraph 60 near the end of the  
6 decision --

7 MR. FULTON: Excuse me, Dr. Stadfeld. The Hearing  
8 Officer has the cases that you were going to refer to.  
9 I don't think he's given them to the Panel yet.

10 MR. STADFELD: Oh, I'm sorry, I'm sorry.

11 MR. FULTON: He places it before --

12 MR. STADFELD: I thought they had been handed up.

13 MR. FULTON: No, that's fine.

14 MR. STADFELD: Okay. So just to reiterate on this, this  
15 is the decision that went to the Supreme Court of  
16 Canada. The Supreme Court of Canada affirmed that  
17 yes, here the Crown in this situation did have the  
18 duty to consult. And what Justice Lambert says at  
19 paragraph 60 I think goes to the point that was before  
20 you yesterday. He says:

21 "However, I would grant a declaration to the  
22 petitioners that the Crown, Pro Venturo, and  
23 Weyerhaeuser..."

24 Now, that point was changed at the Supreme Court of  
25 Canada,

26 "...have now and had in 1999 and 2000 and

1 earlier, a legally enforceable duty to the  
2 Haida people to consult with them in good  
3 faith and endeavour to seek workable  
4 accommodations between the aboriginal  
5 interest of the Haida people on the one  
6 hand, and the short-term and long-term  
7 objectives of the Crown and Weyerhaeuser to  
8 manage TFL 39 in Block 6 in accordance with  
9 the public interest, both aboriginal and  
10 non-aboriginal, on the other hand."

11 **Proceeding Time 9:01 a.m. T07**

12 So that's what the B.C. Court of Appeal  
13 directed the provincial Crown to do, was to do that  
14 type of balancing with the public interest and the  
15 constitutional duty to consult. They didn't see any  
16 contradiction, the Supreme Court of Canada didn't see  
17 any contradiction on that point.

18 Now, I wanted to refer, or try in -- best  
19 as possible in a preliminary way to try to answer one  
20 of the questions that came up from the Panel  
21 yesterday, which was in regards to, what do we do with  
22 203 bands? And so that's the practicality issue.  
23 I'll get to the ordering of that as I go along, but I  
24 agree that it is a significant issue at some time.

25 First, I'd just like to point out, of  
26 course, that there aren't 203 lawyers for different

1 bands representing you here today, thank God. And no  
2 one would wish that upon you.

3 Second, I think what you'll find is what  
4 you'll find here, is that a lot of bands decide to be  
5 represented through their tribal councils. So you  
6 have that, for example, with our clients, the Tahltan,  
7 the Nlaka'pamux, the Okanagan Nation. We represent  
8 numerous bands on their behalf. You find the same  
9 thing for Treaty 8. They're here representing  
10 numerous bands. So I think that's an important point  
11 to keep in mind.

12 But legally, the point here is, you're down  
13 the road a couple of steps to, well, what are the  
14 practical considerations? And I won't go to the case,  
15 but I did ask to be handed up the *Paul* decision from  
16 the Supreme Court of Canada, and just for your notes,  
17 I refer you to paragraph 39. And there the issue was  
18 the Forestry Appeals Commission deciding a Section 35  
19 right. And the question came up about practical  
20 considerations. What's a Commission supposed to do?  
21 Can they do these things? And of course the court,  
22 the Supreme Court of Canada, decided "Well, you can  
23 decide a question of law. If you can decide a  
24 question of law, you can decide a constitutional right  
25 under 35." And practical considerations don't trump  
26 that. You can't side-step it by saying, "Well, you

1 know, we're not really tooled up to do that, it's kind  
2 of a difficult thing for us to do." That's no answer.

3 And this issue came up in the *Kwikitlem*  
4 case, was argued there, and there was -- there is  
5 nothing in the decision from the B.C. Court of Appeal  
6 that said that this Commission can't decide whether  
7 the duty to consult is adequately fulfilled. And I  
8 would say you can extend that to say, based on *Paul*,  
9 there's no practical barrier to consulting yourselves,  
10 so.

11 Now, one last point, and this goes back to  
12 what do First Nations want? How would this be done?  
13 And I'd just like to reiterate the point of the  
14 sequencing of how this, we say, should all be done.  
15 First of all, the Commission has to decide whether or  
16 not the Commission itself owes a duty to consult. You  
17 have to do that first.

18 **Proceeding Time 9:06 a.m. T8**

19 Because if you don't get past Step A, it  
20 doesn't really matter as much what the provisions are  
21 after that. First, what box are you operating in?  
22 Well, if you're operating in the duty to consult, it's  
23 a constitutional imperative. Okay, then you know  
24 where you are. There's case law on that to set out  
25 what the requirements are to make sure the duty is  
26 fulfilled. We outline those principles in our

1 submission and I refer you there.

2 One of the things you have to do right  
3 after that, based on the *Gitanow* decision from the  
4 B.C. Supreme Court from last summer, is you have to  
5 make a determination of the scope and content of the  
6 duty to consult. So that'll be the next step if you  
7 decide that yes, in fact, you will have to consult and  
8 accommodate yourself. You do that. You go there.  
9 Once you get there, then you can start to design the  
10 process. But that's where the process comes.

11 It's hard to design exactly what the  
12 process is, first of all whether or not you do, and  
13 then crucially what's the scope and content? We made  
14 submissions on this point. We've not heard a lot of  
15 argument about this for the last day or so, but we of  
16 course say that the scope of the duty to consult would  
17 be at the high end. What would be required would be  
18 deep consultation. And if that's what the Commission  
19 decided, then you look at the case law and you decide,  
20 well, what's in that box? What's deep consultation?

21 And then, as you've heard, you go to the  
22 case law. The case law says now, when you go to  
23 decide that process, you don't do it behind closed  
24 doors. You don't do it the way we say the terms of  
25 reference here were done, without any participation  
26 input from First Nations. The law says once you go

1 out to do that, you work with First Nations to design  
2 a process that will uphold the honour of the Crown and  
3 fulfill the duty. And that's an interactive process.  
4 We've given you some suggestions. They're not set in  
5 stone except for the legal principles. Those are set  
6 in stone. But that's to be decided down the road.  
7 I'd say it's a bit premature now to go to, well, we're  
8 unsure of some of the things that are being suggested,  
9 so therefore we go back to Step 1 and say we don't  
10 have the duty to consult. Well, that's not logical.  
11 That's not the way the decision process would be made.  
12 You'll be able to design a process with First Nations  
13 as we go along, once you decide whether or not you  
14 yourselves have to consult, once you decide what the  
15 scope and content is. And at that time you'll be able  
16 to ensure that you still have regard to the applicable  
17 principles of procedural fairness and natural justice.

18 That's when you do it. You say, "Oh, well,  
19 we're thinking to design it like this because that's  
20 what the requirements are. What do we have to do  
21 now?" But I think we're kind of getting the cart  
22 before the horse here and trying to shoot the horse  
23 based on that, and that's not the right way to proceed  
24 there.

25 And we do agree that it would be  
26 transparent. You would have a transparent process.

1 But you'd also have a separate process. And the  
2 courts have acknowledged that. First Nations aren't  
3 just other stakeholders. They aren't just other  
4 participants. The Supreme Court of Canada decisions  
5 on this issue are replete with the special  
6 relationship between the Crown and the Crown's agent  
7 and First Nations, and they deserve a separate  
8 process. And if the time comes that designing that  
9 separate process there's a clear request and there is  
10 a need for face-to-face private meetings with First  
11 Nations, we don't rule that out. That's what Crown  
12 agents do now. If you look to what they do, that's  
13 what they do. They have that. They do that. So I --  
14 we submit that that remains a possibility on their --

15 **Proceeding Time 9:11 a.m. T09**

16 And then one final point on this is the  
17 whole idea that quasi-judicial -- we've got something  
18 else that can be done through B.C. Hydro, their own  
19 process. And that will be enough to fulfill the duty  
20 to consult, even though it is quasi-judicial. That's  
21 what I hear B.C. Hydro continuing to say.

22 We submit on that that there's a fatal  
23 contradiction there. Because if B.C. Hydro is  
24 correct, that, yes, this is quasi-judicial, how can  
25 they then, as supposedly an interested party, be  
26 funneling for you the interests of another interested

1 party? Through their own consultation process? Those  
2 two things are internally contradictory, and we say  
3 fatal. Same thing, refer you to our submissions,  
4 where we refer to BCTC's role in helping to create the  
5 terms of reference. Well, how could that be if you're  
6 acting quasi-judicial, that one interested party has  
7 had a role in shaping your terms of reference?

8 We say both those things point to obviously  
9 you're not acting quasi-judicially, and that's why  
10 BCTC has done those things. That's why B.C. Hydro  
11 thinks that it can rely on its consultation process.

12 So, subject to any questions, those are our  
13 submissions.

14 THE CHAIRPERSON: Dr. Stadfeld, perhaps just an example  
15 might help. You mentioned that this process you had  
16 been talking about must be transparent but yet it has  
17 to be a separate process. So can you give me an  
18 example how this separate process --

19 MR. STADFELD: Sure.

20 THE CHAIRPERSON: -- would also remain transparent.

21 MR. STADFELD: I particularly appreciate that  
22 opportunity, because I did miss one point that I  
23 wanted to make, and this fits in perfectly.

24 There's a -- there are examples for how  
25 this can be done, that it has been done, and it's been  
26 endorsed by the Supreme Court of Canada. It's not a

1 complete recipe. It's not a cookie-cutter kind of  
2 situation. But my point here is, this has been done,  
3 and the Supreme Court has said, "Hey, that works  
4 well." And the case I refer you to on that is the  
5 *Taku* case, which can be found at tab 11 of B.C.  
6 Hydro's authorities. This was the companion case with  
7 *Haida*. So they both went up at the same time. It is  
8 an environmental assessment review case.

9 And so the Taku there were saying "We  
10 participated in the review, we disagree with the final  
11 decision that was made by the Minister to grant the  
12 certificate." So when the two cases went up, *Haida*,  
13 the court found for the First Nations. *Taku*, the  
14 court found against them. They found there that in  
15 fact, yeah, the duty to consult had been fulfilled.  
16 It had been adequate.

17 So, I think it's instructive in light of  
18 what was said yesterday to look at what the court  
19 relied on there, and what they relied on were the  
20 provisions of the *Environmental Assessment Act* in  
21 place at that time. Now, the *Act* since then has been  
22 changed, but I don't think that's material to the fact  
23 that these are some of the things that the court said,  
24 "This is what the *Act* provides for, this seems to work  
25 well." In fact it worked well enough that the Taku  
26 lost.

1                   So, when you go there, it's at -- you don't  
2                   have to turn to it now. I will just refer to some of  
3                   the paragraphs quickly. But I begin at paragraph 6,  
4                   and the important point here is that what was provided  
5                   for under the *Environmental Assessment Act* at the time  
6                   was called a project committee. That since has been  
7                   removed, but it was there and the project committee  
8                   specifically under the *Act* allowed for First Nation  
9                   representation on the committee, if the project was in  
10                  your territory. So they had special seats. They had  
11                  reserved seats on this committee.

12                  And then it's interesting to look at what  
13                  the court referred to as the committee's role. They  
14                  called it the primary engine driving the assessment  
15                  process. So that's what the committee was doing, and  
16                  that's at paragraph 8 of the court's decision.

17                  There is examples here of -- they quote  
18                  from the *Act* at the time. "The project committee was  
19                  to provide the executive director and Minister with  
20                  expertise, advice, analysis and recommendations."  
21                  That's what the committee did. There was First  
22                  Nations on there. They were to advise and analyze.  
23                  They were to advise and analyze on potential effects,  
24                  prevention and mitigation. So the First Nations had a  
25                  role to do that for the Minister. And then I think I  
26                  heard someone yesterday say, "Well, you don't get a

1 chance -- First Nations don't get a chance to put  
2 forward their own separate report to the Crown agent  
3 that will be deciding it."

4 **Proceeding Time 9:17 a.m. T10**

5 At paragraph 17 of *Taku* that's exactly what  
6 the court refers to. The Taku were upset with what  
7 the recommendations were, so they provided their own  
8 report directly to the Minister.

9 So my point here is that we've set out  
10 certain examples of what could be done. This advisory  
11 panel, the First Nation Panel, we think that's a good  
12 suggestion. We think there's certain similarities  
13 there. It's not completely identical but what the  
14 court had endorsed in *Taku*.

15 THE CHAIRPERSON: Thank you. Dr. Stadfeld.

16 MR. FULTON: Haisla Nation *et al.*

17 **REPLY BY MS. GRIFFITH:**

18 MS. GRIFFITH: Good morning, Madam Chair and Panel. My  
19 submissions will be brief.

20 I'd like to adopt the submissions of Mr.  
21 Quail, largely in relation to the issue of whether the  
22 question of whether you can act in a judicially fair,  
23 in a -- sorry, in accordance with natural justice, is  
24 relevant to the question of procedural fairness. And  
25 I think the procedural fairness falls into natural  
26 justice. But the concept of procedural fairness, I

1 would submit, is along a spectrum as well. And I  
2 refer you to the decision that's attached to my reply  
3 submissions, *Attorney General of Quebec v. Regis des*  
4 *Alcol* at paragraph 22:

5 "That being the case, it is now necessary to  
6 identify the tests for distinguishing  
7 functions that are quasi-judicial from those  
8 that are not. The debate surrounding this  
9 distinction was for a long time of great  
10 importance in administrative law and  
11 resulted in numerous judicial decisions.  
12 Thus the superior courts, owing *inter alia*  
13 to enactments requiring them to do so,  
14 relied on the distinction in order to  
15 determine what acts were subject to judicial  
16 review. The scope of the rules of natural  
17 justice then depended to a large extent on  
18 the characterization of the process which  
19 the agency in question made its decisions.

20 However, this court gradually abandoned  
21 that rigid classification by establishing  
22 that the content of the rules of a tribunal  
23 must follow depends on all the circumstances  
24 in which it operates, and not on a  
25 characterization of its functions."

26 And I think that a particular relevant

1           circumstance in this inquiry is the fact that there is  
2           case law on the duty to consult, and that that is  
3           relevant, that is a relevant circumstance in this  
4           inquiry.

5                           I'd also like to adopt the submissions of  
6           Treaty 8 Tribal Association, and I referred yesterday  
7           to the environmental assessment model as a process  
8           that is transparent yet involves separate discussions  
9           with First Nations, and I'd just like to endorse Mr.  
10          Stadfeld's submissions on that point.

11   THE CHAIRPERSON:    Thank you.

12   MS. GRIFFITH:        Thank you.

13   THE CHAIRPERSON:    Thank you, Ms. Griffith.

14   MR. FULTON:          That then, Madam Chair and Commissioners,  
15                           concludes the submissions on questions 3 and 4. So we  
16                           now move to -- thank you. That doesn't quite conclude  
17                           the submissions on 3 and 4, potentially though.

18   MR. ANDREWS:         Madam Chair, members of the Panel, I'm  
19                           applying for leave to surreply to the comments made by  
20                           Dr. Stadfeld regarding the point that I made, which he  
21                           characterized, fairly, as the difficulty that this  
22                           Commission would have reconciling its duty to be  
23                           impartial and independent, with an independent duty to  
24                           consult and accommodate. And he quoted to you the  
25                           words from Mr. Justice Lambert in the Court of Appeal  
26                           decision in the *Haida* case. As that case had not been

1 argued in the original submissions, I would like an  
2 opportunity to reply briefly to that point.

3 MR. FULTON: And this is a matter that had been discussed  
4 before we started this morning. Not this particular  
5 case, but what parties would do if there were cases  
6 that were raised in reply that hadn't been raised  
7 before, and people reserved their rights to seek  
8 leave. And I understand that there is no objection to  
9 this request, so.

10 THE CHAIRPERSON: Yes, leave granted, thank you.

11 **REPLY BY MR. ANDREWS:**

12 MR. ANDREWS: Thank you. The point is a very simple one.  
13 The quote from Mr. Justice Lambert refers to the Crown  
14 Provincial, that it was the Crown Provincial that was  
15 being described as having a duty to balance.

16 **Proceeding Time 9:22 a.m. T11**

17 The issue that I was addressing was the  
18 Commission having an independent duty. The BCSEA *et*  
19 *al* have always said that the Crown Provincial has a  
20 duty to consult and accommodate. And in that sense,  
21 what Mr. Justice Lambert said is entirely consistent  
22 with BCSEA *et al*'s position. Thank you.

23 THE CHAIRPERSON: Thank you, Mr. Andrews.

24 MR. FULTON: All right, then, it's with some trepidation  
25 I say that that concludes the submission on questions  
26 3 and 4.

1                   We then can move to questions 5 and 6, and  
2                   in terms of the submissions for questions 5 and 6,  
3                   we'll begin with the Nations.

4                   **SUBMISSIONS BY MS. GAERTNER:**

5                   MS. GAERTNER:     Madam Chair, members of the panel.  
6                   Pleased to be here again today. You know, this is the  
7                   second day I've appeared before you, and I'm learning  
8                   so much about this proceeding in two days. I've  
9                   learned that some people recite Latin and some people  
10                  do strip-teases, and others work outside the box, and  
11                  so I'm not quite sure I'll be okay in this setting,  
12                  but I'll keep trying.

13                  I do appreciate how difficult this issue,  
14                  though, is, and I'm sorry if my submissions seem to --  
15                  on these next two questions, both 5 and 6, seem to  
16                  repeat again what you've heard. But I'm going to try  
17                  my best, but they do -- the questions add one to  
18                  another, and they go from it, and it may also give my  
19                  friends an opportunity to reply in question 5 and 6 to  
20                  some of the things they may have heard for the first  
21                  time from our representations in reply to the last  
22                  questions.

23                  So as I understand question 5, you're  
24                  asking what's your jurisdiction to appoint the panel  
25                  to assist you, and oversee First Nations' engagement,  
26                  or a co-panel with direct and equal role. And I want

1 to clarify our submissions are that this -- the First  
2 Nations' panel that we're proposing is -- it would not  
3 be a co-panel, it would be an advisory assistant panel  
4 to you.

5 Now, the sources of jurisdiction that I --  
6 that you have to rely on are twofold. One is the  
7 common law, and you've heard a lot about the common  
8 law in the last two days, and again this morning, and  
9 we've reviewed it in our written submissions, and it  
10 was discussed in detail that that common law provides  
11 you an upstream constitutional obligation to your  
12 statutory provisions. What does that mean? You have  
13 to look at what you have to do to meet the  
14 constitutional requirements, what procedures you need  
15 to do, all of those, with an open mind, to meeting  
16 those obligations. And so they're upstream to your  
17 obligations under the statute.

18 Secondly, and thankfully, your terms of  
19 reference also provide you with significant latitude  
20 to establish the necessary procedures and expertise to  
21 resolve these specific issues. I interpreted this  
22 question and also to say, "How do you -- how are you  
23 going to do that within your jurisdiction?" And I  
24 wanted to emphasize why it was that the Nations made  
25 the proposals that we made to you in our written  
26 submissions. And we took it both -- what can you do?

1           And what can you do within the time frames that you're  
2           looking for? And I thought those were extremely  
3           important ways of making sure that we made suggestions  
4           within your jurisdiction.

5                       From the Nations' perspective, we need to  
6           get expertise on this panel that directly assists you  
7           on a very complex issue. It's complex not only  
8           culturally from the First Nations' perspective, but  
9           it's also complex geographically. You've got the  
10          whole of the province, with very concrete different  
11          issues that are arising in the Nations' territories  
12          all over the province. So how are you going to  
13          address that within the time frame?

14                      Well, if we were outside that time frame,  
15          we could say we're going to spend a lot of time  
16          educating you. And we're going to put you in the  
17          communities, we're going to put you in all the  
18          territories, and we're going to do quite a long road  
19          show with you. But that doesn't seem like it's  
20          possible within the time frames that you're trying to  
21          work with right now.

22                      So how do we deal with that issue, and also  
23          the secondary issue from the Nations' perspective that  
24          if this panel had been created correctly, their  
25          decision-making powers within their Nations would have  
26          properly been respected by the Crown. So how do we

1 get someone to you with the expertise that will  
2 provide you with the assistance at that level? And  
3 that's -- those are all the complementary factors as  
4 to why we proposed two prongs.

5 **Proceeding Time 9:27 a.m. T12**

6 The panel and the direct consultation  
7 process that would happen at the community, nation and  
8 provincial level, and I think that's an extremely  
9 important part of our submissions. We recommend both.  
10 Not one in replacement of the other. You really have  
11 to do both.

12 Section 10(c) of your terms of reference  
13 provide you, for the purposes of this inquiry you can  
14 go beyond the powers provided under your Act. You can  
15 make use of procedures to resolve specific issues.  
16 And make no doubt about it, given the last few days  
17 and the continued issues, First Nations' consultation  
18 and accommodation requirements is a specific issue  
19 before you, and it clearly says in Section 10(c) that  
20 you can make use of procedures to resolve these issues  
21 within the terms of reference, including -- not  
22 limited to but including a list that they then move  
23 forward to. Workshops, mediations and dispute  
24 resolution mechanisms. And I think those are  
25 extremely important clauses there. Workshops,  
26 mediations, you have the ability to choose mediative

1 powers and use mediative powers, which in my mind is  
2 one step closer to trying to reach collaborative  
3 decisions.

4 My experience at the mediation tables is  
5 what we're trying to do in those settings is  
6 collaborate in order to reach conclusions that are  
7 agreed to by all of the parties. And this First  
8 Nations Panel and the conference that we're proposing  
9 in the consultation process will allow us to get  
10 closer to decision makings that will be acceptable to  
11 all of the parties.

12 I also wanted to emphasize that we are not  
13 suggesting that that process be held behind closed  
14 doors. We suggest that the creation of the First  
15 Nations Panel be done by way of transparent terms of  
16 reference. Of course if you would prefer to have  
17 those transparent terms of reference done in draft and  
18 that every part would like to comment on them, that's  
19 completely acceptable. In fact, we would -- the First  
20 Nations will definitely want an opportunity to comment  
21 on the terms of reference for that panel. Such terms  
22 of reference could easily be drafted in a manner which  
23 deals with the duty of fairness and impartiality.

24 I want to stress that this panel is not the  
25 First Nations' decision makers. They are going to  
26 assist the Commission in implementing the processes.

1                   Secondly, and I heard yesterday a comment  
2                   that you're well familiar with town hall meetings, I  
3                   want to stress that our second proposal for a  
4                   transparent model for directly engaging the  
5                   communities, I'm not proposing town hall meetings.  
6                   I'm proposing consultation meetings with the First  
7                   Nations in their territories, so that they can  
8                   specifically understand the nature of the issues that  
9                   you are considering, that you can understand the  
10                  potential impacts they would have, and have provide  
11                  opportunities to get input on the kinds of  
12                  accommodations that would be necessary for their  
13                  nations at a strategic level.

14                  That parallel process, well, our  
15                  submissions say could be developed in a manner where  
16                  not all participants were there. If that was your  
17                  choice, of course the information that you would rely  
18                  upon from those hearings would have to become clear so  
19                  people could comment on them. If you choose to want  
20                  to have those hearings be available to all proponents,  
21                  that's something that we would have to comment on in  
22                  the context of the terms of reference that you develop  
23                  and look at as a whole to ensure that from the  
24                  Nations' perspective, they would be getting a clear  
25                  opportunity to be heard by you on the issues that they  
26                  have before you.



1           begin with, in order for it to be meaningful. The  
2           First Nations need to make sure that it's transparent,  
3           and it easily meets the tests of impartiality and  
4           natural justice. And I think that -- as long as  
5           you're very transparent about the terms of reference  
6           and how you're proceeding and get inputs, you'll find  
7           yourself well within the requirements of natural  
8           justice.

9                           Those are my submissions, unless there's  
10           any questions.

11 THE CHAIRPERSON:    No questions, thank you, Ms. Gaertner.

12 MS. GAERTNER:        Thank you.

13 MR. FULTON:         Hwlitsum.

14 **SUBMISSIONS BY MS. MUIR:**

15 MS. MUIR:            Good morning, Madam Chair, members of the  
16           panel. The Hwlitsum First Nation welcomes the  
17           opportunity to participate and provide some detailed  
18           comments on the ones that are closest to our heart,  
19           which are the final four.

20                        As an aside, this has been an interesting  
21           and somewhat enjoyable process. I can't say wholly  
22           enjoyable.

23                        So, with respect, I'd like to do the two  
24           questions in order, 5 and then 6, as well as comment  
25           on the submission of the Nations as it is appropriate.

26                        The question raised by the Commission, and

1       the way we focused on it, was very much going  
2       primarily to the Commission's jurisdiction. But we  
3       feel this can be construed as somewhat the wrong  
4       question. The correct question may instead go to the  
5       Commission's obligation and duty to consult, and how  
6       the Commission will best implement this obligation and  
7       duty within its powers under the terms of reference  
8       and legislation.

9               We recognize that in all things the  
10       Commission is master of its own process, and is best  
11       placed to determine what course of conduct and options  
12       it has within its legislated mandate and the terms of  
13       reference.

14              The Hwlitsum First Nation asserts that as  
15       an agent of the Crown, the BCUC must uphold the honour  
16       of the Crown and comply with its constitutional  
17       obligation to consult and accommodate the First  
18       Nations. When we assert that there is a deep  
19       consultation obligation and that it is required, that  
20       means there has to be a detailed response to the  
21       request and preferably extensive dialogue and  
22       meaningful consultation, and as you're hearing some  
23       degree of comments today, different ways to  
24       participate in the decision-making process.

25              There is -- there appears to be consensus  
26       around the First Nations and the counsel for BCUC and

1 B.C. Hydro that this inquiry is a high-level strategic  
2 planning process that has the potential to adversely  
3 impact First Nations, and that was almost the  
4 characterization we got from the initial remarks of  
5 BCTC. The Hwlitsum First Nation believes that the  
6 Minister should have consulted with First Nations  
7 before drafting the terms of reference for the  
8 inquiry. That they chose to do not -- not to do that  
9 is really the Crown's problem and not the First Nation  
10 problems. In other words, the lack of a viable  
11 consultation process early in the process is the  
12 Crown's problem because it holds the duty to consult.

13 The Commission, to help solve this problem  
14 of the Crown, has asked First Nations to assist them  
15 with suggestions. And the First Nations that have  
16 intervened have attempted to assist the Commission by  
17 conferring among themselves and then also making  
18 recommendations. And this is where I go to the  
19 suggestion of the creation of the advisory panel. As  
20 noted, many of the First Nations in this process who  
21 have intervened have suggested the creation of an  
22 advisory panel to assist the Commission. And we would  
23 support that, because we believe currently the BCUC  
24 doesn't have the administrative tools or the expertise  
25 necessary to meaningfully interact and consult with  
26 First Nations.

1                   And then at this point I'd like to very  
2 much endorse and support the comments of the Nations  
3 here with respect to the complementary nature of a  
4 potential advisory panel, combined with community,  
5 regional and provincial meetings with the Commission  
6 and First Nations.

7   **Proceeding Time 9:37 a.m. T14**

8                   The community meetings were one other  
9 measure referred in 7 and this was a very -- the two  
10 together work very well.

11                   Turning now to question 6, this really is  
12 the issues that were canvassed very extensively  
13 yesterday with respect to three and four, but I'd like  
14 to put just a quick summary into that case.

15                   First Nations are special parties before  
16 the Commission with unique rights and impacts. And  
17 with a unique constitutionally protected status.  
18 Yesterday counsel for BCUC argued that ratepayers,  
19 First Nations and power corporations all have rights,  
20 and we agree. This point was made again this morning  
21 as well. However, we would assert the courts have  
22 recognized that the Commission does not have a duty to  
23 treat every participant equally. It has a duty to  
24 treat every participant fairly.

25                   First Nations are also ratepayers and as  
26 citizens of British Columbia could be potential owners

1 of BCUC and B.C. Hydro and therefore enjoy the same  
2 rights as other B.C. citizens. However, the First  
3 Nations people, individually and communally, enjoy a  
4 special constitutional status that entitles them to  
5 different treatment in this inquiry. To treat them  
6 otherwise would not only be unfair but inconsistent  
7 with the law of Canada.

8 Therefore the approaching question about  
9 procedural fairness is not the most relevant, at least  
10 with respect to the assumed requirement that First  
11 Nations be treated like other parties. And again, as  
12 I mentioned, many counsel for the First Nations  
13 referred to this yesterday.

14 And just to go as an analogy, and we've had  
15 a reference this morning to the nature of B.C. Hydro  
16 being involved in the terms of reference, if we look  
17 to the terms of reference themselves, they already  
18 contain a differential and special status.

19 MR. GODSOE: Sorry. I do have to object to that. There  
20 is nothing on the record that indicates B.C. Hydro is  
21 involved in drafting or having input into the terms of  
22 reference. I wanted to clarify that.

23 MS. MUIR: At this point I'm referring to the comment of  
24 the Nations. I'm going to let them address that in  
25 reply because it's not central to my argument.

26 As an analogy, the terms of reference

1           already contain a differential and special status for  
2           the treatment of evidence and submissions of the load-  
3           serving utilities and transmission service providers.  
4           This includes the ability to provide submissions on  
5           evidence on any matters, but as of yet, no one has  
6           raised the concerned that these difference of  
7           treatment in the inquiry breach procedural fairness  
8           and natural justice. And what I am referring to are  
9           in Sections 8 and 9 of the terms of reference for the  
10          inquiry.

11                       I'm going to refer briefly to another  
12          matter we've discussed and that was talking about the  
13          PACA guidelines as amended by the order of the  
14          Commission in Exhibit A-15. In this case the load-  
15          serving utilities and transmission service providers  
16          have the ability to scrutinize applications of costs  
17          from other participants in the inquiry. We have  
18          raised that in the past and continue to view that as a  
19          brief of procedural fairness and natural justice  
20          within the specific context of this inquiry.

21                       Those are all my submissions.

22   THE CHAIRPERSON:    Thank you, Ms. Muir.

23   MR. FULTON:          Toquaht Nation.

24   **SUBMISSIONS BY MR. CHRIST:**

25   MR. CHRIST:         Madam Chair and Members of the Panel.

26                       I'm going to address question number 5 on

1 First Nations' Advisory Panel and the source of the  
2 Commission's jurisdiction to implement any such panel.  
3 The first thing I want to do, though, is I'd like to  
4 know the limitation, if I could, specifically that any  
5 proposed measures do not necessarily discharge, in  
6 full, the Crown's duty to consult. Specifically I'm  
7 going to read a very short paragraph from our written  
8 submissions which says:

9 "Accordingly, Toquaht Nation's submissions  
10 on possible consultation measures do not  
11 reflect agreement or acceptance that the  
12 process to date has been consistent with the  
13 Crown's consultation duties or that adoption  
14 of these measures will necessarily discharge  
15 the Crown's duty to consult with respect to  
16 the inquiry."

17 If I could I'd like to contextualize a  
18 little. In our written submissions Toquaht Nation has  
19 indicated its support for a collaborative First  
20 Nations approach, subject of course to the  
21 availability of appropriate capacity funding, and so  
22 long as any such process respects the rights of  
23 individual First Nations to represent their own  
24 specific positions and interests.

25 In its written submissions, the Toquaht  
26 Nation indicated that it supported other suggested



1 would be first of all subject to sufficient capacity  
2 funding. That's necessary. It would require  
3 additional outreach on the part of the Commission, and  
4 by that I mean a serious effort to involve B.C. First  
5 Nations beyond the standard referral letters. It  
6 would involve a generation of a formal proposal for a  
7 consultation process. I don't believe that that would  
8 require a great amount of time, and I would  
9 provisionally suggest two weeks to do the hard work.  
10 However, communicating and involving First Nations who  
11 are not present today would involve more time than  
12 that, and I can't estimate what that might take.

13 The effort to generate a formal proposal,  
14 being a collaborate effort, would necessarily involve  
15 building a consensus among First Nations as to the  
16 comparative adequacy of that process, and that would  
17 require time. But that would also strengthen the  
18 proposal's efficacy if it were implemented. And I  
19 don't believe that it would be inappropriate for the  
20 Commission to set certain parameters in which  
21 participating First Nations would attempt to generate  
22 this proposal.

23 Now, turning to the Commission's question  
24 about the source of jurisdiction to appoint such an  
25 advisory panel, I'd like to note first of all, as was  
26 noted earlier, the terms of reference, specifically

1 paragraph 10(b) and (c). 10(b)

2 "10. For the purposes of conducting this  
3 inquiry, the Commission ...

4 may use all of the powers provided to it  
5 under the *Act*; and

6 (c) may make use of procedures to resolve  
7 specific issues within the Terms of  
8 Reference, including..."

9 and as was noted before, "but not limited to" is not  
10 present,

11 "...as it considers appropriate, workshops,  
12 mediations, dispute resolution mechanisms,  
13 pre-hearing conferences, working groups, and  
14 oral and written public hearings..."

15 In other words, there's statutory  
16 authorization to discover the means and the tools for  
17 going forward on any contested issue, and generally to  
18 resolve issues confronting the Commission so that this  
19 mandate might be fulfilled.

20 But I'd also like to note that Mr. Quail  
21 yesterday anticipated today's question with the  
22 suggestion of utilizing Section 8 of the *Utilities*  
23 *Commission Act*. And Section 8 reads:

24 **Proceeding Time 9:47 a.m. T16**

25 "The Commission may appoint or engage  
26 persons having special or technical

1           knowledge necessary to assist the Commission  
2           in carrying out its functions."

3                   I appreciate Mr. Quail's constructive  
4           suggestion. But I'd like to note -- first of all, I  
5           haven't had the opportunity to do any research on the  
6           legislative history of this provision. I'm not sure  
7           that "technical consultants" is flexible enough to  
8           accommodate this meaning. I'm also unsure how First  
9           Nations would receive this characterization of the  
10          appointment, or engagement.

11                   So in closing I'd like to suggest that the  
12          real answer, if and when this Commission does  
13          acknowledge that it has an independent duty to  
14          consult, perhaps this Commission should have a  
15          conversation with the Minister about amending the  
16          terms of reference, and that this Commission should  
17          have that conversation with the Minister in  
18          consultation with First Nations.

19                   I have no submissions on question number 6,  
20          so that concludes my submissions, subject to  
21          questions. Thank you.

22 THE CHAIRPERSON: Thank you, Mr. Christ.

23 MR. FULTON: Treaty 8 Tribal Association.

24 **SUBMISSIONS BY MS. RANA:**

25 MS. RANA: I'd first like to again clarify with respect  
26          to question 5 that the Treaty 8 submission recommended

1 an advisory panel to assist the Commission, but not  
2 one that would have a direct and equal role in the  
3 deliberations. So our response will be directed to  
4 pointing the Commission to the jurisdiction to create  
5 the advisory panel that we have envisioned in our  
6 submissions.

7 And I adopt the submissions of the Nations  
8 with respect to the intention of that advisory panel,  
9 and the role that it might play in assisting you in  
10 some of these complex issues that are going to arise  
11 with respect to the First Nations consultation, and  
12 the vast range of interests that we will see from all  
13 the different geographic locations in the province,  
14 that those interests emanate from.

15 And I also -- I would like to note that  
16 we're not asking you to do something that you don't  
17 already have the power to do, and it's much like my  
18 friend from the Nations stated in his reply to  
19 questions 3 and 4. And in highlighting the *Taku* case,  
20 and the project committee that was created under the  
21 *Environmental Assessment Act*, fulfilled the duty. And  
22 what we're saying here with respect to the advisory  
23 committee is, this could really be something that you  
24 could do or that you have the power to do, that would  
25 go a long way to assisting you in fulfilling that  
26 duty.

1                   Everyone has already pointed you to the  
2                   terms of reference, and in particular paragraph 10(c)  
3                   and the vast range of tools that it puts at your  
4                   disposal. But we would also like to point out that  
5                   there's a provision in the Act itself that you may be  
6                   able to rely on to help you fulfill this duty, and I  
7                   handed it up -- I don't know if you have copies of  
8                   Section 4 of the *Utilities Commission Act*.

9                   And we were just canvassing in response to  
10                  your question, where could we go to find this  
11                  jurisdiction? And as part of our research we sort of  
12                  stumbled across this section and we thought we would  
13                  put it forward for your consideration. And we don't  
14                  have any examples of where it's been used before.  
15                  It's just something that came to our attention that  
16                  might be useful. But it allows the Commission under  
17                  4(2) to organize into divisions, and we're suggesting  
18                  that you may be able to do that, to create a division  
19                  that specifically dealt with the First Nations'  
20                  issues. And so Section 4(2) allows you to organize  
21                  into divisions and 4(4)(b) gives that division all the  
22                  jurisdiction and powers and duties that the Commission  
23                  already has. So we would submit that that division,  
24                  that special First Nation advisory division, would be  
25                  able to implement the terms of reference as well, and  
26                  specifically relying on 10(c), would then be able to

1 create sort of a First Nations advisory panel that  
2 would have First Nations representatives sit on it to  
3 give advice to them about the First Nations specific  
4 issues.

5 So the division itself would still very  
6 much be the Commission, and it wouldn't have  
7 representation from the First Nations on it. So there  
8 is no co-decision-making. We're not suggesting that.

9 **Proceeding Time 9:52 a.m. T17**

10 But we're trying to create an avenue for you to sort  
11 of hive off this complex matter and have the advice  
12 needed to sort of feed through that process and  
13 ultimately up to the Commission, so that when you make  
14 your decisions and your deliberations, you have had  
15 access to the information that you need to make  
16 decisions that take into account the constitutional  
17 rights of the First Nations.

18 Now, with respect to question 6, again this  
19 takes us back to a lot of the things we heard  
20 yesterday afternoon under questions 3 and 4, that  
21 assuming that you have the duty and you create this  
22 panel, how do you take into account the natural  
23 justice and the duty to create a fair process for the  
24 other participants? And we want to remind you of the  
25 *Baker* decision and the spectrum that it sets out.  
26 Depending on where on that spectrum you find your

1 process sitting with respect to how much like a court  
2 you actually are, you're going to find that the duties  
3 to the other parties, the duties of fairness are going  
4 to sit somewhere along that range. And depending on  
5 where you find it, you can design this advisory panel  
6 to take into account the duty of fairness to the other  
7 parties in different ways.

8 So for example, if you feel that you have  
9 or you find that you have a fairly high duty of  
10 fairness to the other parties based on your finding of  
11 whether or not you're a quasi-judicial body and what  
12 your duty is to the First Nations, you may provide  
13 certain types of access to that panel by the other  
14 participants, different measures for transparency,  
15 different opportunities to the other participants to  
16 access that panel.

17 On the other hand, if you find that you're  
18 at the other end of the spectrum on the quasi-judicial  
19 question, you may not need to develop all the  
20 procedures that you would if you were on the other  
21 end, to allow access and transparency. But we're not  
22 suggesting that this panel operate behind closed doors  
23 in any event, wherever you are on the spectrum. We  
24 feel that it will do its job best if everybody buys  
25 into the need for it to be there, if everybody  
26 supports it, and it will be able to function in a way

1           that will actually assist you in your deliberations in  
2           an open way.

3                       But in closing, I just want to remind the  
4           Commission that the important point that was made by  
5           the First Nation representations yesterday in answer  
6           to questions 3 and 4 should guide your deliberations  
7           on this question or your consideration of this  
8           question on how to design this advisory panel to  
9           respect natural justice. That if you find that you  
10          are not a quasi-judicial body and if you find that you  
11          have a duty to consult, the mechanisms that you design  
12          to address, to fulfill that duty, need to be done  
13          first. And the processes to respect the other  
14          participants and their access and their participation  
15          need to be designed to support your ability to fulfill  
16          your constitutional duty, because that comes first, if  
17          you find that you have one.

18                       Thank you.

19   COMMISSIONER COTE:   Yes, I've got one question. In your  
20          submissions you've talked about an advisory panel,  
21          which all have addressed. Have you or would you  
22          consider the idea of an advisory panel that involved  
23          more than just First Nations?

24   MS. RANA:   I think that would be the value of creating a  
25          process where we could all work together to design  
26          these mechanisms. And my friends that spoke before

1 me, I believe all said that we're just putting the  
2 ideas forward, and what we're asking for is an  
3 opportunity to design this with you. And I think  
4 there's been -- I mean, I know in our own written  
5 submissions we said the First Nations need to have an  
6 opportunity to design this with you, and the speakers  
7 before me said the same thing. But I can't see why  
8 you would close that to the other participants. You  
9 need to hear what they think about it. You need to  
10 hear what concerns they might have about it, or it's  
11 never going to take off.

12 So I believe the conversation has to  
13 include everybody, and then we can work forward to  
14 design a process that would work.

15 COMMISSIONER COTE: Thank you.

16 THE CHAIRPERSON: Thank you, Ms. Rana.

17 MS. RANA: Thank you.

18 MR. FULTON: Squamish Nation, Carrier Sekani Tribal  
19 Council.

20 **Proceeding Time 9:57 a.m. T18**

21 **SUBMISSIONS BY MR. KIRCHNER:**

22 MR. KIRCHNER: Ms. Gaertner has, in my submission, really  
23 articulated our position well, and we would -- I would  
24 generally adopt what she has to say, or had to say,  
25 both in -- on both questions.

26 I want to comment just on this point that I

1 think arises specifically from our submission about  
2 this advisory panel sitting as equals. This -- our  
3 suggestion of an advisory panel stems in part from --  
4 as we say in our submissions, our written submissions  
5 at paragraph 55, from the absence of aboriginal  
6 participation in the panel itself. And that's, in our  
7 submission, of course, goes back to the original terms  
8 of reference and the make-up of the panel, and it is,  
9 in our submission, a fundamental problem, that First  
10 Nations' perspective is not represented at the  
11 decision-making level. And the suggestion for an  
12 advisory panel, as I say, in part derives from that --  
13 what we submit is an institutional flaw.

14 So for that reason we've suggested that  
15 this advisory panel ought to sit as equals. And what  
16 we mean by that is that the advisory panel would  
17 participate as the Commission does. It would have the  
18 opportunity to ask questions of participants at  
19 hearings. It would be present throughout.

20 We are not suggesting, and I want to make  
21 this clear, we're not suggesting that the Commission  
22 in any way turn over its decision-making authority to  
23 the panel, or to the advisory panel. You -- we're not  
24 asking you to do that. We don't think you could do  
25 that. So, I want to make that clear, that when we're  
26 saying "equals" we're not saying "Let's have more

1           Commissioners to make the decision."

2                     Another point I wanted to make, and I think  
3           Ms. Gaertner made this point as well, but the purposes  
4           of this Commission is to be -- excuse me. The purpose  
5           of this panel is to be your advisor. This isn't --  
6           the advisory panel isn't there as an advocate for the  
7           First Nations. We're not -- we wouldn't caucus with  
8           the panel before hearings. This is your panel, to  
9           advise you, and assist you in understanding aboriginal  
10          perspectives on the questions before you.

11                    And aboriginal concerns will permeate, in  
12          our submission, almost all aspects of your work, or  
13          could very well do. We don't want to compartmentalize  
14          aboriginal issues into this box over here and then  
15          there's all the other issues that the Commission is  
16          dealing with. Our concern is that First Nations  
17          concerns will permeate all aspects of your work, and  
18          that's why it's necessary, in our submission, to have  
19          an advisory panel that is equal in the sense that I've  
20          described it.

21                    And I would also say, just -- the question  
22          doesn't get into the community engagement hearings,  
23          but Ms. Gaertner commented that both of those are  
24          necessary, and we certainly agree. And one of the  
25          reasons for that, and I stress this is just one  
26          reason, but the advisory panel being your advisor, the

1 community engagement hearings are still necessary to  
2 hear directly from the First Nations involved whose  
3 interests are going to be widely varied. There's no  
4 way that a three- or five-member panel, advisory  
5 panel, could understand the concerns of their various  
6 First Nations. So those too are critical, in our  
7 submission.

8 COMMISSIONER HARLE: You just mentioned a number there at  
9 the end. How the panel -- what size it could be. Do  
10 you have any feeling on that, what would be required?

11 MR. KIRCHNER: I wouldn't want to lock it in at this  
12 point. I've got to say, I've been operating on the  
13 thinking that it would be, say, a three-person panel,  
14 and I was just looking at my submissions to see if I  
15 got that out of that, and I don't seem to have. So,  
16 it perhaps was in my discussions with my colleague,  
17 but -- oh, no, I do. I'm sorry. We do say a three-  
18 person panel in our submissions. That is where I'm  
19 getting it from. But I wouldn't lock in a number.  
20 That's something that we could discuss.

21 COMMISSIONER HARLE: What process would you see to  
22 identify the candidates to sit on that panel?

23 MR. KIRCHNER: My submission would be -- and we've said a  
24 couple of times in our written submissions that there  
25 are a number, obviously, of First Nation intervenors  
26 that are here, and involved, and who are experienced,

1 very experienced, in consultation on accommodation  
2 processes, not just going to court and litigating  
3 about these issues but, you know, actually rolling up  
4 their sleeves and getting things done. And our  
5 clients, the Squamish and the Carrier Sekani, and the  
6 Lakwolams, have in my submission been among the  
7 leaders in that. They've -- you know, the Squamish,  
8 for example, with the Olympics, have reached all kinds  
9 of accommodations.

10 So, they -- now, I've lost the question.  
11 I'm sorry.

12 COMMISSIONER HARLE: It's the process for identifying  
13 candidates.

14 MR. KIRCHNER: The process for identifying -- so, in my  
15 submission, in this room there are considerable -- not  
16 just from my clients but from the others, considerable  
17 experience brought to bear in terms of this question.  
18 So I would submit the best thing to do would be to  
19 have the aboriginal intervenors here and the  
20 aboriginal groups intervening to come up with a list  
21 of names, of suggestions that could be then  
22 circulated, of course, and the parties could make  
23 submissions on who the participants would be. And  
24 then ultimately the decision to be made by the  
25 Commission.

26 But I don't think there's any need to go

1 outside of this process to come up with a list of  
2 names. I think one intervenor suggested talking to  
3 the provincial aboriginal organizations. Given the  
4 time frame we're operating in, and given the  
5 experience and expertise in the room, I don't think we  
6 need to go there and I don't think that we should go  
7 there. I think you've got the expertise in front of  
8 you to come up with a list of names.

9 **Proceeding Time 10:03 a.m. T19**

10 THE CHAIRPERSON: Thank you, Mr. Kirchner.

11 MR. FULTON: Haisla Nation and the Weiweikei.

12 **SUBMISSIONS BY MS. GRIFFITH:**

13 MS. GRIFFITH: Madam Chair and panel, my submissions  
14 are very brief. I wish to adopt and support the  
15 submissions of the Nations and just reserve the right  
16 to reply if that comes up. Thank you.

17 THE CHAIRPERSON: Thank you, Mr. Griffith.

18 MR. FULTON: Shuswap Arrow Lakes Division.

19 **SUBMISSIONS BY MS. LEBOURDAIS:**

20 MS. LEBOURDAIS: Wej kukqai. Every time I sit up here I  
21 get butterflies. I'm going to start with a story and  
22 I have to recite it because I don't have permission to  
23 tell the story myself.

24 "Coyote built an underground house on the  
25 upper North Thompson River at a place now called  
26 Coyote's House, and it was afterwards turned into rock

1 and may be seen there at present. He spent several  
2 winters at this place and one fall the salmon came up  
3 the river in great numbers and he made up his mind to  
4 catch a large supply saying, "I will dry very many and  
5 then we will invite all the people to a great feast."  
6 By the time the salmon ceased running he had filled  
7 many sticks and was delighted when he viewed the large  
8 amount of fish he had on hand.

9 One day he was passing underneath the  
10 sticks where the salmon was hanging and his hair  
11 caught on one of them. And this made him angry. Four  
12 times this happened and each time he became angrier.  
13 The last time he became very angry saying, "Why can't  
14 I pass underneath these fish without their catching in  
15 my hair." He tore down the offending salmon and threw  
16 it into the river. At once it came to life and swam  
17 away. Then all the salmon came down from the sticks  
18 and plunged into the river.

19 In vain, coyote tried to stop them by  
20 catching them and clubbing them. In a short time they  
21 had all disappeared and he was left without any  
22 supplies for the winter and had to give up the project  
23 of the feast. Instead, he gathered up all the slabs  
24 of wood which he had used for splitting salmon on, and  
25 all the poles on which they had been hanging, he took  
26 them up to his house and said, "I will boil them for

1 the wintertime and have fish soup."

2 And this was a story recounted by James  
3 Teit in 1909 by a story told by George Sisylecw from  
4 Simpcw First Nation.

5 And in these stories is where all of our  
6 laws and policies lie. If you look at this story, in  
7 particular it tells us of how, if we disrespect our  
8 resources, how we will be punished for it.

9 And this is just a quote from our  
10 submission and it says: "Before the transmission  
11 lines, the forest areas cut down and cleared for  
12 powerlines provided nourishment and shelter. These  
13 lands were a part of a carefully managed ecosystem  
14 which acted as the foundation for our people. In  
15 essence, the land and the people act as mirrors to one  
16 another and now both reflects the effects of western  
17 civilization like a battle-scarred soldier. We have  
18 spent many years now in direct disrespect to our  
19 surroundings and the living things which give us life.  
20 We are all suffering the consequences of that  
21 disrespect in sickness, addictions, greed, and sadness  
22 plagues our people and your people.

23 We suffer sickness from the drowning of our  
24 rivers, the blocking of the salmon and the overall  
25 mismanagement of our territory and the effects it has  
26 on ourselves and our relatives and our communities.

1                   Only when we, and the word in our language  
2                   is "*Tknémentem Secwepemcúlecw*", when we respect the  
3                   earth and do not waste the natural resources in our  
4                   traditional territories will our sicknesses recede.  
5                   Only when we reclaim our rightful as *Yecwemíntelmin*  
6                   *Secwepemcúlecw*, as caretakers and stewards of the  
7                   Secepemc traditional territory through a newly  
8                   developed management model will health and harmony  
9                   return to our people and our lands."

10                   So we are asking to work together with you  
11                   to reclaim our position as *Yecwemíntelmin*  
12                   *Secwepemcúlecw* and work towards this co-management  
13                   structure.

14                   So in reference to your questions "Should  
15                   there be a First Nations Advisory Panel", yes, First  
16                   Nations should be sitting with you and making  
17                   decisions together with you. And we would volunteer  
18                   to be a part of this panel to work together with you.  
19                   However, I also must say that we want to move past  
20                   this issue of consultation. Unfortunately because  
21                   the provincial government did not make an agreement  
22                   under the new relationship before he ordered the terms  
23                   of reference, that agreement was not made, and that  
24                   process for us to make those decisions together with  
25                   you was not laid out, and so you're already at a  
26                   disadvantage.

1 **Proceeding Time 10:09 a.m. T20**

2 With regards to whether or not you decide  
3 that you have the duty to consult, if you do decide  
4 that you have the duty to consult, you certainly could  
5 hold workshops with First Nations to create a  
6 consultation process that is acceptable to both you  
7 and us. And this is permitted under the terms of  
8 reference as many of the other nations have mentioned,  
9 on Section 10(c).

10 Though these workshops may decide to create  
11 a First Nations Advisory Panel, I also believe that  
12 Commission hearings would benefit by coming to our  
13 territories, to coming to our territories to hear our  
14 oral stories, to hear our submissions. I realize that  
15 many of the submissions that you have are very  
16 technical in nature, and a lot of the work that is  
17 done by a number of the other participants is very  
18 technical and scientific. However, you can see  
19 through the use of our stories that there are a number  
20 of policies, laws, there is a lot of ecological  
21 knowledge that is all stored within our nation but  
22 it's stored within people. It's not stored in books,  
23 it's not stored in documents. And you won't hear any  
24 of those perspectives, you won't hear any of those  
25 evidences, and you won't hear any of those submissions  
26 through the B.C. Hydro First Nations Consultation

1 Report, which is the currently the only way that  
2 you're going to really hear from us other than in this  
3 room, which also, to bring our knowledge keepers, to  
4 bring our spiritual leaders to an area like this and  
5 in an environment like this, like I say, I mean, it  
6 rattles me so I don't know -- I don't know how  
7 comfortable they would be.

8 If you did this, you would also hear from  
9 our people in their own voices, in their own time, in  
10 their own way. And this does mean that there is a  
11 monetary cost that needs to be borne to gather  
12 together this information and to do this properly.  
13 And we do acknowledge that this is a very big and  
14 difficult undertaking by yourselves. Stating that  
15 there's 203 First Nations throughout British Columbia,  
16 those First Nations choose to be represented in a  
17 number of different ways, and this is the type of  
18 information that this First Nations Advisory Panel  
19 could tell you about. They could tell you what works  
20 within each nation, how those bands work, you know,  
21 our bands working together.

22 So for example, in our territory, the Lakes  
23 Division is breaking down the INAC bands. We are  
24 saying we do not to be recognized as INAC bands any  
25 more because that segregated us. That was a  
26 government completely subjected to their ideas, their

1        locations, their ideals and laws that govern us  
2        through the *Indian Act*, which we do not accept. We're  
3        standing ourselves up, and as it turns out we have  
4        three bands that are coming together in the Lakes  
5        Division. Within the Secwepemc Nation a number of  
6        divisions exist, and it's been explained those  
7        divisions are like the pillars of our pit houses.  
8        Once all of the pillars of all of our nations, all of  
9        our divisions are stood up, then our nation roof can  
10       be put over top.

11                    When it comes to, for example, with the  
12        Lakes Division coming to our area, we would need to be  
13        able to prepare for you. And that means bringing  
14        together a number of our knowledge keepers, talking to  
15        them about a lot of this information on what is going  
16        on at this Commission, what is the decisions that are  
17        being made, what is the scientific and technical  
18        things, which we acknowledge we can get from B.C.  
19        Hydro, a number of the scientific and technical  
20        information. And then what are the possible effects  
21        that those decisions will have on them and on our  
22        traditional territory? And then only when they know  
23        that type of information will they know what they need  
24        to relay to you. And they would be much more  
25        comfortable relaying it to you in their own  
26        communities than here in downtown Vancouver.

1 **Proceeding Time 10:13 a.m. T21**

2 If you decide that you do not have the duty  
3 to consult, no one here has refuted that you have the  
4 duty to assess the consultation. We've told you that  
5 the current consultation process with B.C. Hydro and  
6 BCTC is inadequate. It was developed without our  
7 input. We are grossly underfunded under it. And we  
8 see it as only being adequate as an information-  
9 sharing forum where the information flows in one  
10 direction, from them to us. This is an issue, and you  
11 still need to grapple with what do we do, and how do  
12 you ensure that consultation is done properly?

13 And that will come down to issues such as  
14 funding, providing funding, and I do agree, for  
15 example, the creation of a panel, the creation of  
16 proposals from each of the nations, or each of the  
17 bands, as they decide that they want to be represented  
18 and bring their voices to this table.

19 Funding seems to make everyone very  
20 uncomfortable.

21 THE CHAIRPERSON: Excuse me, Ms. Lebourdais.

22 MS. LEBOURDAIS: Yeah?

23 THE CHAIRPERSON: Are you kind of shifting, perhaps, to  
24 questions 7 and 8, like -- because right now we are  
25 hearing responses to question 5 and 6.

26 MS. LEBOURDAIS: Right.

1 THE CHAIRPERSON: And then you will have another  
2 opportunity when we will have the questions 7 and 8.

3 MS. LEBOURDAIS: Okay. I'm just about done.

4 THE CHAIRPERSON: All right.

5 MS. LEBOURDAIS: Two minutes.

6 So, funding makes everyone uncomfortable,  
7 but all of the money that -- all the money that is  
8 garnered for this process comes from our traditional  
9 territories, and these monies also fund yourselves,  
10 they fund B.C. Hydro and BCTC. So why wouldn't we  
11 have access to some of these funds so that we could be  
12 a part of the decisions that are being made at this  
13 panel, and on our territory?

14 And that's it. Thank you.

15 THE CHAIRPERSON: Thank you very much. Ms. Lebourdais.

16 MR. FULTON: Sto:lo Tribal Council.

17 Madam Chair, I called upon the Sto:lo  
18 Tribal Council to come forward at this time, and that  
19 will conclude the First Nations submissions, apart  
20 from the First Nations Energy and Mining Council. So  
21 that would seem to be a good time to break. But I'm  
22 in your hands.

23 THE CHAIRPERSON: How long --

24 MS. HEASLIP: Briefly.

25 THE CHAIRPERSON: All right. We'll hear you, Ms.

26 Heaslip, and then we'll take our coffee break.

1 **SUBMISSIONS BY MS. HEASLIP:**

2 MS. HEASLIP: I actually haven't -- no specific responses  
3 for questions 5 and 6, but just to say more generally  
4 that if the Commission determines it does have an  
5 independent duty to consult, that the Sto:lo Tribal  
6 Council submits that we require additional time to put  
7 forward more specific recommendations on a  
8 consultation process. And that the Section 5 inquiry  
9 has been very demanding so far on our time and  
10 resources, and we have yet to receive any funds.  
11 Further time and resources are necessary, not only for  
12 us to participate here but for us to do the very  
13 important work of communicating and receiving feedback  
14 from Sto:lo leadership and from our Salstimuk Steering  
15 committee which is made up of Sto:lo Tribal Council  
16 community representatives.

17 THE CHAIRPERSON: Thank you, Ms. Heaslip. And now, I  
18 think our court reporter here also require a break, so  
19 we'll return in 15 minutes. Thank you.

20 **(PROCEEDINGS ADJOURNED AT 10:17 A.M.)**

21 **(PROCEEDINGS RESUMED AT 10:33 A.M.)**

**T22/23**

22 CHAIRPERSON: Please be seated.

23 MR. FULTON: Madam Chair, Commissioners, there have been  
24 some discussions amongst the parties over the break in  
25 terms of questions 7 and 8, and it is the preference  
26 of the room now that those two questions be unbundled,

1 to use a phrase that was given to me by Mr. Devlin, so  
2 that they be heard then separately. And so with the  
3 Chair and the Panel's leave, I'm asking that we now  
4 unbundle 7 and 8.

5 So we'll finish with 5 and 6, then we'll  
6 deal with question 7 separately and question 8  
7 separately.

8 THE CHAIRPERSON: Yes, that is fine with the Panel, thank  
9 you.

10 MR. FULTON: Thank you. So the next party making  
11 submissions is the IPPBC.

12 MR. AUSTIN: Good morning, Panel.

13 (INAUDIBLE COMMENTS MADE OFF MIKE)

14 MR. FULTON: Yes, but you immediately precede FortisBC.  
15 Remember you're way down on the list. Just because  
16 you've got in first in terms of your intervention. Or  
17 fourth anyways. Thank you.

18 **SUBMISSIONS BY MR. AUSTIN:**

19 MR. AUSTIN: The IPPBC submissions with respect to  
20 questions 5 and 6 are going to be concentrated in part  
21 on the concept of this First Nations Advisory Panel,  
22 and to get there I just have to go through a little  
23 bit of preliminary comment.

24 The IPPBC assumes that the hearing process  
25 for the Section 5 review will provide First Nations  
26 with an opportunity to participate fully in this

1 process, and to bring to the BCUC's attention all  
2 their concerns, through evidence. The IPPBC assumes  
3 that the hearing process will provide all parties with  
4 a forum in which they will receive further  
5 information, are able to question and challenge the  
6 evidence put forward by all parties, and present their  
7 own views and concerns. The IPPBC is making this  
8 assumption because the hearing process really hasn't  
9 started.

10 I made the comment of this nature with  
11 respect to the scoping exercise, and so much of what  
12 we've been talking about are perceptions of impacts  
13 with respect to First Nations. We haven't had any  
14 First Nations evidence. The IPPBC has assumed that  
15 there will be impacts on First Nations, but the degree  
16 and extent of those impacts will only be made clear  
17 through evidence.

18 It's also important to realize that neither  
19 BCTC, B.C. Hydro, Fortis or any of the other  
20 intervenors have filed any evidence in these  
21 proceedings. And in terms of the concept of a First  
22 Nations Advisory Panel, that's quite important,  
23 because the key issue that the IPPBC has with respect  
24 to an advisory panel is what is this advisory panel  
25 going to do?

26 If this advisory panel is going to be

1 appointed in order to assist you in better receiving  
2 First Nations evidence, the IPPBC is clearly in favour  
3 of it. If the First Nations Panel is going to be  
4 appointed for the purposes of providing evidence as  
5 opposed to the means of receiving it, the IPPBC is not  
6 in favour of it, because the whole concept of this  
7 hearing, if you boil it down, is the reception and  
8 testing of evidence, that you the decision makers are  
9 going to look through and exercise your decision-  
10 making powers with respect to.

11 It would appear to the IPPBC that as a  
12 quasi-judicial body, that there's plenty of room  
13 within that approach to receive First Nations  
14 evidence. And that's why there is no particular need  
15 that the IPPBC can see, or an advisory committee to  
16 provide you with evidence, or to have a joint  
17 decision-making capability with the BCUC.

18 **Proceeding Time 10:38 a.m. T24**

19 That's where the advisory committee might  
20 be helpful in terms of saying, for the purposes of  
21 receiving evidence, "Here is some of the things that  
22 might be particularly useful when you're receiving  
23 First Nations evidence." But, if you are going to be  
24 looking to that advisory panel for the purposes of  
25 giving evidence, then we're going to run into the  
26 concepts of the requirement of the BCUC being

1 independent, impartial, and abiding by the rules of  
2 natural justice and procedural fairness, because for a  
3 quasi-judicial process to work, all parties should be  
4 able to test the evidence.

5 Now, the IPPBC is fully aware that the  
6 Commission has its own staff with respect to the  
7 review of usually technical evidence. The IPPBC has  
8 no objection if the BCUC wants to engage staff with  
9 expertise in First Nations matters as part of that  
10 process that the BCUC has used historically.  
11 Certainly the IPPBC has from time to time raised --  
12 been concerned about exactly what it is this technical  
13 staff is or isn't doing, but it assumes that  
14 ultimately it's the panel that makes the decisions,  
15 and the panel is not giving evidence to the  
16 Commissioners. They're providing support in terms of  
17 reviewing the evidence, but not actually giving  
18 evidence.

19 So I think that's a very fundamental issue  
20 as far as the IPPBC -- the fundamental issue that the  
21 IPPBC is concerned about with respect to something  
22 like an advisory panel or any other type of means of  
23 receiving evidence from First Nations.

24 So, if it's within the confines of a quasi-  
25 judicial body, the IPPBC has no objection to it, and  
26 what the IPPBC would like to hear and apply from the

1 First Nations is exactly what is this advisory panel  
2 going to be doing? Or, any of the other suggestions  
3 they have with respect to First Nations consultation.  
4 Exactly what is really required that's not present in  
5 terms of the quasi-judicial process that the BCUC is  
6 going to employ in this process?

7 Again, the assumption always is that you're  
8 going to follow the rules of natural justice and  
9 procedural fairness. And certainly it's always open  
10 to parties to say that that wasn't followed at the end  
11 of it. But the assumption has to be that we're  
12 starting from that point. And it also would be  
13 helpful in terms of any decision that you make to  
14 recognize that we don't even have any evidence at this  
15 point in time. So I would caution the Panel in terms  
16 of making far-reaching decisions in the absence of any  
17 evidence at this point in time.

18 And those are the IPPBC's submissions,  
19 subject to any questions.

20 MR. FULTON: Madam Chair, before Mr. Austin leaves the  
21 mike, I just wanted to raise one historical example of  
22 when the Commission engaged an individual. This would  
23 have been back in the 90s, early 90s to mid-90s. He  
24 was an economist, Dr. Waters. A report was obtained  
25 by Dr. Waters. It was a staff report that was  
26 presented in evidence, and Dr. Waters was made

1 available for cross-examination.

2 So, I just wanted to understand whether Mr.  
3 Austin was opposed to that type of evidence, if that  
4 was within the range of alternatives that were being  
5 considered by the First Nations, in terms of what the  
6 First Nations advisory panel might do, if it was ever  
7 to provide evidence.

8 **Proceeding Time 10:43 a.m. T25**

9 MR. AUSTIN: I think that example fell within the remarks  
10 that I made, is if they're tendering evidence, and if  
11 it's open for all parties to cross-examine or ask  
12 questions with respect to that evidence, then that  
13 would certainly fall within the concept of procedural  
14 fairness, provided that the terms of reference were  
15 structured so that the terms of reference weren't set  
16 up so that the independence of that particular  
17 evidence provider was somehow in doubt. That's always  
18 the problem of the Commission independently engaging  
19 witnesses that come forward later on as witnesses,  
20 because you have to look at the terms of reference,  
21 you have to look at how the consulting role was  
22 controlled and governed, and if it's too tightly  
23 controlled and governed then the concept of an  
24 independent witness falls by the wayside.

25 THE CHAIRPERSON: Thank you for raising that, Mr. Fulton,  
26 because that was still an example I was thinking of

1 asking a question of clarification, because the  
2 suggestion has been made earlier, yesterday or earlier  
3 this morning, that under the Act, Section 8, I  
4 believe, we could retain a technical expert. And so  
5 if that was technical expert on First Nations issues  
6 and would provide evidence, and would -- so that on  
7 behalf of the staff, but that person then would  
8 testify in our oral proceeding and would be available  
9 for cross-examination.

10 MR. AUSTIN: I think the IPPBC's preference would be to  
11 have any consultation provide advice with respect to  
12 the reception of evidence from First Nations. And in  
13 this process it's open to any First Nation to bring  
14 forward its evidence. It seems to be one of the  
15 issues is that the formality of this process might  
16 restrict the bringing forward of evidence. But I  
17 think there are ways and means, and I'd certainly like  
18 to hear from First Nations about how that could be  
19 improved.

20 COMMISSIONER ANDERSON: Mr. Austin, I might have missed  
21 it, but I'm not sure I heard from you the question in  
22 item 5, and that is what is the source of the  
23 Commission's jurisdiction.

24 MR. AUSTIN: I think the source of the Commission's  
25 jurisdiction has been Section 8.

26 COMMISSIONER ANDERSON: Thank you.

1 THE CHAIRPERSON: Thank you, Mr. Austin.

2 MR. FULTON: ESVI.

3 **SUBMISSIONS BY MR. BERTSCH:**

4 MR. BERTSCH: Good morning, Panel.

5 We look at this with great interest on  
6 Vancouver Island and certainly understand the issues  
7 of when we get further down in the questions, that  
8 they're more detailed when the question hasn't been  
9 answered, the original question. So taking that into  
10 context, we certainly find these questions of great  
11 interest.

12 The question, of course, for question 5 is  
13 what is the source of the jurisdiction? But what I'd  
14 like to first focus on what it is that we're talking  
15 about, and that is the advisory panel. I certainly  
16 encourage the Inquiry Panel to think about the  
17 advisory panel as a model for operating more  
18 efficiently. And that's looking at it from a general  
19 point of view at this point instead of specifically at  
20 the First Nations. And that is that you may have a  
21 subject area in which BCUC does not have enough  
22 expertise or enough focus to be able to accomplish on  
23 its own. That could be a First Nations issue or it  
24 could be a technical issue, or there may be other  
25 areas as well.

26 If you then identify the terms of

1 reference, within those terms of reference for that  
2 particular panel you would focus in a particular area  
3 and have that tightly defined.

4 Then I would say that you would set up a  
5 mechanism within the terms of reference, and what I  
6 would say is if you look at the terms of reference for  
7 this inquiry at 10(c), which has been referenced, but  
8 I'd like you to point to something else which I think  
9 would mean that you do not need to go back to the  
10 terms of reference and change them, I think it's  
11 already in there, and that is to key on the words  
12 called "working group". And that is already in the  
13 list and I believe one that already stands and  
14 encapsulates what we're talking about.

15 Myself, I've been in a number of working  
16 groups and committees, and I certainly can say that if  
17 it's set up appropriately it can work and get the job  
18 done.

19 **Proceeding Time 10:48 a.m. T26**

20 I would suggest -- there was a question  
21 about membership earlier, and a question about whether  
22 or not there should be some non-First Nations in that  
23 panel, or working group, shall we call it. And I do  
24 believe there should be some representation beyond  
25 First Nations. I think it will make it a much more  
26 successful outcome.

1                   I think also what's important is to appoint  
2                   an impartial coordinator. I call it "coordinator"  
3                   rather than "leader", because their role is to  
4                   coordinate the working group, rather than to dictate  
5                   what the answers are. And there are many models for  
6                   this, for these groups. Some of them which have been  
7                   used with some of the utilities that we're talking  
8                   with, and other examples have been used throughout.

9                   I think consensus within that working group  
10                  is important, and that decisions that do not abide by  
11                  that consensus are such that those that don't agree  
12                  have a right to indicate that.

13                  For the working -- for the advisory working  
14                  group, it's one thing, and I think there's -- and my  
15                  discussion has been around that, and not so much  
16                  around the co-panel or co-decision-making process.

17                  If we come back to the original question  
18                  now, the reason why I had to go a little bit into  
19                  detail is so that I could answer your original  
20                  question, which is "What is the source of the  
21                  jurisdiction?" And the way I would say it is, if you  
22                  frame the question such as I've described, as that  
23                  particular type of advisory working group, and you  
24                  frame it in that realm, then I think you can point to  
25                  -- certainly point to Section 10(c) working group as  
26                  your ability to do that.

1                   I think also, in question 6, one of the  
2                   questions is fairness, procedure fairness for other  
3                   members. And again, I think that's handled by  
4                   including non-First Nations within the working group  
5                   and I think that will give you ability to do that.

6                   So those are my suggestions for 5 and 6.

7                   Thank you.

8                   THE CHAIRPERSON: Thank you, Mr. Bertsch.

9                   MR. FULTON: Commercial Energy Consumers' Association of  
10                  British Columbia.

11                  **SUBMISSIONS BY MR. WEAVER:**

12                 MR. WEAVER: Good morning, Madam Chair, members of the  
13                  Panel.

14                         Before looking at the jurisdiction issue,  
15                         I'd just like to break down question 5 as drafted into  
16                         the three sentences, because as we look at  
17                         jurisdiction I think there are some aspects of this  
18                         question as drafted which we don't think you have  
19                         jurisdiction to do, and some that you do.

20                                 If we took sentence one in its entirety, we  
21                                 think you have jurisdiction to establish an advisory  
22                                 panel.

23   If we look to question 2, and the clause  
24   "sits as equal in some or all of the Commission's  
25   deliberations", we don't think you have that  
26   jurisdiction, and I think one of the counsel for First

1 Nations acknowledged that. We're -- the Commission  
2 can't delegate its authority to an appointed advisory  
3 panel.

4 And lastly in the third sentence, the  
5 clause "or a co-panel with a direct and equal role in  
6 some or all of the Commission's deliberations," again,  
7 we submit you don't have jurisdiction to delegate that  
8 authority to a co-panel.

9 That said, we do go back to some of our  
10 opening comments. This is an important long-term  
11 planning -- strategic planning exercise and First  
12 Nations issues are critical to that, in terms of  
13 receiving that input in order to plan long-term  
14 effectively. And so, we do support the concept of a  
15 First Nations panel, and we do believe that the  
16 jurisdiction is with the Commission in terms of the  
17 terms of reference, which has been referred to by  
18 previous counsel in Section 10(c) and indeed the  
19 Commission has a broad jurisdiction over its own  
20 processes. So we do see an opportunity to pursue the  
21 creation of this First Nations panel.

22 And I'm intentionally avoiding the word  
23 "advisory", because we'll talk about this in response  
24 to question 8, because we think there are other roles  
25 for this entity if the Commission does determine it  
26 should be created.



1 panel, be as a result of recommendations from First  
2 Nations. We're going to speak to this again in  
3 response to question 8, but the geographic challenge,  
4 the broad cross-section of First Nations interests,  
5 the over 200 First Nations entities require some form  
6 of efficient representation of First Nations, and we  
7 see a value in using processes within your  
8 jurisdiction to try and aggregate those interests so  
9 all of us can more effectively understand the issues  
10 that will face strategic long-term planning for  
11 transmission.

12 So, in conclusion, we think you have the  
13 jurisdiction, we think the jurisdiction should be  
14 exercised in accordance with procedural fairness and  
15 natural justice, and that other stakeholders and  
16 representations' interests are also protected in terms  
17 of the role of the First Nations panel.

18 Absent any questions, those are our  
19 submissions.

20 THE CHAIRPERSON: Thank you, Mr. Weafer.

21 MR. WEAVER: Thank you.

22 MR. FULTON: British Columbia Old Age Pensioners'  
23 Organization *et al.*

24 MR. QUAIL: We already dipped our oar in on these ones,  
25 in an anticipatory fashion, with other questions, so I  
26 have nothing further to add.

1 THE CHAIRPERSON: Thank you, Mr. Quail.

2 MR. FULTON: British Columbia Sustainable Energy  
3 Association *et al.*

4 **SUBMISSIONS BY MR. ANDREWS:**

5 MR. ANDREWS: Madam Chairman, members of the Panel, I  
6 think that the first thing that really needs to be  
7 clarified about all of the topics in 5 and 6 is  
8 whether we're talking about the context in which the  
9 Panel here decides that it does have an independent  
10 duty to consult and accommodate First Nations' title  
11 and rights, or a different context in which the Panel  
12 has decided that it does not.

13 And to jump to where I'm going to end up  
14 with this is that I think that there's a huge  
15 potential for creating confusion as to what the role  
16 of any of these bodies is supposed to be, and that  
17 it's really important to anticipate that and prevent  
18 confusion. And so the starting point should be, to be  
19 very clear, that is whether -- if it's a decision that  
20 the Commission Panel does not have an independent duty  
21 to consult and accommodate, then presumably part of  
22 the rationale for that is that the Commission is an  
23 independent, impartial, quasi-judicial panel. And  
24 therefore, in that context, it is axiomatic that  
25 anything done is to comply with that concept of the  
26 Commission's role.



1           whether it's staff or First Nations or utilities. But  
2           in that world where you have an independent duty to  
3           consult, then that would be in a sense a different  
4           matter.

5                        I want to, on a different topic, flag a  
6           potential legal issue, which is references have been  
7           made to the terms of reference section 10(c), that  
8           sets out the -- describes measures that the Commission  
9           could use in carrying out its inquiry function. I  
10          just note that there's a potential legal issue,  
11          whether that 10(c) clause gives the Commission power  
12          to do something that it doesn't have under the rest of  
13          the *Act*, or whether it is by of example of the kinds  
14          of ways that the Commission could exercise the powers  
15          that it does have under the *Act*.

16                       Now, I don't think that you need to resolve  
17          that legal issue in order to deal with the suggestions  
18          that have been made here today, because I think that  
19          the *Act* already has very broad powers and gives the  
20          Commission very broad powers to adjust its processes  
21          to meet the needs that are presented in this inquiry,  
22          and particularly to do with First Nations involvement.  
23          But I do think that if you -- as you deal with these  
24          you might keep that potential issue in mind.

25                       Following from my comment that the *Act* and  
26          the *Administrative Tribunals Act* gives the Commission

1 ample authority, I would emphasize that both courts  
2 and quasi-judicial tribunals have often amended or  
3 adapted their procedures so as to be respectful and  
4 culturally appropriate and efficient and effective in  
5 receiving evidence and submissions from First Nations,  
6 and from other communities as well, but we're focused  
7 here on First Nations. So on the *Delgamuukw* case, for  
8 example, the Supreme Court of British Columbia held  
9 hearings in local communities. And as Dr. Stadfeld  
10 pointed out in the *Chilcotin* case, hearings were held  
11 in the evening because that was the appropriate way  
12 for that evidence to be received. And my submission  
13 is that there are a lot of ways that the Commission  
14 could adjust its procedures that would make people  
15 more comfortable than they would be certainly giving  
16 evidence in this hearing room.

17 I'd like to comment briefly on the *Taku*  
18 *River Tlingit* case because it came up in the reply  
19 submissions on the previous questions, and I think it  
20 relates to this topic of 5 and 6, which is that it was  
21 said correctly that in the *Taku River Tlingit* case,  
22 the First Nation was sitting on the project committee  
23 as provided for by the *Act*, and the Supreme Court of  
24 Canada held that that met -- in the context of all the  
25 other things that went on, that discharged the Crown's  
26 duty to consult. And then it was pointed out that the



1           it's unhelpful in that it doesn't yet have any  
2           sufficient form for people to understand what exactly  
3           is intended. And my fear is that it's going to be the  
4           kind of thing that everybody looks at it and sees what  
5           they want it to be, and that the suggestion will be  
6           that we'll just agree on it. But then we'll end up  
7           squabbling about what it was supposed to be in the  
8           first place. And I think that it's important to  
9           identify what the need is that the advisory committee  
10          or working group or whatever term is used for it is  
11          supposed to address.

12                           And one of the suggested needs is that  
13          there's an absence of First Nations experience on the  
14          part of Panel members. To the extent that the Panel  
15          decides that that is a need, in my respectful  
16          submission, the most straightforward way to deal with  
17          that would be to engage First Nations expertise in the  
18          Commission's staff, which the Commission has ample  
19          authority to do. That doesn't have to be in any way  
20          by virtue of having a report provided by that person.  
21          Most of the Commission staff work is done without  
22          providing reports, but the Commission staff help  
23          preparing Information Requests, and they help prepare  
24          the meetings in communities, and they could have a  
25          very useful role in that respect. And I'm not at all  
26          suggesting that that will necessarily meet the needs

1 or the requests that First Nations have made. I'm  
2 just saying that that would be one helpful  
3 opportunity.

4 I guess one of the things that I keep  
5 coming back to is that it seems to me that the  
6 opportunity for any party to put evidence and  
7 submissions directly to the Panel is the most valuable  
8 way to influence the panel appropriately. And that  
9 one has to ask whether, if there's a perception that  
10 there's going to be a difficulty in First Nations  
11 providing information and submissions to the Panel,  
12 that the most direct way to meet that need is to cure  
13 that problem. To make it comfortable, to make it  
14 efficient and effective for First Nations to provide  
15 evidence and submissions to the Panel, and for the  
16 Panel to have the expertise on staff to be able to  
17 handle that.

18 Whether in addition there's a need for an  
19 advisory panel, I am not going to say. I'm just  
20 saying that to the extent that the need is defined as  
21 the ability to communicate with the Panel, I think  
22 that's best focused on improving the structures.  
23 Whether it's going into communities, whether it's  
24 having a different layout of the room. You know, not  
25 using microphones. Whatever it is, I suggest dealing  
26 directly with that challenge.



1 generic tools that could work in both systems? I kind  
2 of thought from your first part of your discussion you  
3 were kind of saying, "This box is one and this box is  
4 the other box."

5 MR. ANDREWS: Well, I think that the -- what I was trying  
6 to get at is that any tool that you describe can -- I  
7 think you need to be really clear in the first place,  
8 whether this is a tool within a quasi-judicial  
9 function or that it is a tool within something else.  
10 And as to whether there are things that can work for  
11 both, there probably are but they would have -- I mean  
12 they may be semantic, but they would have to look  
13 different. I mean, one of the fundamental points of  
14 difference being that the opportunity for First  
15 Nations to interact directly, whether parties or an  
16 advisory panel, to interact directly with the  
17 Commission Panel in the absence of other parties,  
18 would not be consistent with the quasi-judicial  
19 context.

20 As we've heard, the Crown routinely  
21 discusses matters with First Nations in a consultation  
22 and accommodation context in the absence of other  
23 actors in those issues, and that's not a problem  
24 because there's no requirement or expectation in that  
25 circumstance.

26 THE CHAIRPERSON: Thank you, Mr. Andrews.

1 MR. ANDREWS: Thank you.

2 MR. FULTON: Joint Industry Electricity Steering  
3 Committee.

4 **SUBMISSIONS BY MR. BURSEY:**

5 MR. BURSEY: Thank you, Mr. Fulton. Madam Chair,  
6 Commissioners, I'll address question 5 first.

7 The question asks about the Commission's  
8 jurisdiction, and JIESC submits there is no  
9 jurisdiction for the Commission to appoint an advisory  
10 panel. And the term "advisory panel" has had  
11 different meanings attached to it in the proceeding  
12 this morning, so I'll explore those as we go through,  
13 particularly in question 6.

14 But if you were to appoint an advisory  
15 panel, Commissioners, whether they sit as equals or as  
16 advisors, there's nothing in the Act or the terms of  
17 reference that allow you to do that. You cannot step  
18 outside your Act and the terms of reference as a  
19 matter of law. It's trite law that the Commission as  
20 an administrative tribunal is a create of statute.  
21 You have no inherent jurisdiction. You've been given  
22 terms of reference pursuant to Section 5 of the Act by  
23 the Minister, and Section 5 talks about this inquiry  
24 as well.

25 So just to launch off on a new endeavour  
26 where you're appointing a new panel to hear First

1 Nations issues with decision-making, or even  
2 appointing new commissioners, is not within the scope  
3 of your jurisdiction.

4 There is a couple of specific references to  
5 the *BCUC Act* that were put before you this morning.  
6 One is Section 4 of the division -- which talks about  
7 the Commission appointing divisions. That section  
8 does not give you the power to appoint new  
9 commissioners. It talks about how the Commission  
10 organizes its affairs to hear applications. This  
11 Panel is sitting as a division of the Commission.

12 Section 8 was referred to, which talks  
13 about the appointment of technical experts. That  
14 section talks about something quite a bit less than an  
15 advisory panel, I would suggest. It does allow for  
16 the Commission to appoint advisors to the Commission  
17 within the scope of the proceeding, and again I'll  
18 speak to that in a little more detail. There's two  
19 types of advisors that you can appoint. One is an  
20 independent advisor, such as the example that Mr.  
21 Fulton had referred to. The Commission had engaged an  
22 economist and financial expert to present a report, to  
23 assist all parties and the Commission.

24 **Proceeding Time 11:13 a.m. T31**

25 In that situation, the engagement was an independent  
26 person who presented the report and was subject to

1 cross-examination, and did not participate in the  
2 deliberations before or afterwards with the  
3 Commission.

4 There's also advisors that are not  
5 independent in the sense that they're independent from  
6 the Commission. They're impartial, but they work with  
7 Commission staff to bolster the expertise of staff, to  
8 assist you in developing Information Requests and  
9 analyzing the issues.

10 So those powers under Section 8 are less  
11 than I think what is really being asked for by the way  
12 of a technical advisory panel on First Nations issues.

13 There was reference to 10(c) of the terms  
14 of reference. Those powers referred to in 10(c),  
15 workshops and mediation and so forth, those are not  
16 new powers that the terms of reference have added on  
17 to your duties or your jurisdiction. Those are powers  
18 that you have already.

19 Finally, there was a reference to a common  
20 law source of jurisdiction, that being -- that is  
21 upstream of the statute. And by "upstream", I take it  
22 to mean that there's a -- by virtue of the  
23 constitutional obligations that arise in relation to  
24 Section 35, that that somehow gives the Commission  
25 power to do these extraordinary steps. I submit that  
26 that's an incorrect view of the law in that area.

1                   The duty to consult which arises in  
2                   relation to Section 35 imposes on those agents of the  
3                   Crown that have that duty an obligation to consult and  
4                   discharge the duty to consult and accommodate. It  
5                   does not give that agent new powers that would  
6                   basically re-write the statute. You're bound by the  
7                   statute. The Commission only exists within the  
8                   confines of the statute.

9                   The point of departure really in all this  
10                  debate is about whether there is an independent duty  
11                  to consult. And there was a question a moment ago  
12                  about generic tools in each box. And there are indeed  
13                  certain procedures of gathering information, certain  
14                  aspects of openness and transparency and fairness,  
15                  that are common to both. And so it's in that context  
16                  that I want to address question 6, that there are some  
17                  things that the Commission can do. And before my  
18                  friend Mr. Quail accuses me this time of ducking or  
19                  trying to avoid the question, I want to make a couple  
20                  of comments.

21                  First, throughout this JIESC's been trying  
22                  to look for practical means to understand what the  
23                  specific concerns are and look for ways to adjust it  
24                  within the Commission's existing process. JIESC does  
25                  take the position that there is no independent duty of  
26                  consultation. We've been through that. But that does

1           lead us to certain conclusions on all of these  
2           questions. And further, it's not up to JIESC to make  
3           the case for how these procedures would work, because  
4           we're not advocating any extraordinary measures to be  
5           added to this procedure. So, it's not -- the onus is  
6           on those that would seek that sort of change.

7                         Now, what types of things could be done?  
8           The call for an advisory panel seems to be a response  
9           to a perceived deficiency, and Mr. Andrews spoke to  
10          this a moment ago. And I would adopt his comments,  
11          that the Commission should listen carefully to what is  
12          the -- at the heart of it, the real problem. Is it  
13          access to the hearing, is it a concern about the --  
14          how the process works? Most of those concerns that  
15          I've heard this morning can be addressed through the  
16          existing Commission procedure.

17                        We have a concern that if you add an  
18          advisory panel into the mix, what you're doing is not  
19          simplifying the procedure, you're complicating it, in  
20          a significant way.

21   **Proceeding Time 11:17 a.m. T32**

22                        How does the advisory panel operate? Will  
23          it sit in another room at the same time? Will it sit  
24          at different phases? How do the two connect? There's  
25          some experience with the Mackenzie Gas Project, where  
26          there's two different panels hearing different parts

1 of the application at the same time, and that process  
2 has been going on for years and it's pretty bogged  
3 down.

4 If there was to be that sort of a distinct  
5 parallel process, as I said in the answer to question  
6 5, you cannot set it up. That would have to be terms  
7 of reference given by the Minister.

8 And there's also questions about it's to be  
9 equal as the Commission but no decision-making  
10 authority. I'm not sure what that means, because one  
11 of the key attributes that you have is that you've got  
12 the decision-making authority. If it's to try to  
13 receive information from First Nations and then  
14 present it to you, there's questions about how that  
15 would be presented. Is it a report? Would the panel  
16 member appear as a witness? Why is it necessary for  
17 the filter? Also you'd want to make sure that there's  
18 acceptance throughout the entire First Nation  
19 community of this process.

20 The way the process operates now, each  
21 First Nation can appear directly before you and  
22 express the views of that community. They also can  
23 organize. They could form an advisory panel to  
24 present a joint submission. There's opportunity for  
25 counsel, for experts.

26 There may be some perception that the

1 Commission process, because it's quasi-judicial, is  
2 necessarily very formal. Ms. Rana had a comment about  
3 rules of evidence earlier. It made me smile, and yes,  
4 I do smile from time to time. And the Commission's  
5 process is quite informal. There are the ability to  
6 have workshops and there is mediation, negotiated  
7 settlement process. There's quite a range of tools  
8 available to the Commission. Community meetings, site  
9 visits, all of these things have been done by the  
10 Commission.

11 So rather than complicate the process,  
12 let's get the specific concerns on the table and see  
13 if they can be accommodated within a simplified  
14 process. That's what JIESC would urge.

15 Also, if it's that there's technical  
16 evidence that's difficult to follow, the Commission  
17 can hold the hearing in phases. There can be a phase  
18 that just deals with First Nations concerns. There  
19 can be, as I say, experts that can be engaged to  
20 assist Commission Staff in helping organize procedures  
21 for First Nations presentations. There can be  
22 independent experts called. All of those tools are  
23 available as a generic tool within the Commission's  
24 procedure, not as a specific part of the duty to  
25 consult and accommodate.

26 Some of the procedures and aspects of the

1 duty to consult and accommodate that are the troubling  
2 part are the special duty owed in that situation,  
3 which is incompatible with the impartiality. And  
4 finally it's the -- as you go through consultation you  
5 reach the point where if there's a concern, there's a  
6 duty to accommodate. Try to avoid the impact,  
7 mitigate the impact or compensate for the impact. The  
8 Commission simply does not have the jurisdiction to  
9 enter into that path.

10 So what I'm talking about are procedural  
11 remedies to address some of the concerns. Now, that  
12 won't fulfill in total the duty to consult, but it'll  
13 assist the Crown in fulfilling the duty to consult.  
14 And throughout all this, I want to be clear that JIESC  
15 has not said there is no duty to consult. We've said  
16 it lies elsewhere.

17 There was a couple of comments about the  
18 *Taku River* case, and I echo the comments of Mr.  
19 Andrews, that that was different legislation that  
20 specifically allowed for that type of a structure with  
21 a committee.

22 And subject to any comments or questions,  
23 those are my comments.

24 THE CHAIRPERSON: Thank you, Mr. Bursey.

25 MR. BURSEY: Thank you.

26 MR. FULTON: First Nations Energy and Mining Council.

1     **SUBMISSIONS BY MR. DIMITROV:**

2     MR. DIMITROV:     Good morning, Madam and Panel members.

3                     I'm pleased today that we're moving beyond  
4     the polarities of yesterday to exploring some possible  
5     ways that we can do this in a more harmonized, more  
6     unified kind of way. And with respect to question  
7     number 5, it is a multi-faceted question and asks  
8     really with respect to -- I'll break it down.

9                                     **Proceeding Time 11:23 a.m. T33**

10                    Essentially it asks, what is the source of  
11     the Commission's jurisdiction, if any, to appoint  
12     either a First Nations Advisory Panel? And we would  
13     agree with the submissions by the Nations, that the  
14     jurisdiction flows from upstream, from constitutional  
15     requirements to consult with First Nations pursuant to  
16     Section 35 and also as a consequence of the  
17     determinations and the reliance that will be made on  
18     those determinations by others that will flow from  
19     this inquiry.

20                    Furthermore, we do see that the  
21     jurisdiction could flow from terms of reference,  
22     Section 10(c). 10(c) is very interesting. It states  
23     the "Commission may make use of procedures to resolve  
24     specific issues within these terms of reference  
25     including..." Well, specific issues have to do with  
26     the issue of how to consult with First Nations and

1           therefore it includes a list of potential skillful  
2           resources that you might tap into to engage in doing  
3           that.

4                       I don't think, however, that Section 8 of  
5           the UCA, which has been suggested by Mr. Quail, is a  
6           source to provide you jurisdiction for an advisory  
7           panel. I don't think, as well, it would be prudent to  
8           try to expect that you could hire an expert on First  
9           Nations, because really, as I said way back at the  
10          beginning of this inquiry, to use the term "First  
11          Nations" really is actually an encumbrance. There are  
12          no First Nations and there are no First Nations  
13          experts. There is the Tahtlan Nation, there's a  
14          Toquaht Nation, there's a Kaska Nation, and there is  
15          no one person who is an expert on what is going on  
16          there. And I think it might lead you astray to think  
17          that you could hire an expert on First Nations. They  
18          are all different, different laws, different  
19          expectations, a different history of interaction with  
20          the Crown. So I would caution you in doing that.

21                      With respect to the advisory panel, I don't  
22          see it being a panel that would provide evidence to  
23          the inquiry. I see it as the Nations do, as a panel  
24          that would provide an expertise in how to engage and  
25          how to consult with First Nations.

26                      And we also adopt the submissions of the

1 Tolquaht Nation, because I think their submission says  
2 that if you decide that you yourself do have a duty to  
3 consult, then you can come back to us and we could  
4 develop then a more thorough consultation model for  
5 you, that would include things like the advisory  
6 panel, that would include other suggestions to you  
7 that would give this more, so to speak, meat on these  
8 bare bones. And so that is a very good proposal.

9 And that really takes in question 5. And  
10 with respect to question 6, given that we adopt the  
11 submissions of the Nations, I don't see any conflict  
12 between developing a consultation model and respecting  
13 principles of natural justice and procedural fairness.  
14 I think it could be done, and I think we've got  
15 guidance, both in the *Baker* decision and the new  
16 relationship document. And in terms of what  
17 "impartiality" means, as distinct what it might mean  
18 in the American context.

19 Impartiality doesn't necessarily mean  
20 treating everybody the same, or equally in a formal  
21 kind of sense. There are substantive and more formal  
22 concepts of equality, and I think that the law, as it  
23 regards Section 35, the case law that has come down  
24 respecting consultation has established that First  
25 Nations have a special relationship with the Crown and  
26 there are special obligations to First Nations that



1 Write down a draft terms of reference, circulate them  
2 to all the intervenors here, and refine that, and you  
3 would see that there would likely be -- given that  
4 they're composed of First Nation members, there would  
5 likely be a difference than if you just hired a  
6 technical expert on one nation. This would be -- or a  
7 technical expert on First Nations *per se*.

8 This would be a panel that would  
9 potentially have a -- would take -- would balance the  
10 perspectives of both the local and the provincial --  
11 the local, the regional and the provincial. And I  
12 can't see that just an expert on First Nations could  
13 do that.

14 COMMISSIONER COTE: How large would you anticipate this  
15 panel being?

16 MR. DIMITROV: I think this is provisional and not final,  
17 but I would think, you know, approximately 3 to 5  
18 members. That would have to be determined, I think,  
19 once you call for submissions as to what the terms of  
20 reference and composition of such a panel could be. I  
21 think then the First Nations intervenors would make  
22 submissions on that.

23 COMMISSIONER COTE: Thank you.

24 THE CHAIRPERSON: Thank you, Mr. Dimitrov.

25 MR. DIMITROV: Thank you, ma'am.

26 MR. FULTON: FortisBC.

1     **SUBMISSIONS BY MR. McDONELL:**

2     MR. McDONELL:     Thank you.

3                     Madam Chair, Commissioners, in regard to  
4     question 5, and whether the Commission has the  
5     jurisdiction to appoint a person or a panel, having an  
6     equal role to this panel, I hope everyone will  
7     recognize -- and I think having heard the submissions  
8     this morning that people do -- participants do  
9     generally recognize that this Commission and this  
10    panel do not have the jurisdiction to appoint any  
11    person or panel having equal powers. You simply don't  
12    have the jurisdiction to what, in my submission, would  
13    be a delegation of the inquiry. I think Mr. Bursey  
14    fully outlined that. Only the provincial Crown would  
15    have the jurisdiction to make such an appointment.

16                    However, under Section 8 of the *Utilities*  
17    *Commission Act*, and in my submission Section 10 of  
18    your terms of reference, you do have great flexibility  
19    as to engaging special expertise and working groups.  
20    And I don't fixate on any name, whether it's called an  
21    advisory panel or a working group or what it's called.  
22    I think generally the powers you have under your *Act*  
23    and the powers under your terms of reference at  
24    Section 10, enable you in these specific challenging  
25    circumstances of dealing with and respecting First  
26    Nations issues, that you can design and develop

1 processes that are going to work for this inquiry  
2 towards your ultimate determinations.

3 I think that you need very specific and  
4 practical input from the participants and the parties  
5 to this inquiry in designing this process. I think it  
6 was Mr. Burseley and Mr. Andrews who have said there's  
7 -- it's as if there's a deficiency being identified,  
8 and I don't know if I'm using that term exactly as  
9 they are, but they're -- in using your broad powers  
10 and the flexible procedural powers you have, with  
11 substantial impact from the -- sorry, substantial  
12 input from the parties, you should be able to design a  
13 process that will lead to a fair process, and will  
14 satisfy the respect for First Nations issues and the  
15 procedural rights of all parties, and the duties you  
16 have of procedural fairness will be satisfied.

17 I think we might hear -- and hopefully we  
18 will substantially start a movement towards developing  
19 and hearing from the parties to this proceeding some  
20 specific suggestions and details as to what process  
21 might be -- processes might be appropriate when we  
22 deal with questions 7 or 8. I think that it will just  
23 be a start, because we're going to have to have your  
24 decision from this procedural conference before  
25 finalizing anything, and we may -- and it will be an  
26 evolutionary process as we go through the fall, and

1 get into this Commission further -- into the inquiry  
2 further.

3 I'm smiling because yesterday everyone was  
4 very -- not everyone, a lot of people were very clear  
5 in saying there's no dispute here. Well, there's no  
6 evidence filed here yet. So it's not surprising  
7 there's no dispute.

8 But in any event, we do have -- have found  
9 a lot of things to advocate for and against. But in  
10 any event, I see you as an independent, impartial  
11 tribunal that is going to be adjudicating some  
12 evidence in these specific circumstances, with some  
13 challenges.

14 **Proceeding Time 11:34 a.m. T35**

15 But with the flexibility you've got, as I  
16 say, you have the ability to appoint experts, working  
17 groups, witness panels, all sorts of procedures, and  
18 those -- you do need the parties substantially engaged  
19 in the appointment and formation of those terms of  
20 reference or terms of participation, for panels or  
21 whatever they're going to be called. And with all  
22 those powers in hand, I think that First Nations  
23 interests as we've heard them identified to date in  
24 this inquiry, and in regard to your ultimate  
25 determinations can be respected, and along with the  
26 duties of procedural fairness.

1                   Those are my submissions, thank you.

2 THE CHAIRPERSON:   Thank you very much, Mr. McDonnell.

3 MR. McDONELL:      Thank you.

4 MR. FULTON:        British Columbia Hydro and Power Authority.

5 **SUBMISSIONS BY MR. GODSOE:**

6 MR. GODSOE:        Thank you, Mr. Fulton.  Madam Chair,  
7                   Commissioners.

8                   Just like First Nation participants,  
9                   counsel for CECBC and counsel for FortisBC, I do  
10                   distinguish between the questions -- sub-questions  
11                   posed in question 5.  And I'm going to address the  
12                   second question first, and that is, "What jurisdiction  
13                   does the Commission have to appoint a First Nations  
14                   advisory panel which is 'a co-panel with a direct and  
15                   equal role in some or all of the Commission  
16                   determinations?'"  And we respectfully submit the  
17                   Commission has no jurisdiction to appoint such a panel  
18                   with such a role.

19                   I agree with counsel for CECBC that the  
20                   starting point is the well-known maxim against sub-  
21                   delegation.  And let me just put that forward so that  
22                   you understand what we're talking about.  I'd  
23                   summarize that maxim as follows.  Unless expressly  
24                   authorized, a tribunal given a power to exercise or a  
25                   duty to fulfill cannot delegate its powers to another.  
26                   So, quite simple.

1                   And in determining whether the legislature  
2                   and the Minister expressly authorized sub-delegation  
3                   or not, you've got to look at the *Utilities Commission*  
4                   *Act* and the terms of reference. So that's what I'm  
5                   going to do. And I apologize, but I'm going to grind  
6                   through a lot of different sections here. If you want  
7                   to turn to the *Utilities Commission Act*, it's found at  
8                   tab 1 of Exhibit B2-7, and the terms of reference are  
9                   found at tab 2, but I'm not necessarily asking that  
10                  you need to do that.

11                  B.C. Hydro's submission, a clear reading of  
12                  Sections 5(4) to 5(9) of the *Utilities Commission Act*  
13                  and the terms of reference indicate that the B.C.  
14                  legislature and the Minister, respectively, did not  
15                  intend that the Commission sub-delegate its power to  
16                  determine the need for and timing of additional  
17                  transmission to a First Nations advisory panel. Again  
18                  with a quote, "a direct and equal role in some or all  
19                  of the Commission's determinations."

20                  I look at Section 5(4) of the *UCA* and it's  
21                  clear. "The Commission ..." is how it starts.

22                  "... in accordance with subsection (5) must  
23                  conduct an inquiry to make determinations  
24                  with respect to British Columbia's  
25                  infrastructure and capacity needs for  
26                  electricity transmission."

1           So it is the Commission that is the named recipient of  
2           the power to determine the need for and timing of  
3           additional transmission infrastructure. That is  
4           clear.

5                         Moving to Section 5(5), that reads:

6                         "The Minister may specify by Order, terms of  
7                         reference, requiring and empowering the  
8                         Commission to enquire into the matter  
9                         referred to in subsection 5(4)."

10                        Turning to the terms of reference, those  
11                        are also replete with references to the Commission as  
12                        the body entrusted by the B.C. legislature and the  
13                        Minister to make the determinations. So I look at  
14                        paragraph 4.

15                        "The Commission must make determinations  
16                        respecting the need for and timing of  
17                        additional transmission infrastructure and  
18                        capacity."

19                        I look to paragraph 11:

20                        "The Commission must prepare a report  
21                        containing the determinations and reason for  
22                        the determinations, and must provide the  
23                        report to the Minister."

24                        I also look to paragraphs 3, 6, 7, 8, 9, 10, and  
25                        lastly 12, and they all name the Commission as the  
26                        body entrusted to make these decisions.



1           discretion to sub-delegate its decision-making role in  
2           whole or in part.

3                       Now, let me move to the positive. I've  
4           emphasized the negative. Sub-question 1 asks:

5                       "What jurisdiction does the Commission have  
6           to appoint a First Nations advisory panel to  
7           assist the Commission and oversee First  
8           Nations engagement?"

9                       I agree with the Nations, I agree with  
10          Treaty 8 Tribal Association and with others that  
11          paragraph 10(c) of the terms of reference likely  
12          permits the appointment of a such a panel. And I'm  
13          going to give some qualifiers to that. Let me  
14          emphasize "transparently assisting the Commission with  
15          elements of First Nation participation in the inquiry  
16          regulatory review process."

17                      In saying this, I agree with JIESC that  
18          paragraph 10(c) does not give you powers beyond what  
19          you already have in the statute.

20                      Now, Commissioner Ravelli asked to what  
21          extent really does the independent duty to consult  
22          inform you with respect to this advisory panel. And  
23          what I'm going to lay out for you is B.C. Hydro's view  
24          of how this advisory panel could function consistent  
25          with the finding that the Commission is a quasi-  
26          judicial body and must adhere to the strictest level

1 of natural justice.

2 So while, like any good counsel, I'm going  
3 to reserve my right to make further submissions on  
4 this very important topic as part of question 8,  
5 because I think B.C. Hydro needs to better understand  
6 the exact rule of this First Nation advisory panel,  
7 I do think that the Nations' submissions in particular  
8 were quite helpful in illuminating a little bit more  
9 about how we could proceed on this.

10 So my question was, to myself: How would  
11 the Commission maintain its impartiality if it was  
12 providing an opportunity for First Nation  
13 participants, or First Nation advisory panel that it  
14 is not providing to others? And I thought the  
15 Nations' suggestion with the transparent terms of  
16 reference was very helpful. In our view, the draft  
17 terms of reference must be circulated to all parties  
18 for comment. To not do so is inconsistent with  
19 natural justice.

20 I also respectfully submit that the  
21 complexion or composition of this advisory panel  
22 should be more than just First Nations. I have heard  
23 my friends from JIESC and BCSEA speak to the project  
24 committee, and I agree entirely that that was driven  
25 by the *B.C. Environmental Assessment Act* as it existed  
26 at the time of that *Taku* decision. I note that the

1 project committee did not consist entirely of First  
2 Nations. It was a mixture of stakeholders and First  
3 Nations, and I urge the same outcome with respect to  
4 this advisory panel.

5 And while this may not be a solution,  
6 paragraph 10(a) of the terms of reference do identify  
7 certain parties from which you must hear submissions.  
8 So I would say there needs to be utility  
9 representation, and because of B.C. Hydro's unique  
10 service role, I'm always concerned with ratepayers.

11 **Proceeding Time 11:43 a.m. T37**

12 I would say there must be ratepayer participation in  
13 this advisory panel, not only participating in the  
14 terms of reference but sitting on the advisory panel.  
15 I agree with counsel for CECBC at the end of the day  
16 it is the ratepayers that bear the cost and risk of  
17 the outcome of this inquiry. So I would die on the  
18 sword that ratepayers must be represented on this  
19 advisory panel.

20 Turning a bit more to the terms of  
21 reference, I hear counsel for BCSEA saying that what  
22 you need to really nail down is the precise role of  
23 this advisory panel. I think that's exactly right.  
24 And that's why I think circulation of draft terms of  
25 reference for comment and then finalization is the way  
26 to go.

1                   What I don't have an answer for you right  
2                   now but I will for question 8 is, I'm uncomfortable  
3                   with the Commission appointing the First Nation  
4                   Advisory Panel. I hear JIESC on Section 8, I hear  
5                   JIESC on the *Utilities Commission Act*. I'm not sure  
6                   you have the jurisdiction to actually appoint members.  
7                   So I want to consider that more carefully.

8                   That being said, I do think that the  
9                   logical starting point is for First Nation  
10                  participants to put forward their views on membership,  
11                  and then for the other participants to put their views  
12                  as well.

13                  My understanding of the project committee  
14                  is it ranged from about eight to twelve members. I  
15                  think you've got to keep the size manageable or we're  
16                  going to -- we're not going to be efficient or  
17                  effective. I don't have an answer on the numbers and  
18                  I'll give that further consideration. I think it has  
19                  to be more than three for the reasons I've outlined.  
20                  I think it needs to go beyond just First Nation  
21                  representation.

22                  I will leave it to the First Nation  
23                  participants in reply, and I will be listening with  
24                  interest as to what concerns this advisory panel will  
25                  address, but I do see a potentially helpful role in  
26                  giving advice to the Commission on where to host the

1 regional sessions, for example, and how to make those  
2 regional sessions amenable so that First Nations can  
3 participate. And I'll come to this as part of  
4 question 8. Those regional sessions, of course, in my  
5 view must be open to all.

6 Now, First Nations and others raised a  
7 number of issues: the separate process issue, draft  
8 determinations, direct consultation, PACA guidelines,  
9 and the inadequacy of our own process. I think it's  
10 more proper I address all of those, and I will as part  
11 of question 8.

12 So I think that brings me to the end of my  
13 submissions on both questions 5 and 6. I do want to  
14 emphasize that I think you can structure an advisory  
15 panel that within the confines of your own regulatory  
16 review process, consistent with the finding that you  
17 are a quasi-judicial tribunal and must adhere to the  
18 strictest level of natural justice. So I guess my  
19 answer to 2 is a qualified yes. I think you have the  
20 jurisdiction but I think there are some concerns with  
21 respect to natural justice that must be addressed.

22 THE CHAIRPERSON: Thank you, Mr. Godsoe.

23 MR. GODSOE: Thank you.

24 MR. FULTON: Before Mr. Godsoe sits down, I just want to  
25 make sure that there is no objection within the room  
26 to him addressing those matters that he said he was

1 going to address in his answer to question --

2 MR. GODSOE: I don't know how there can be because they  
3 are clearly for question (a), but --

4 MR. FULTON: Well, but they were raised in terms of this  
5 session, so I just wanted to make sure that we have  
6 consensus, and we do have consensus so that's fine.

7 THE CHAIRPERSON: Thank you. Thank you, Mr. Godsoe.

8 MR. GODSOE: I'll be quiet then.

9 MR. FULTON: British Columbia Transmission Corporation.

10 **SUBMISSIONS BY MR. FELDBERG:**

11 MR. FELDBERG: Thank you, Madam Chair, members of the  
12 Panel.

13 Again being last, I find myself in the  
14 position where much of what I had to say has been  
15 already said and probably said much better than I  
16 would have said it, so that's all good.

17 The gist of the answer to questions 5 and  
18 6, though, is as Mr. Godsoe said and as my friend from  
19 JIESC and my friend from BCSEA said. It is the answer  
20 to the question whether you have jurisdiction to  
21 appoint a First Nations panel is all in what is it  
22 that the First Nations panel is going to do. And in  
23 my submission it is clear, as the submissions of Mr.  
24 Bursey and Mr. Godsoe have indicated, that the  
25 Commission does not have the jurisdiction to appoint a  
26 panel that would take any part in the decision-making

1 process that the Commission has.

2 And in the way that's been expressed in a  
3 couple of the submissions of the First Nations was  
4 that it would be a panel with a direct and equal role  
5 in decision making. And in my submission, clearly the  
6 Act doesn't provide for that, and the terms of  
7 reference don't provide for that. The maxim, for Mr.  
8 Bursey's benefit, is *delegatus non potest delegare* and  
9 it's quite a trite proposition of law, even expressed  
10 in English or Latin.

11 **Proceeding Time 11:44 a.m. T38**

12 The only comments I wish to make further,  
13 though, is that there have been a number of helpful  
14 comments, I think, made by both my friend Mr. Austin,  
15 my friend representing CEC and certainly the counsel  
16 for the Nations, that there are structures, ways and  
17 models within the existing regulatory process that you  
18 have within which the process for ensuring that First  
19 Nations' evidence is received and considered in a way  
20 that is more appropriate, conducive to that received  
21 by the Commission, may be made. There are, for the  
22 terms of reference are fairly flexible. They do not  
23 add to your powers under the Act. I agree with that  
24 proposition. But the terms of reference do give you  
25 flexible processes to use to ensure that the evidence  
26 of First Nations gets to you in a proper and

1           appropriate manner.

2                           And the -- to my mind, it's almost  
3           impossible to address this in the abstract, until we  
4           hear really the specifics, as Mr. Austin described it,  
5           of what the particular need is and then try to draft  
6           and define the measures that can address it. And it  
7           may be that they exist already. We do have processes  
8           for certain regional hearings. We do have processes  
9           by which the First Nations can come directly. They  
10          can file evidence in written form, they can put panels  
11          together. There are many ways of addressing some of  
12          the concerns that they've relayed to you.

13                          But if those are not appropriate, if what  
14          it requires is more community sessions in the -- in  
15          other parts of British Columbia, if they require more  
16          informal processes, then those can be explored. I'm  
17          just at a loss to be able to tell you whether or not  
18          that works from our perspective until I hear a little  
19          bit more about what the specific need is and about  
20          what the specific proposal is.

21                          I can tell you, and this is perhaps for the  
22          benefit of my friends who are about to reply, that the  
23          concerns that we're going to have, and I'm speaking  
24          for the Transmission Corporation, are not simply those  
25          of procedural fairness, although of course we share  
26          the need that natural -- the observation that natural

1 justice must be, of course, observed by the Panel. We  
2 would want any panel that is set up to address First  
3 Nation issues to be as transparent as possible. We  
4 would want the opportunity to comment. All of those  
5 sorts of things that we would normally see.

6 But aside from the procedural safeguards,  
7 my client has a particular interest, being the  
8 transmission company and being the source of much of  
9 the technical and policy planning that this Commission  
10 is going to rely on, in ensuring that at the end of  
11 the day we develop a process that will be  
12 substantively good. Not simply procedurally good, but  
13 substantively good. So that the evidence that you're  
14 receiving is going to be evidence that you can then  
15 rely on to make the determinations that you ultimately  
16 are going to have to make.

17 So, my plea, and for my friends to consider  
18 as well, is consider how we make this effective, not  
19 only for the First Nations' interest that everybody  
20 wants to make sure are looked after, but also to  
21 ensure at the end of the day that the evidence that  
22 you're going to get is going to be accurate, properly  
23 designed and properly considered. And for that to  
24 happen, the planners have to be involved. The  
25 planners have to ensure that they hear the evidence  
26 and have to incorporate that into the designs and the

1 plans and the suggestions on determinations that  
2 you're going to hear.

3 Because at the end of the day, the quality  
4 of this inquiry is not going to be ultimately  
5 developed by the 50 lawyers that are in the room  
6 today, but largely by the people that actually know  
7 how to plan the system and actually know the impacts  
8 on the lands that they're going to be affecting. And  
9 at some point they have to be engaged in all these  
10 processes.

11 So I'm saying that for your benefit, but  
12 also for the benefit of my friends. When they think  
13 of the processes, think not only of how it's going to  
14 work for their clients, but how at the end of the day  
15 we get something that is workable for all of us.

16 Those are my submissions.

17 THE CHAIRPERSON: Thank you, Mr. Feldberg.

18 MR. FULTON: We're now in the reply cycle.

19 THE CHAIRPERSON: I believe so.

20 MR. FULTON: For questions 5 and 6. British Columbia  
21 Hydro and Power Authority.

22 MR. GODSOE: No reply.

23 MR. FULTON: FortisBC Inc.

24 MR. McDONELL: No reply, thank you.

25 MR. FULTON: First Nations Energy and Mining Council.

26 MR. DIMITROV: No reply.

1 MR. FULTON: Joint Industry Electricity Steering  
2 Committee.

3 MR. BURSEY: No reply, thank you.

4 MR. FULTON: British Columbia Sustainable Energy  
5 Association *et al.*

6 MR. ANDREWS: No reply.

7 MR. FULTON: British Columbia Old Age Pensioners'  
8 Organization *et al.*

9 **Proceeding Time 11:54 a.m. T39**

10 **REPLY BY MR. QUAIL:**

11 MR. QUAIL: I just want to reply -- Mr. Godsoe has  
12 indicated he's willing to die on the sword of  
13 ratepayer participation, and that's encouraging in  
14 many ways. I'd just like to say that we are not  
15 taking the position in this particular process that we  
16 would seek a seat in that kind of a structure, mainly  
17 because this panel is aware more than anybody else,  
18 what the regulatory schedule is like over the coming  
19 period. And our organization does a lot of other  
20 matters than energy and utility regulation, and there  
21 simply aren't enough days in the week, or weeks in the  
22 month, or months in the year for us to do that. And  
23 we would be quite content, if we had access to the  
24 record of such a process, an opportunity to present  
25 evidence and comment, potentially make submissions and  
26 to be apprised of it in that fashion, and would not

1 seek direct participation.

2 THE CHAIRPERSON: Thanks, Mr. Quail.

3 MR. FULTON: Commercial Energy Consumers Association of  
4 British Columbia?

5 MR. WEAVER: No reply to that.

6 MR. FULTON: *ESVI et al.*

7 MR. BERTSCH: No reply.

8 MR. FULTON: Independent Power Producers Association of  
9 British Columbia?

10 MR. AUSTIN: No reply.

11 MR. FULTON: Sto:lo Tribal Council?

12 MS. HEASLIP: No reply.

13 MR. FULTON: Shuswap Arrow Lakes Division?

14 MS. LEBOURDAIS: No reply.

15 MR. FULTON: Haisla Nation?

16 **REPLY BY MS. GRIFFITH:**

17 MS. GRIFFITH: Madam Chair, Commission Panel. I'm glad  
18 I reserved the right to reply.

19 I think what we have here is submissions on  
20 behalf of First Nations that are saying there is a  
21 need a for an advisory panel in order to discharge the  
22 duty to consult and this is what it should look like,  
23 and submissions from other parties saying there can be  
24 an advisory panel but it has to be -- or the type of  
25 advisory panel we are suggesting is one that operates  
26 within the confines of a quasi-judicial process where

1           there is no independent duty to consult. So that what  
2           that advisory panel looks like has to be limited. And  
3           I think to some extent what we are talking about is  
4           apples and oranges. So I think it's very important  
5           that the Commission decides what is it selecting from  
6           grocery store, is it apples or oranges.

7                       My main concern with some comments made by  
8           -- in particular a comment made by JIESC that they are  
9           not saying there is no duty to consult but that it  
10          lies elsewhere, is that I think it's critical that it  
11          is the Commission consult on its determinations,  
12          because it's only the Commission that can demonstrably  
13          integrate First Nations' concerns into its  
14          determinations.

15                      And in our view, an advisory panel would be  
16          to assist the Commission in demonstrably integrating  
17          First Nations' concerns into its determinations in  
18          accordance with procedural fairness and openness and  
19          transparency. But I think its important not to  
20          sidestep, sort of, the first question. Is there an  
21          independent duty to consult? We say, "Yes, there is."  
22          I'm not going to go into the details of why, once  
23          again, but I think it's critical to answer that  
24          question before we can answer what this advisory panel  
25          would look like and what its functions are.

26                      Subject to any questions, those are my



1           There's a body of case law and administrative law  
2           about when persons in that situation may or may not  
3           have to testify, and it may be the subject of further  
4           submissions on the composition of the Panel. But in  
5           my submission, Section 8 does not get at that kind of  
6           narrow reading.

7                         Also in respect of Mr. Bursey, we don't  
8           envision this Panel as being something through which  
9           First Nation evidence is filtered. That's not the  
10          function. It's an advisory panel, and as I said in my  
11          primary submissions, for the Commission's benefit.

12                        And it's come up a couple of times in the  
13          submissions what the First Nations envision this  
14          advisory panel dealing with. Well, we're short of  
15          time. It's in our submissions. But I think it's  
16          quite obvious that we can't cobble that together in  
17          the time that we have, and so if the Commission  
18          decides that an advisory panel is the appropriate way  
19          to go, it will require further, more detailed  
20          submissions from the parties on the terms of reference  
21          and what will be dealt with. So, just to make sure  
22          we're not doing that on the seat of our pants on a  
23          reply.

24                        The last point I would make is, while I  
25          would regret Mr. Godsoe's untimely demise on his  
26          sword, I have some concerns about expanding this Panel

1           into a multi-faceted panel of all different interests  
2           because it sort of then turns into what we're doing  
3           here. I think the focus needs to remain on it being a  
4           First Nations advisory panel, providing the Commission  
5           with a First Nations perspective on the tasks before  
6           it. So again, that's probably an issue for a later  
7           day, but I would have some significant concerns about  
8           expanding a panel beyond a First Nations  
9           representative.

10 THE CHAIRPERSON: Thank you, Mr. Kirchner. It's now  
11           12:00. What's the preference? Finish with the reply  
12           round or take a lunch break right now?

13 MR. FULTON: There are four parties yet to speak in  
14           reply, the Treaty 8, the Toquaht, the Hwlitsum, and  
15           the Nations, so.

16                        I think, it looks like we could get  
17           finished by about quarter after, so --

18 THE CHAIRPERSON: Let's try to wrap these questions up  
19           then.

20 MR. FULTON: Treaty 8 Tribal Council.

21 **REPLY BY MS. RANA:**

22 MS. RANA: Okay, don't let the size of the binder mislead  
23           us here. It's just B.C. Hydro's authorities. I've  
24           just got a few points. An unimportant binder.

25                        I want to respond to Mr. Burse's  
26           suggestion or submissions that on the common law

1 source of your jurisdiction to appoint or create the  
2 advisory panel, and he noted that even if there was a  
3 duty to consult, it doesn't give you powers to rewrite  
4 your statute. That's not what we're suggesting.

5 The common law constitutional argument is  
6 really saying that if the duty is found to exist, you  
7 have an obligation to interpret your statute to allow  
8 you to fulfill that obligation. And I can point you  
9 to the *Halfway River* decision to provide you some  
10 further guidance on this point, and it's at tab 16 of  
11 Hydro's submissions. And I'll refer you to Madam  
12 Justice Huddart's comments at paragraph 177 of that  
13 decision. Now, Halfway River is one of the Treaty 8  
14 Tribal Association members. This was a case that  
15 Halfway brought forward in the B.C. Supreme Court. It  
16 went up to the B.C. Court of Appeal, quite a long time  
17 ago, in the 80s, late 80s -- oh, sorry, late 90s.

18 **Proceeding Time 12:04 p.m. T41**

19 And it was a judicial review of the district manager  
20 of the Ministry of Forests' issuance of a cutting  
21 permit on lands over which they exercised treaty  
22 rights. And in quashing the decision to -- the  
23 Supreme Court quashed the decision to issue the  
24 cutting permit, and the Court of Appeal upheld that  
25 decision, and Madam Justice Huddart stated in  
26 reference to the interpretation of statutes and

1 regulations, she said at paragraph 177:

2 "Just as the impact of a statute or  
3 regulation may be scrutinized to ensure  
4 recognition and affirmation of treaty rights  
5 of aboriginal peoples, so may the impact of  
6 a decision made under such a statute or  
7 regulation by an employee of the Crown. The  
8 district manager could no more follow a  
9 provision of a statute, regulation or policy  
10 of the Ministry of Forests in such a way as  
11 to offend the constitution as he can to  
12 offend the *Criminal Code* or the *Offence*  
13 *Act*."

14 So the point there is that if you have a  
15 duty, and the constitution requires you to consult and  
16 accommodate, what your statute says, or limits you in  
17 doing, is irrelevant. You have to interpret that  
18 statute to allow you to fulfill the constitutional  
19 duty. And that would be the argument that would be  
20 made in court if any decision-maker, any Crown  
21 decision-maker, ignored the constitution and said,  
22 "Well, our statute doesn't let us do that. Our  
23 statute doesn't allow us to fulfill our duty." Well,  
24 then, the challenge would be against the statute. The  
25 statute itself is unconstitutional.

26 A further comment that Mr. Burse said was

1           that, "Well, you may find -- or if you find that you  
2           have a constitutional duty to consult, you might get  
3           into a situation where you don't have the jurisdiction  
4           to accommodate." Because we all know consultation is  
5           not just a process, but it's a process that will  
6           hopefully allow you to make your decisions in such a  
7           way that will accommodate any of the impacts that your  
8           decision may have on the treaty and aboriginal rights  
9           of the First Nations.

10                         Well, I would submit that that's incorrect.  
11           If you have the duty to consult, you necessarily have  
12           the duty to accommodate. They work hand in hand.  
13           They're two sides of the same coin. You can't find a  
14           constitutional duty to do one and not the other. And  
15           it's not always accommodate. The courts have said  
16           it's consult, and if necessary accommodate. The  
17           accommodation is the outcome of the consultation. And  
18           the consultation process will show you and will  
19           demonstrate to you, what you need to do, if anything,  
20           to accommodate. It's not a given.

21                         And my third and final comment is in  
22           response to Mr. Godsoe's suggestion that -- in our  
23           suggestion that Section 4 of the Act may provide you  
24           somewhere to go to help address your concern about  
25           jurisdiction to create the advisory panel. We weren't  
26           suggesting that this Commission appoint new

1           Commissioners under Section 4. There are many  
2           Commissioners. There are other Commissioners besides  
3           this Panel. We would suggest that that -- this  
4           Section 4 may be a way to appoint other Commissioners  
5           to sit as a separate division to deal with the First  
6           Nation consultation issues simply because the task is  
7           so large. It's a complex issue. You've got 10 months  
8           to do your work, and if this is going to raise all  
9           kinds of other procedural questions and other  
10          processes over the next ten months, a separate  
11          division may be a more efficient way to deal with the  
12          complexities that might arise. And we weren't  
13          suggesting that you appoint new Commissioners that be  
14          First Nations.

15                         In fact, we said that this division could  
16          then be tasked with working with the First Nation  
17          advisors that could be created under 10(c) of the  
18          terms of reference. So it's still Commissioners from  
19          the Commission that would be sitting separately to  
20          address these issues.

21                         Those are my submissions.

22   THE CHAIRPERSON:    Thank you, Ms. Rana.

23   MS. RANA:            Thank you.

24   MR. FULTON:          Toquaht Nation? Hwlitsum First Nation.

25   **Proceeding Time 12:08 a.m. T42**

26   **REPLY BY MS. MUIR:**

1 MS. MUIR: Madam Chair, members of the Panel, just a few  
2 comments from the Hwlitsum First Nation.

3 First we'd like to thank all the parties  
4 that have really spoken today on this issue for their  
5 flexibility and cooperation in terms of trying to  
6 provide some discussion and also support for an  
7 advisory panel First Nation issues, and also to  
8 endorse all the different First Nation comments and  
9 submissions, particularly the very practical comments  
10 and discussion that was provided by some of the  
11 parties.

12 One aspect that's been raised is a whole  
13 collaborative effort between the First Nations and  
14 BCUC with respect to discussing the terms of reference  
15 for this advisory panel that could then be circulated  
16 and put out for comment to the other parties and we  
17 would support that initiative. These collaborative  
18 efforts can lead to really the different discussion  
19 and raising terms with respect to the nomination  
20 process, the size and who participates on these  
21 panels.

22 It seems it would be somewhat  
23 micromanagement to try to pre-determine all these  
24 things now, but it might be useful to set up a process  
25 for how there can be the first terms of reference, so  
26 they could be circulated to other parties.

1                   And lastly, we would support Treaty 8's  
2                   suggestions with respect to Section 4 as a tool that  
3                   the Commission consider, as another means of building  
4                   up expertise within the Commission on First Nation  
5                   issues. It was so eloquently described by the  
6                   Commercial Consumers Association. There is going to  
7                   be an ongoing relation that's going to occur in this  
8                   proceeding as well as other proceedings, so this is  
9                   one of the good first steps to do so.

10                   Thank you.

11 THE CHAIRPERSON: Thank you, Ms. Muir.

12 MR. FULTON: The Nations.

13 **REPLY BY MR. STADFELD:**

14 MR. STADFELD: Just a few points in reply.

15                   First of all from the question from the  
16                   panel as to whether or not this First Nation panel  
17                   would include more than First Nation representatives,  
18                   our position on that is that it would not. That the  
19                   point is a First Nation panel. And so I'm sorry to  
20                   endorse the submissions of Mr. Kirchner on this in  
21                   regard to Mr. Godsoe's sword, but we do not see a  
22                   place on the First Nation panel for the utilities or  
23                   ratepayers. They have a place before this Commission  
24                   and it would not be on a First Nation panel.

25                   As far as to how it would be developed, I  
26                   do refer you, as Mr. Godsoe did, to our submissions on



1                   My point there was, this was an example of  
2                   a response to their question of how do you balance the  
3                   duty to consult and the concerns to be impartial? And  
4                   this was an example from that case, from that Act,  
5                   where the Supreme Court of Canada said there was no  
6                   inherent problem with a special place for First  
7                   Nations. And I think that's the instructive point  
8                   about *Taku*. We're not saying you should create a  
9                   project committee exactly based on the old *EA Act*, but  
10                  we are saying that the Supreme Court of Canada didn't  
11                  have a problem with the special place there for First  
12                  Nations in the Minister's decision, in the Crown's  
13                  decision.

14                  And then I think you'll hear more from Mr.  
15                  Godsoe on this point, but there are provisions for  
16                  ensuring the duty to consult and accommodate are  
17                  fulfilled that aren't defined by the statute. What  
18                  you'll hear, I think, later is the specific Northwest  
19                  Transmission Line which is referred to in your terms  
20                  of reference. Our client, the Tahltan Central  
21                  Council, has designed with B.C. Hydro and with the  
22                  Minister a separate review process. And that's been a  
23                  signed agreement between them that they're now  
24                  implementing. And so there's no specific provision  
25                  set out in the *Act* that would allow them to do this,  
26                  but this is what they've agreed to do in order to

1           fulfill the duty to consult. So it's not driven by  
2           the Act itself.

3                       On JIESC's submissions, I think it's clear  
4           our clients are not proposing the appointment of a new  
5           panel. Our clients are not proposing the appointment  
6           of new commissioners. I endorse my friend Mr.  
7           Kirchner's submissions on Section 8. Our submission  
8           is they're much wider than was urged upon you by Mr.  
9           Burse.

10                      And subject to any questions, those are our  
11           submissions.

12 THE CHAIRPERSON:    Thank you, Dr. Stadfeld.

13                      Now it's quarter past twelve and I believe  
14           we are now finished with questions 6 and 7.

15 MR. FULTON:        No, 5 and 6, Madam Chair.

16 COMMISSIONER RAVELLI:   Nice try though.

17 THE CHAIRPERSON:    It didn't work. So questions 5 and 6.

18                      So we are now going to take one hour of  
19           lunch break and reconvene quarter past one.

20 MR. FULTON:        Thank you, Madam Chair.

21                      **(PROCEEDINGS ADJOURNED AT 12:16 P.M.)**

22                      **(PROCEEDINGS RESUMED AT 1:15 P.M.)**

**T44/45**

23 THE CHAIRPERSON:    Please be seated.

24 MR. FULTON:        Madam Chair, we are now at question 7, and  
25           Hwlitsum is first.

26 **SUBMISSIONS BY MS. MUIR:**

1 MS. MUIR: Good afternoon Panel.

2 The Hwlitsum would like to begin its  
3 comments on section -- question 7 by recognizing the  
4 good working relationships we have with B.C. Hydro and  
5 BCTC. As you can see, they're very pleasant  
6 collaborative parties.

7 We're willing -- I'm not saying that in  
8 jest, actually. We do have a good working  
9 relationship because it's a very complex range of  
10 people we deal with. But the Hwlitsum is willing to,  
11 and eager to develop equally good working  
12 relationships with other parties at this panel and  
13 with the Commission.

14 And our comments today are really intended  
15 to address some flaws as we perceive them in the  
16 process, and to ameliorate that and assist.

17 We'd like to just comment generally about  
18 the need for all parties to implement deep  
19 consultation in good faith, collaboratively and with  
20 open minds. The First Nations have been open and  
21 transparent in this participation in the inquiry, and  
22 with an exploration of how the Commission might best  
23 implement its duty to consult, through suggestions and  
24 discussions for relevant measures.

25 While we've been experiencing some  
26 adversarial aspects to discussing the duty to consult,

1           there will be the need to work together and  
2           collaboratively to implement this duty to consult.

3                       We'd like to raise some concerns with what  
4           might be discussed now and the next one, which is  
5           dealing with some of the parallel process, because  
6           that's been raised as part of that well. We notice  
7           that there's already been a unilateral conclusion from  
8           B.C. Hydro about the level of consultation required in  
9           this inquiry across all parties, all First Nations at  
10          the low end of the spectrum. As you can see, that  
11          contrasts quite sharply with the First Nations  
12          positions, which are requesting deep consultation.

13                      Second, as referred to earlier, BCTC has  
14          confirmed that in their long-term planning process so  
15          far, they have not budgeted for the cost of doing  
16          business in First Nation traditional territory, that  
17          they haven't included money in their 30-year planning  
18          projections yet in terms of consultation or  
19          accommodation. To our view, a consultation process  
20          does not plan or provide the resources is going to be  
21          faulty.

22                      We're also going to briefly talk about --  
23          this is in the context of the "any other measures",  
24          about BCTC's concerns about the inclusion of their  
25          work and their economic forecasting within the First  
26          Nation measures that are proposed.

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**Proceeding Time 1:18 p.m. T46**

And just very last, and this is just the last general comment, that the Hwlitsum First Nation has attempted to assist the Commission in fulfilling its constitutional duty to consult with First Nations. Our participation in the process, both the B.C. Hydro's parallel consulting, has indicated that there is serious flaws there, perhaps fatally flawed. If, as we suspect, B.C. Hydro attempts to convince the Commission later this afternoon that their consultation process can be repaired through unilateral action, we believe they're mistaken and we will reserve the right to comment further in reply. And why we say in part the B.C. Hydro parallel process is seriously flawed is that there has been no discussion with First Nations even on the implementation of that.

Addressing now on the key other measures, we propose three matters in our submission. The first one is the First Nation scenario; the second one is a First Nation cost/benefit analysis; and the last one is community meetings between the BCUC Panel and First Nations.

First I'd like to stress this is a non-exhaustive list. As mentioned earlier, they were put on the table to assist the BCUC in meeting its duty,

1           and primarily to ensure that the Commission has  
2           appropriate information to make informed  
3           determinations on First Nation issues for this  
4           inquiry.

5                        If we look to the scenario analysis, the  
6           First Nation scenario analysis and the First Nation  
7           socioeconomic cost/benefit analysis, these go to  
8           quantitatively and qualitatively understand the  
9           impacts and costs of electricity generation,  
10          transmission and demand on First Nations within B.C.,  
11          both historically and with respect to the present and  
12          the future. And this is where I'd like to refer to  
13          the BCTC comment.

14                      As much as possible within that, we would  
15          like to understand and be able to incorporate the  
16          economic forecasting that BCTC is already doing and  
17          will continue to do for September and into the fall.  
18          And as I mentioned earlier, up to now there haven't  
19          been costs provided for First Nation accommodation  
20          into the long-term planning.

21                      The honour of the Crown demands that  
22          consultation with First Nations be meaningful. The  
23          absence of cost analysis in a budget for accommodation  
24          so far leads us to believe that B.C. Hydro and BCTC  
25          will not have the capacity and may not have the intent  
26          to engage in meaningful consultations with First

1 Nations. Given this absence, the Hwlitsum First  
2 Nation, and we speak only for the Hwlitsum First  
3 Nation, can no longer trust B.C. Hydro and BCTC to  
4 cost out the First Nation impacts on accommodation,  
5 given their deficient parallel process and the absence  
6 of costs so far.

7 **Proceeding Time 1:21 p.m. T47**

8 As well as, or compounded by, the B.C.  
9 Hydro's determination in the advance of any  
10 engagement, in the advance of any consideration of  
11 First Nation evidence or submissions, that the duty to  
12 consult with First Nations is uniformly low throughout  
13 the province.

14 Therefore, and this goes to the two  
15 measures that we're proposing to discuss today, we  
16 recommend that BCUC provide the intervening First  
17 Nations with funds to complete First Nations  
18 scenarios, and to commission a study of the actual  
19 costs of development to First Nations. These studies  
20 would assist the Commission in the design of their 30-  
21 year process, and it could assist, and would assist,  
22 BCTC and B.C. Hydro and other power companies.

23 As mentioned earlier, if possible, and  
24 provided on the access, First Nations could use B.C.  
25 Hydro and BCTC's forecasts of demand, generation and  
26 transmission. And as the intent that these measures

1           and these reports be implemented cooperatively and  
2           collaboratively by First Nations, with expert guidance  
3           and coordination, and done collectively with the  
4           Commission and other parties.

5                       This brings now, to the larger question,  
6           and this has been discussed, or among the First Nation  
7           counsel, about the First Nations and the Commission  
8           collaboratively designing the consultation process.  
9           There have been, on the transcript from Dr. Stadfeld  
10          yesterday some very good submissions with respect to  
11          the necessary steps that must be made. But once the  
12          steps have been made with respect to the duty to  
13          consult, First Nations need to be included and to  
14          cooperate in the design of this consultation process.  
15          And of course other parties will have the subsequent  
16          ability to comment on these joint suggestions and  
17          recommendations to the Commission and First Nations.

18                       These are all my submissions at this time.  
19          We reserve the right of reply, because I think there's  
20          going to be very extensive remarks.

21 THE CHAIRPERSON:    No questions right now. Thank you, Ms.  
22                       Muir.

23 MR. FULTON:        Treaty 8 Tribal Association.

24 **SUBMISSIONS BY MR. DEVLIN:**

25 MR. DEVLIN:        Good afternoon, Madam Chair and  
26                       Commissioners.

1                   So, for question 7, the Treaty 8 Tribal  
2                   Association would like to generally adopt the  
3                   submissions you just heard from the Hwilitsum First  
4                   Nation, and to reiterate that we set out suggested  
5                   elements for consultation process in our initial  
6                   submissions. Those are in Exhibit C105-2, paragraphs  
7                   81 and 82.

8                   Some of those suggested elements would  
9                   include the consultation advisory panel, of which you  
10                  heard significant submissions this morning, community  
11                  hearings, consultation sub-hearings, First Nations  
12                  scenario submissions, First Nation comment periods,  
13                  and capacity funding. Furthermore, that the  
14                  consultation process would likely evolve and there may  
15                  well be additional elements that are required as the  
16                  process goes along, and issues get raised. But, as  
17                  Dr. Stadfeld said, and Mr. McDonell said earlier this  
18                  morning, it may be premature to determine the  
19                  consultation process at this time.

20                  And we submit that the sort of outcome --  
21                  or the outcome from this procedural conference that is  
22                  most likely appropriate is that the Commission first  
23                  of all decide whether or not it has this independent  
24                  duty to consult, and those reasons were extensive --  
25                  or the background for that was extensively canvassed  
26                  yesterday.

1 **Proceeding Time 1:25 p.m. T48**

2 Secondly, that the Commission then, if it  
3 does decide it has its independent duty to consult, to  
4 consult with First Nations about that process and how  
5 that process is going to unfold, and may well  
6 incorporate some of the elements that have been  
7 discussed today and that are in the submissions before  
8 you. And then the third part is that the Commission  
9 address this issue of interim capacity funding. And I  
10 raise this because you've heard submissions yesterday  
11 and today from some of the First Nations who are here  
12 that they haven't been paid to date to participate,  
13 and in fact because this process is complex, it may  
14 well be that the lack of capacity funding is  
15 preventing some First Nations who are directly  
16 affected by the determinations from participating.  
17 And the nature of the funding which sort of comes  
18 after the fact, doesn't assist First Nations in  
19 participating now, and that may well prevent them from  
20 showing up.

21 Subject to your questions, those are my  
22 submissions.

23 THE CHAIRPERSON: No, no questions, thank you very much,  
24 Mr. Devlin.

25 MR. FULTON: Toquaht Nation.

26 **SUBMISSIONS BY MR. CHRIST:**

1 MR. CHRIST: Madam Chair, members of the Panel, the  
2 Toquaht Nation generally adopts the comments just made  
3 by the Hwlitsum First Nation and the Treaty 8 Tribal  
4 association. We have no further submissions in  
5 question number, but would like to reserve the right  
6 to reply. Thank you.

7 THE CHAIRPERSON: Thank you, Mr. Christ.

8 MR. FULTON: Squamish Nation and Carrier Sekani Tribal  
9 Council.

10 **SUBMISSIONS BY MR. KIRCHNER:**

11 MR. KIRCHNER: Madam Chair, members of the Panel, the  
12 question that has been asked us to elaborate on these  
13 three points from the Hwlitsum submission, the other  
14 key measures in achieving consultation, in our  
15 submission, our written submission at paragraph 55 on  
16 page 12, we've set out a list of six items, or key  
17 measures if you want to call them that, that in our  
18 submission would apply, and recognizing the Panel has  
19 asked to comment on the Hwlitsum submission, not ours,  
20 I'll avoid doing that.

21 But going through the three points -- or at  
22 least two of the points in the Hwlitsum submission at  
23 paragraph 13, the first one being the development of  
24 First Nations scenarios, we discussed scenarios in two  
25 paragraphs, subparagraphs, in paragraph 55,  
26 subparagraph (3) and subparagraph (4), and I just

1           wanted to expand a bit on those.

2                       Subparagraph (3) concerns scenario  
3 critiques, and this would be both critiquing or  
4 developing scenarios along the lines that BCTC and  
5 B.C. Hydro have been asked to do from a First Nations  
6 perspective. And one of the fundamental problems we  
7 see with the process is that all the scenarios that  
8 are going before the Commission are from or generated  
9 from the perspective of Hydro and BCTC and not from  
10 the First Nations' perspective, which in our  
11 submission is required to meet the duty to consult.

12                      So what we are suggesting there in that  
13 aspect of the scenario is to give First Nations the  
14 capacity to develop their own scenarios, working in  
15 conjunction with B.C. Hydro and BCTC, but to develop  
16 First Nation generated scenarios and to be able to  
17 really do meaningful critiques of Hydro's scenarios.  
18 And the problem there, of course, is that First  
19 Nations simply lack the expertise and capacity to do  
20 that. So there we're talking about empowering through  
21 capacity First Nations to be able to develop those.

22                      Now, we've said throughout our submission  
23 that our clients are prepared to work collaboratively  
24 with other intervenors involved here, and so one of  
25 the models that we would consider looking at, if it  
26 can be worked out, is some kind of effort on the part

1 of all First Nations working collaboratively to work  
2 up these scenarios so that the effort isn't  
3 duplicated. That on our side we would endeavour to do  
4 that.

5 **Proceeding Time 1:29 p.m. T49**

6 The other type of scenario that we talked  
7 about is in paragraph -- subparagraph (iv) of  
8 paragraph 55 of our submission, and that is developing  
9 consultation and accommodation scenarios. One of the  
10 points that we have made in our submission, and this  
11 is at paragraph 31, is that at the end of the day --  
12 we don't know what kind of accommodations will be  
13 necessary at the end of the day. The kinds of  
14 accommodations that are normally -- would normally be  
15 considered would be possibly changing transmission  
16 choices if the consultation process led you there, or  
17 specific compensation.

18 But given the broad nature of this inquiry,  
19 and the sort of high level study that's being made,  
20 another and quite likely accommodation would be what  
21 we have called process options. So, for this  
22 Commission to recommend a series of suggestions at  
23 processes for resolving or reconciling First Nations  
24 issues in future planning over the next 30 years, for  
25 this Commission to come up with models that will allow  
26 all the parties, moving forward, after your

1           determination is made, to achieve the honour of the  
2           Crown and consult and accommodate in the future. So,  
3           what we have suggested in our submissions is another  
4           scenario development model, should be for First  
5           Nations to develop these kinds of consultation and  
6           accommodation scenarios for future planning.

7                        I'm going to skip down to the third bullet  
8           under the Hwlitsum submission, being the community  
9           discussions, and I've talked about -- a bit about that  
10          this morning, so I won't say much more. Community  
11          engagement hearings in our submission are essential --  
12          are critical for proper consultation, and that I would  
13          submit would also require capacity for First Nations,  
14          not just here but those that are not here and wish to  
15          be consulted. And one of the -- in order to have  
16          meaningful hearings at a community-based level, First  
17          Nations in the communities who wish to be consulted  
18          need to have some capacity to understand what's going  
19          on and be prepared so that we can have effective  
20          community-based hearings. So there's going to be a  
21          capacity issue to look at there -- a capacity funding  
22          issue.

23                       And again, that may be something that can  
24          be done collaboratively with the First Nations here in  
25          helping to assist other communities that wish to  
26          participate.

1                   So again, as we've said in our written  
2                   submissions, and I'm -- we're prepared to try to work  
3                   collaboratively to try to achieve some of these  
4                   things.

5                   The last couple of points that we mentioned  
6                   that don't overlap with the Hwlitsum submission are a  
7                   separate consultation and accommodation section of the  
8                   hearing. So ultimately when the Commission comes to a  
9                   hearing, it's our submission that a portion of it  
10                  should be devoted specifically to dealing with these  
11                  kinds of issues. So that there's real focus on the  
12                  aboriginal issues. And testing the First Nation  
13                  generated scenarios, not just by other First Nations  
14                  but all the participants here and the Commission.

15                  And finally, as Mr. Devlin mentioned, a  
16                  draft -- circulation of draft reasons in order to  
17                  provide the parties with an opportunity to comment.  
18                  And it may seem a little unusual to do that. But I  
19                  think there's a couple of analogies to providing draft  
20                  reasons and receiving submissions on them. One is,  
21                  it's done frequently in the courts with jury  
22                  instructions, which are circulated to Crown and  
23                  defence counsel prior to being delivered.

24                  But more importantly, and this is a little  
25                  bit anecdotal, but in the *Squamish Nation Garibaldi*  
26                  case that's been referred to a couple of times here,

1 Madam Justice Konigsberg did that approach in trying  
2 to bring the parties together through a consultation  
3 and accommodation, even in the face of litigation,  
4 where she sort of gave her initial thoughts and asked  
5 for submissions on it before finalizing a decision.  
6 So that can be quite a helpful approach to getting it  
7 right.

8 The last thing I'll say is that these are  
9 intended to be suggestions. The Commission's asked  
10 that -- in the second question, initially given for  
11 this procedural conference, for us to provide you with  
12 what we can to help you implement the duty, should you  
13 find it's there. We acknowledge it's a very  
14 challenging problem you have before you, but one that  
15 can be met.

16 **Proceeding Time 1:34 p.m. T50**

17 These are ideas, they're not exhaustive,  
18 and will certainly require some shaping over time,  
19 depending how things play out and other elements will  
20 need to come in.

21 I would say, though, with respect to our  
22 paragraph 55 and the six points there, we consider  
23 those six to be essential to any proper consultation  
24 process, and removing one would mean that in this case  
25 the duty could not be met.

26 Those are my submissions.

1 COMMISSIONER COTE: Yes, in your submissions you spoke  
2 numerous instances about First Nations scenarios. For  
3 my own understanding, could you give me some idea what  
4 a First Nations scenario would look like, and maybe an  
5 example of some of the content, without getting into  
6 any specifics?

7 MR. KIRCHNER: Right. Well, there's sort of two  
8 potential scenarios. One would be the more technical  
9 side of a power generation and transmission scenario,  
10 and that is the more technical one in subparagraph  
11 (iii), and the other kind of scenario would be a  
12 consultation and accommodation scenario. Is it one or  
13 the other that you're --

14 COMMISSIONER COTE: Well, I'm sorry. It's the first one.  
15 When you talk about a technical one, there is a set of  
16 scenarios being developed by B.C. Hydro where they're  
17 going to have an open system for taking input and  
18 whatnot.

19 MR. KIRCHNER: Right.

20 COMMISSIONER COTE: And I'm wondering what would be so  
21 much different -- I'm trying to figure what would be  
22 different from a First Nations one.

23 MR. KIRCHNER: Well, it's a difficult question to answer  
24 because it really comes from the First Nations  
25 themselves. But part of the problem that we say  
26 exists here is that everything is being generated from

1 -- and I'm not trying to avoid your question, but  
2 everything is being generated from the side of Hydro,  
3 of Transmission Corporation, that nothing is coming  
4 from First Nations. And I don't like the word  
5 "organic", but there's sort of no organics in a First  
6 Nations scenario that's coming forward.

7 If a First Nation or a group of First  
8 Nations brought forward a scenario, it may look very  
9 very different. We simply don't know at this point.  
10 It's from their perspective. And so it turns things  
11 around. Rather than everything coming up from the  
12 non-First-Nations side, this comes from a very  
13 different perspective and really involves First  
14 Nations very much from the ground up in developing the  
15 kinds of scenarios that the Commission will be looking  
16 at.

17 So I wouldn't want to say what it might  
18 look like now because I suspect it would be generated  
19 from a very different kind of thought process and  
20 different priorities and different objectives.

21 COMMISSIONER COTE: Okay, thank you.

22 THE CHAIRPERSON: I have one more question, Mr. Kirchner.  
23 Going back to your list of ideas in paragraph 55 of  
24 your submission C98-2, and a number of times you have  
25 mentioned the capacity funding, and you know and we  
26 all know now there are sort of two sources or two

1 avenues for capacity funding. One is through B.C.  
2 Hydro, and then with the recall of capacity funding,  
3 but it's Commission funding. And you are familiar  
4 with this letter that B.C. Hydro filed recently, which  
5 I believe that B2-9 is the exhibit number. And there  
6 is section 1.2 on page 3 of that document which  
7 provides funding for studies and technical reviews and  
8 related criteria.

9 MR. KIRCHNER: I don't have it in front of me.

10 THE CHAIRPERSON: Can somebody give you my document?

11 MR. KIRCHNER: I do recall that, yes.

12 THE CHAIRPERSON: Yes. So if you go to page 3 then.

13 MR. KIRCHNER: Page 3 of the letter?

14 THE CHAIRPERSON: Yes. Attachment, sorry, page 3 of 11.  
15 That's the attachment.

16 MR. KIRCHNER: 3-11, thanks.

17 THE CHAIRPERSON: Of Attachment 1. So my question is,  
18 like, let's -- if you take, for instance, your  
19 suggestion, third suggestion, which is the scenario  
20 critiques.

21 **Proceeding Time 1:39 p.m. T51**

22 MR. KIRCHNER: Right.

23 THE CHAIRPERSON: Do you see the funding for that coming  
24 through B.C. Hydro by way of this vehicle that has now  
25 been filed, or do you see that one coming through the  
26 Commission channels? And similarly, let's take

1 another example, the -- in four and five, the -- four  
2 is the consultation and accommodation modeling. And  
3 then the fifth is this -- I guess I would call it  
4 actually more these community hearings we talked  
5 about.

6 So if we take these three examples, where  
7 do you see the source of capacity funding for these?

8 MR. KIRCHNER: Well, I suppose it could potentially come  
9 from Hydro. The problem -- well, firstly, I've got to  
10 say, my clients don't accept the consultation process  
11 that B.C. Hydro's laid out, and will not be  
12 participating in it, because it -- they deem it to be  
13 entirely inadequate. So, insofar as funding there  
14 requires them to participate in it, that's not going  
15 to work.

16 But if I can answer it this way, the  
17 funding is critical, from our -- in our submission, in  
18 order to achieve the scenario critiques or scenario  
19 development. It requires, you know, a high level of  
20 expertise in matters that the First Nations simply  
21 don't have, that very few do. So it's going to  
22 require retaining of experts to work with First  
23 Nations to develop these scenarios.

24 THE CHAIRPERSON: Right.

25 MR. KIRCHNER: Where the funding comes from -- it --  
26 potentially B.C. Hydro through this or through another

1 Commission process, or potentially the Commission. I  
2 don't have the answer to put my hand on.

3 THE CHAIRPERSON: Okay, so you don't really have --

4 MR. KIRCHNER: But I do say it's critical, because if  
5 it's not there, this can't be done, and the duty can't  
6 be met. So it really is -- it's a difficult question  
7 and if -- I apologize, I should have -- I wish I could  
8 have prepared a better answer for you, and I may yet  
9 be able to do that, but --

10 THE CHAIRPERSON: I guess we accept that it is critical,  
11 but I think it would help all parties if there is  
12 sooner a better understanding where the funding comes  
13 from. And that's why I think I wanted your sort of --  
14 if you have read this B2-9, if you see it as a vehicle  
15 for applying for funding for this type of an expert.

16 MR. KIRCHNER: Well, it may be, frankly. I didn't really  
17 see it as a vehicle when I read it, because as I say,  
18 our clients have difficulty with the process. And I  
19 would suspect a prerequisite from Hydro's perspective  
20 would be we've got to be involved. But I would  
21 perhaps let B.C. Hydro speak to that.

22 THE CHAIRPERSON: Then perhaps then we'll have Mr. Godsoe  
23 speaking to that as well. Thank you. Thank you, Mr.  
24 Kirchner.

25 MR. FULTON: The Nations.

26 **SUBMISSIONS BY MS. GAERTNER:**

1 MS. GAERTNER: Madam Chair, members of the Commission,  
2 I'm going to answer 7, but I'm going to answer on the  
3 basis that we're assuming we're within a consultative  
4 process. I'm assuming that's the question, that's how  
5 Hwlitsum Nation -- Hwlitsum First Nation put those key  
6 measures forward. They were putting measures forward  
7 as to what were the types of measures the panel could  
8 use in meeting their obligation to consult, and so  
9 that's how I understand that question.

10 I frankly -- I need to say at the outset  
11 that I think it's going to remain confusing, if we're  
12 trying to answer those specific questions without  
13 knowing whether you've engaged with that obligation to  
14 consult. And if you're saying you don't have the  
15 obligation to consult, we've got a different dialect  
16 that we need to have. If you engage with the  
17 obligation to consult, we're trying to give you as  
18 many good ideas as we can as to how you can do that,  
19 and it's on that basis that my submissions to question  
20 7 are going to proceed.

21 And I will also take up the two questions  
22 that you asked of the previous speaker, if I may, but  
23 I'll do that at the end of my submissions.

24 **Proceeding Time 1:44 p.m. T52**

25 THE CHAIRPERSON: That's fine.

26 MS. GAERTNER: I don't have a lot to say. I want to

1 refer you to our written submissions, which is Exhibit  
2 97-3, because when you're looking for the different  
3 measures, what we did was take a look at the elements  
4 of consultation and what are the elements of  
5 consultation, so that when you're looking to see what  
6 you're trying to achieve, how do you achieve them.  
7 And we've summarized them for you on page 11 and 12 of  
8 our submissions, and if you'd like you can go to them.  
9 I'm just going to highlight them.

10 We've talked about them a little bit  
11 already over the course of the last two days, but any  
12 of your other measures need to be going directly at  
13 meaningful consultation. Consultation is not just an  
14 information-gathering process. It's an information-  
15 gathering process that is to meaningfully inform the  
16 accommodation. So you're not just trying to create a  
17 great way of seeing how many people -- like how many  
18 people you can check off the list, and how many people  
19 have responded. You're really trying to get  
20 meaningful engagement as best as you can, and you can  
21 see from the First Nations that have already engaged,  
22 we're trying to do that. We're trying to respond as  
23 substantively as we can to your questions.

24 We also say consultation does and will in  
25 these circumstances require a unique process, and  
26 we've talked to you about those.

1                   The one that I want to emphasize next is  
2                   that consultation and accommodation is an ongoing and  
3                   interactive basis. Now, the previous speaker  
4                   suggested that he didn't like the word "organic".  
5                   Perhaps because I'm a gardener, I very much like the  
6                   word "organic", and I use it a lot at -- when working  
7                   with Crown actors around consultation. Because you  
8                   can't assume at this stage of the process that you are  
9                   going to know everything you're going to need down the  
10                  road. It's way too difficult. You're setting  
11                  yourself up for way more of a task than you need.

12                  You need to know at this stage of the  
13                  process what's the best footing from which to go  
14                  forward. How do we best assume right now -- how do we  
15                  start on the right foundation? And as we go forward  
16                  and we learn what we need to learn about the scenario  
17                  developments, about all of those things, how do we  
18                  remain flexible so we can adjust that process? And  
19                  that's an extremely important thing, because if you  
20                  stay -- if you think we're going to put consultation  
21                  in a box, and halfway through this process we learn a  
22                  lot of different things that that means that box is  
23                  very uncomfortable, if we stay in that box and the  
24                  process may end up being bankrupt, but if we remain  
25                  flexible, then at the end of the day we've reached  
26                  what the courts say is required, which is substantive

1           consultation. Not process consultation. At the end  
2           of the day, we're trying to get to substance, not a  
3           really good process.

4                       And so it's extremely important, in my  
5           view, and it -- I think it's helpful. I think it  
6           somewhat takes away the fears. What if we don't get  
7           it wrong, we've got to think about all the things we  
8           possibly need from here till the end of our process,  
9           all of that. We're not suggesting you do that.

10                      What we did, in our submission, and I'm  
11           going to go again to it, we said, "Here's the two  
12           foundations you have to start with." I've already  
13           spoken to that this morning, I'm not going to repeat  
14           myself, but it's the panel and get your -- you're off  
15           the ground right with respect to developing a  
16           consultation that puts you in at the communities, at  
17           the regional level and at the provincial level.

18                      It has to be timely and effective, and  
19           that's why we say you can't wait till a later time to  
20           start, you must start now. Our core -- the core  
21           objective has to be reconciliation. And at the end of  
22           the day, you need to show that our -- the First  
23           Nations concerns and interests have been considered  
24           and of course adequate resources have to be put into  
25           place, and there's references to case law with respect  
26           to that.



1           The scenario developments that I'm imagining or we're  
2           imagining at this point in time start with the title  
3           and rights, the exercise of title and rights by  
4           aboriginal people and the Nations that we represent,  
5           and that includes looking at what resource  
6           developments they will see and are possible and not  
7           possible within their territories. I think it's  
8           extremely important not to assume resource development  
9           on the basis of what third party proponents may be  
10          proposing. First Nations definitely have a view and  
11          have a right to determine how their lands and  
12          resources will be used. And so their views on what  
13          demands for generation of electricity will be  
14          necessary within their territory. Their views on what  
15          resources, i.e. land or otherwise would be available  
16          for generation of electricity will also be extremely  
17          important. And their views on what lands are  
18          available for transmission lines will also be  
19          extremely important for the development of these  
20          scenarios.

21                           And in my view, inherent in B.C. Hydro and  
22          BCTC's work in the past are views that they carry as  
23          the service provider for the Province of British  
24          Columbia. Those are not views that all of the First  
25          Nations carry, and they're definitely not views that  
26          First Nations always agree with. And so those

1 scenario developments are going to be extremely  
2 important and they'll need to be independent of B.C.  
3 Hydro and BCTC's processes.

4 Now, on my feet, as I was considering the  
5 issue of scenario development and what could occur,  
6 and I will need -- I'll reserve time to think about  
7 this more but I just wanted to give you the idea,  
8 which is that as you know, I pointed out this morning  
9 that you also have powers to introduce mediative  
10 processes into this. It may be that in this scenario  
11 development, that may be a useful place. Once the  
12 independent work has been done by First Nations on  
13 scenario development and the work of B.C. Hydro and  
14 BCTC have been developed, it may be a very useful  
15 place for mediative assistance, to see if we can  
16 identify the differences quickly and see what the  
17 options on those differences are, and get that  
18 information developed.

19 But we're going to have to make sure First  
20 Nations are standing on the footing that they feel  
21 provides them an equal playing field, which gives them  
22 an opportunity to fully have looked at the options  
23 they see are available given their values and  
24 judgments around their territories. And so it may be  
25 that it's a two-pronged step or a three-pronged step,  
26 but it might be an area that could be very useful.

1           And so again that was just listening to the two days  
2           of submissions that I have, and trying to think of  
3           ways in which we can move this forward.

4                       I think the remaining different ideas that  
5           we set out in our written submissions on page 16 I've  
6           spoken to already earlier in this engagement.

7                       I don't really have any other ideas at this  
8           stage, or we don't really have any other ideas. It's  
9           extremely important from our perspective that the  
10          terms of reference for the Panel and the proposed  
11          consultative process that would be used would be open  
12          for engagement by all the intervenors so that we can  
13          ensure that the best way forward is put before you.  
14          If you are to generate the first drafts of these terms  
15          of reference, for example, and the first draft of the  
16          process, we would want an opportunity to review it and  
17          respond and engage. And of course, as the process  
18          proceeds, if we are proceeding on the basis that it's  
19          a consultative process, we will put forward to you  
20          other ideas as they come, as we see them necessary as  
21          they unfold. Those are my submissions.

22                      Oh, I had -- sorry, I'm sorry, I didn't  
23          answer your questions about costs, I'm sorry. I would  
24          like to speak to that. I think your question really  
25          shows the difficulty around parsing this consultative  
26          process up, and being unclear who's responsible for



1           once we know that you've fully engaged with your  
2           obligation.

3 THE CHAIRPERSON:     Thank you very much, Ms. Gaertner.

4 MR. FULTON:       Haisla Nation and Weiweikei Nation.

5 **SUBMISSIONS BY MS. GRIFFITH:**

6 MS. GRIFFITH:     Madam Chair, Commission Panel, my comments  
7           will be brief.

8                     I'd like to generally adopt the submissions  
9           of the Treaty 8 Tribal Association and the Nations,  
10          and in particular I'd like to adopt the comments about  
11          the flexibility of the process as it evolves. I refer  
12          you to my -- to our submissions on pages 18 to 22. We  
13          also set out the elements of meaningful consultation,  
14          and then ways in which those elements can be met. But  
15          as Ms. Gaertner put so eloquently, the process will  
16          change as it evolves, as it proceeds, and as  
17          information comes to light.

18                    The process that we envision entails an  
19           iterative process with respect to potential  
20           determinations. What types of determinations might  
21           the Commission be considering? And that -- what those  
22           determinations might be will influence the way that a  
23           consultation process unfolds. So I just wanted to  
24           make that point that it's critical to stay flexible,  
25           in a flexible process, as it proceeds.

26                    Subject to any questions, those are my

1           submissions.

2   THE CHAIRPERSON:    Okay, thank you, Ms. Griffith.

3   MR. FULTON:       Shuswap Arrow Lakes Division, and the  
4           Splats'ln First Nations.

5   **SUBMISSIONS BY MS. LEBOURDAIS:**

6   MS. LEBOURDAIS:    Wej kukqai.

7   In response to question number 7, at first I thought that  
8           it was just directed to the Hwlitsum First Nation.  
9           However, given everybody else's comments, I have  
10          decided to put in my two bits. And I would like to  
11          suggest that the Commission look at consultation not  
12          so much as a duty but as an opportunity. And we  
13          welcome the opportunity to work together to you to  
14          develop a consultation process, which may include but  
15          not be limited to the key measures that were  
16          identified in paragraph 13 of -- that question number  
17          7 is referring to.

18                    I've heard you speak to the First Nations  
19                    scenarios, and what the reality might be if we were to  
20                    develop similar types of scenarios for ourselves.  
21                    Having gone to the BCTC workshop here in Vancouver,  
22                    there was a modeling technique that was done that was  
23                    looking at power needs at possibly the U.S. and  
24                    Alberta borders. And during that modeling, it was  
25                    explained to us that they looked at a number of  
26                    different policies, and those policies, for example,

1           could be Washington State's or Oregon State's  
2           greenhouse gas emission targets, and how different  
3           policies that they may have or targets that they may  
4           have may either enhance or reduce that demand at the  
5           border.

6                           It was noted at this workshop that there  
7           was no inclusion of any aboriginal policies, any  
8           aboriginal input, or any of our title and rights  
9           information. And that can be something -- or that is  
10          something that I think does need to be looked at.

11   **Proceeding Time 1:59 p.m. T55**

12   So for example, if you're looking at  
13          the transmission of electricity from one region to  
14          another, it'll be really important to know whether or  
15          not within that region there is a nation that has  
16          signed a modern treaty. That's going to have an  
17          already defined -- possibly an already defined set of  
18          information on how they're going to deal with  
19          transmission, electrical transmission through their  
20          traditional territories.

21   You may be dealing within our nation, for  
22          example, on unseated and surrendered lands that have  
23          never been treated and with a group that is not in  
24          the treaty process any more, and that modelling those  
25          different types of ideas would show you a lot of  
26          different scenarios in terms of, you know,

1 cost/benefit analysis and the fact that it might be a  
2 lot more complex in that type of a situation.

3 So for example, in our area, what we  
4 propose to do and what we will be applying for funds  
5 to do would be a cumulative model, and a cumulative  
6 model that will allow us to take a look at what  
7 transmission lines do we have and right of ways do we  
8 have in our traditional territory already? What other  
9 types of developments are already exerting their  
10 effects on our traditional territory, on our  
11 resources? And can we realistically look at the  
12 implementation and another pressure from further  
13 transmission lines on our area, on our traditional  
14 territory? And that is something that I think that  
15 you would need to hear.

16 In essence, we need to find out whether or  
17 not putting another transmission line, or putting more  
18 pressure on our area, literally turns into the straw  
19 that broke the camel's back. And the reality is we  
20 just don't know right now.

21 In reference to the capacity-building  
22 funding, capacity funding is provided and it was  
23 submitted as evidence by B.C. Hydro. Part of that  
24 capacity funding is to attend the B.C. Hydro  
25 workshops, the regional workshops. So you can be  
26 compensated for your time and your travel to go to

1       those workshops. Again, I really do feel that those  
2       workshops are a one-way street. They're very good for  
3       information sharing where we can receive information  
4       from them, but when you leave a workshop and you have  
5       a two-page questionnaire that you're supposed to fill  
6       in, and if you submit your comments you go in a  
7       raffle, that probably isn't really what consultation  
8       should be made up of.

9               Also, they do have the request in there for  
10       funds -- proposals for technical studies, and within  
11       the document itself it says and I'm quoting from  
12       section 1.2 from their document:

13               "It is currently anticipated that capacity  
14               funding will be provided for a limited  
15               number of studies to be commissioned by  
16               First Nations, and also for First Nations to  
17               have access to technical experts to review  
18               and comment..."

19       and here's the focus,

20               "...on submissions and evidence to be  
21               submitted by B.C. Hydro and B.C.  
22               Transmission Corporation during the  
23               inquiry."

24               And then in assessing those proposals and  
25       on bullet number 2, one of the criteria that's to be  
26       used when assessing whether or not they're going to

1 fund these proposals is  
2 "...the relationship to B.C. Hydro or B.C.  
3 Transmission Corporation's evidence. Would  
4 the proposed study provide additional  
5 information or material that would be  
6 relevant to the proposed evidence of B.C.  
7 Hydro or B.C. Transmission Corporation?"

8 So that funding is very much funnelled  
9 towards studies, information, will only be funded if  
10 it serves their evidence and their submissions.

11 No further questions. I'm finished, thank  
12 you.

13 THE CHAIRPERSON: Thank you, Ms. Lebourdais.

14 MR. FULTON: Sto:lo Tribal Council.

15 **SUBMISSIONS BY MS. HEASLIP:**

16 MS. HEASLIP: I just very briefly want to the support the  
17 submission that the Shuswap Arrow Lakes Division, and  
18 note that we had made the same concerns with the  
19 capacity funding letter from B.C. Hydro.

20 **Proceeding Time 2:03 p.m. T56**

21 THE CHAIRPERSON: Thank you, Ms. Heaslip.

22 MR. FULTON: Independent Power Producers' Association of  
23 British Columbia.

24 **SUBMISSIONS BY MR. AUSTIN:**

25 MR. AUSTIN: The IPPBC is not answering question 7  
26 because it's not directed to it, but in a sense what

1           it's doing, it's doing its reply to First Nations  
2           because of the -- order of the process.

3                         What the IPPBC has heard this afternoon is  
4           a lot of frustration in terms of dealing with  
5           transmission planning. And the IPPBC appreciates the  
6           frustration that the First Nations are encountering in  
7           dealing with transmission planning, because it's a  
8           very complex area. It's very technical, and through  
9           experience in the past, the IPPBC has found at least  
10          the Utilities Commission's participant assistance cost  
11          award system to be rather awkward in terms of  
12          providing the certainty that's necessary to engage  
13          experts and properly participate in a process.

14                        There are ways that that can be improved,  
15          whether it's through the Commission's participant  
16          assistance cost award process or through the capacity  
17          funding that B.C. Hydro is offering. So I would think  
18          that it's really not a question of the Commission's  
19          duty to consult First Nations. It's just -- it is a  
20          question of trying to make whatever process is being  
21          used more flexible and something that will work for  
22          First Nations. So I think there's a big distinction  
23          there between concerns about the funding and its  
24          relation to any duty that the Commission has to  
25          consult. So I think that distinction has to be drawn.

26                        And what I also heard from First Nations is

1           that they want cost studies done, and there's  
2           technical scenarios that have to be done. And in  
3           response to questions 1 and 2, the IPPBC, through  
4           experience, has found out that the best place to start  
5           for those types of studies would be with BCTC and B.C.  
6           Hydro. And if we look back at this concept of  
7           consultation, what benefit would there be to First  
8           Nations in bringing its concerns about cost studies or  
9           technical studied [*sic*] forward to the Utilities  
10          Commission pursuant to a duty to consult?

11                        The IPPBC doesn't see any benefit  
12          whatsoever. So in this particular instance, unlike  
13          most of the cases -- or any of the cases that have  
14          been cited, we've got three representatives of the  
15          Crown. We have the B.C. Utilities Commission, and  
16          then we have BCTC and B.C. Hydro. There is a duty to  
17          consult, but it would seem that the best -- or it's  
18          not "seem". The best parties to do this consultation  
19          with First Nations or B.C. Hydro and BCTC, because at  
20          the end of the day we're going to engage in a  
21          technical process whether we like it or not.

22                        The transmission of electricity is governed  
23          by the laws of physics, and no matter how we try to  
24          move away from that and how complicated it is, it's  
25          not going to change. And the IPPBC is in the same  
26          position, to a large extent, that the First Nations

1 are in being able to come to terms with this, and come  
2 to terms with it in terms of resources. The advantage  
3 it has is through the passage of time and  
4 participation, there's been some self-learning, is  
5 what it really comes down to.

6 So if there's anything the Commission can  
7 do, and not in a sense its duty to consult, to assist  
8 the First Nations in moving up that learning curve so  
9 that they can participate in the Commission's process,  
10 that would be exceptionally helpful.

11 And those are the IPPBC's submissions,  
12 subject to any questions.

13 THE CHAIRPERSON: Thank you, Mr. Austin.

14 MR. FULTON: Energy Solutions for Vancouver Island  
15 Society *et al.*

16 **Proceeding Time 2:08 p.m. T57**

17 **SUBMISSIONS BY MR. BERTSCH:**

18 MR. BERTSCH: Good afternoon, Panel.

19 I'd like to look at question 7 literally,  
20 as in the question is to elaborate on other key  
21 measures described in paragraph 13. Looking at  
22 paragraph 13, and I'd like to concentrate on the first  
23 item, being the development of First Nations scenario,  
24 and given the wording of this I think most of my  
25 points will be questions that I'll look for answers in  
26 reply, just the way it's worded. So I will try to put

1 out the questions and wait for the reply for those  
2 questions.

3 If I look at the development of First  
4 Nations scenario, it may be a small point but it does  
5 become a significant point when you look at it in  
6 context, and that is I'm not sure if it's "a" or "the"  
7 or "several". There has been evidence put forward  
8 that a limited number of scenarios is important, and  
9 so I think it would be important to understand are we  
10 talking about one or several, and if it is several,  
11 how many we might be talking about.

12 The second question that we have is we talk  
13 about the First Nations scenario or scenarios, and  
14 we've heard evidence of 203 nations. I would be very  
15 interested to hear how the decision would be made in  
16 putting together the First Nation scenarios.

17 In the workshop which I went to as well on  
18 August 5<sup>th</sup> for scenarios, there was seven scenarios  
19 that were laid out, and one of the questions is the  
20 one or several scenarios, are those seen in addition  
21 to the seven, or substitute for some of the scenarios  
22 that are there?

23 The workshop also came up through an  
24 exhaustive process that you heard earlier, talking  
25 about the drivers, which then formulate the scenarios.  
26 One of the questions that I'd like to pose is, are the

1 First Nations proposing that those drivers also be  
2 changed, not just the names of the scenarios but the  
3 drivers driving those?

4 Our fifth question is, what is missing in  
5 the process right now specifically in the First  
6 Nations sending in their -- there is a 28 slide page  
7 or slide document. And so the question is, on August  
8 12<sup>th</sup> there was a deadline provided for input, and the  
9 question is, has the First Nations submitted some  
10 comments based upon that? It may be that they  
11 disagree with what's there, but it would be very  
12 interesting to hear from the First Nations on how they  
13 have responded to what's on the record.

14 Another question is when we talk about the  
15 scenario development, I'd be interested to hear  
16 specifically what the First Nations plan on doing as  
17 far as accomplishing that. Are they going to be  
18 hiring experts, and if so, what will that process be?

19 The other question is, in the scenario  
20 development, should it from a First Nations point of  
21 view -- I talked earlier about the drivers. Should it  
22 change the drivers that all the scenarios are put  
23 back? Would that then affect all of the other  
24 scenarios? So I'm trying to look at, if we have a  
25 First Nations scenario with certain drivers or  
26 important aspects of it, would that work be intended

1 to then drive back and change the other six or seven  
2 scenarios that are being developed? I would like some  
3 discussion on how those would link together if they  
4 would.

5 And I would like to also reiterate, and I  
6 know this is not a question related to but it has been  
7 brought up, relating to the uncertainty of PACA. And  
8 those are my comments.

9 THE CHAIRPERSON: Thank you, Mr. Bertsch.

10 MR. BERTSCH: Thank you.

11 MR. FULTON: Commercial Energy Consumers Association of  
12 British Columbia.

13 **SUBMISSIONS BY MR. WEAVER:**

14 MR. WEAVER: Thank you, Mr. Fulton. I had also not  
15 intended to speak to question 7 on its own, so I'm  
16 just responding to the issues raised by primarily the  
17 First Nations counsels, because there was a bit of a  
18 reargument of the question, whether there's an  
19 independent duty to consult, and we made our position  
20 known in earlier comments.

21 **Proceeding Time 2:14 p.m. T58**

22 But the fact of the matter is, we are  
23 encouraging a fulsome engagement with First Nations.  
24 And so the proposals put forward by the Hwlitsum First  
25 Nation as well as others, we think do need to be  
26 developed further and do need to be incorporated into

1           this process. The detail of that, there will be more  
2           discussion on that in response to question 8, but we  
3           -- whether the Commission determines that it has an  
4           independent duty to consult or not, we say as  
5           ratepayers we need to deal with this issue and get a  
6           good understanding of what the implications of the  
7           issues are. So, we are -- we remain open to the  
8           dialogue and open to encouraging a more fulsome  
9           engagement.

10                           Those are my submissions.

11 THE CHAIRPERSON:    Thank you, Mr. Weafer.

12 MR. FULTON:        British Columbia Old Age Pensioners'  
13                    Organization *et al.*

14 **SUBMISSIONS BY MR. QUAIL:**

15 MR. QUAIL:        We endorse what Mr. Weafer's just said, and  
16                    have nothing to add.

17 THE CHAIRPERSON:    Thanks, Mr. Quail.

18 MR. FULTON:        British Columbia Sustainable Energy  
19                    Association *et al.*

20 **SUBMISSIONS BY MR. ANDREWS:**

21 MR. ANDREWS:        I'm not going to reiterate the BCSEA *et*  
22                    *al*'s position regarding the independent duty, but I  
23                    guess my main point is that the -- much of the other  
24                    measures that are proposed, I believe, fit within the  
25                    context of whether the Commission decides it has an  
26                    independent duty or does not. And I will address it

1 on the assumption that it does not, because for me  
2 that's easier, conceptually, and I don't mean by that  
3 to be purporting to say that what I have in mind  
4 responds to the request for independent duty to  
5 consult.

6 In a nutshell, a lot of what is described  
7 regarding First Nations scenarios and First Nations  
8 cost/benefit analysis is what would otherwise be  
9 called evidence development within the BCUC-type  
10 terminology. And BCSEA totally supports the First  
11 Nations in their efforts to develop evidence that they  
12 believe is material and relevant to the proceeding.

13 They've raised the question of the funding  
14 for it, and likewise we agree that that's critically  
15 important. I do note that the PACA -- the Participant  
16 Assistance Cost Award guidelines do have a provision  
17 for advance approval of funding in certain  
18 circumstances, and that might be appropriate.

19 Another aspect of PACA that I do agree is  
20 problematic is the after-the-fact nature of the  
21 funding, which has two core problems to it. One is  
22 simply that the money doesn't arrive until after the  
23 activities have occurred, but the other is, of course,  
24 the risk of an unfunded liability for the work that  
25 was done participating in the proceeding. We're very  
26 sympathetic with that, and anything that the

1 Commission can do that will respond to that, I  
2 suggest, would make the First Nations participation  
3 much more effective and efficient.

4 Subject to any questions, those are my  
5 submissions.

6 THE CHAIRPERSON: Thank you, Mr. Andrews.

7 MR. FULTON: Joint Industry Electricity Steering  
8 Committee.

9 **SUBMISSIONS BY MR. BURSEY:**

10 MR. BURSEY: Thank you, Mr. Fulton. Good afternoon.

11 Uncharacteristically, I only have a few  
12 comments, which should cut down on the reply, if this  
13 morning was any indication.

14 I was looking at the key measures outlined  
15 in Hwlitsum submission in paragraph 13, and I agree  
16 with Mr. Andrews, these three measures are available  
17 to the Commission whether you're engaged in an  
18 independent duty to consult or whether you're just  
19 following the normal Commission practice. And the  
20 first one, the development of a First Nations scenario  
21 and the independent expert cost/benefit analysis, the  
22 second one, they require still more elaboration of  
23 exactly what is meant by that, because I'm not sure  
24 that I've heard enough to help me understand the  
25 content. But my understanding is less important. I  
26 think it's your understanding which is the key here.



1 is available to the First Nations to try to develop  
2 this evidence, develop the case for how they want to  
3 do it and whether it's to ask questions of B.C. Hydro  
4 to adjust the models that they have, or develop an  
5 independent presentation to the Commission. And  
6 that's something, I guess, for later on.

7 Thank you. Any questions?

8 THE CHAIRPERSON: Thank you, Mr. Bursey.

9 MR. BURSEY: Thank you.

10 MR. FULTON: First Nations Energy and Mining Council.

11 **SUBMISSIONS BY MR. DIMITROV:**

12 MR. DIMITROV: Good afternoon, Madam Chair and Panel  
13 members.

14 We generally adopt the submissions by  
15 Hwlitsum and Toquaht Nation. To commence, though, we  
16 want to talk about Exhibit B2-9 which was filed by  
17 B.C. Hydro. We have stated previously that -- well,  
18 although we're praiseworthy of this effort, we do say  
19 that it does not discharge the Commission's or B.C.  
20 Hydro's duty to consult in a lawful manner with First  
21 Nations. Goes part of the way there, but --

22 In looking at this particular document I  
23 want to bring some matters to your attention. You  
24 asked what will be the source of funds? Page 1 of the  
25 document under section 1 states:

26 "B.C. Hydro will not be providing capacity

1 funding for First Nations to participate  
2 directly in the Commission's inquiry, which  
3 is distinct from the consultation on the  
4 submissions and evidence of B.C. Hydro and  
5 B.C. Transmission Corporation."

6 So that's pretty clear for you there.

7 Interestingly enough, on that first page as  
8 well, we note that -- and my friend from Hydro can  
9 correct me if I'm wrong, that this capacity funding  
10 for studies and technical reviews was developed as a  
11 consequence of -- they call it a consultation plan. I  
12 guess this is part of that consultation plan. We  
13 would say to you that with respect to development of  
14 that plan, that this is one aspect of it.

15 There's something here that we wanted to  
16 bring to your attention which is an error, in case you  
17 read it. At page 3 in the third paragraph, it notes  
18 that:

19 "B.C. Hydro and BCTC have provided capacity  
20 funding to the First Nations Energy and  
21 Mining Council to participate in the  
22 consultation process..."

23 that means the B.C. Hydro process,

24 "...and to undertake technical and legal  
25 reviews of B.C. Hydro and B.C. Transmission  
26 Corporation evidence in the submissions."

1 It states that:

2 "The FNEMC have retained technical experts..."

3 And that we have, it's InterGroup,

4 "...to undertake a review of the evidence and  
5 information provided by B.C. Hydro and BCTC  
6 to the inquiry. The FNEMC will make the  
7 reviews available to First Nations..."

8 Which we shall do, but the next part,

9 "...and provide technical support for First  
10 Nations."

11 We will not be doing that. We don't have  
12 the capacity to do that, but what we will be doing, we  
13 will be assisting First Nations to respond to the  
14 request to develop proposals and sharing our analysis  
15 of B.C. Hydro, BCTC information, helping First Nations  
16 identify deliverables in their proposals, and items  
17 like that.

18 **Proceeding Time 2:24 p.m. T60**

19 But we don't have the specific capacity to  
20 provide technical support for First Nations, we  
21 haven't got that kind of technical expertise. So I  
22 thought I would bring those matters to your attention.

23 Now, with respect to other possibilities or  
24 other ideas, or the key measures, we propose that if  
25 the Commission decides it has an independent duty to  
26 consult, then some of the key measures that it could

1       develop are as follows. Well, of course, there's the  
2       development of terms of reference in collaboration  
3       with First Nation intervenors of this advisory panel,  
4       the draft of which would be posted and transparent for  
5       all others to comment on.

6               Secondly, it's suggested -- with the  
7       suggestion of the First Nations advisory panel and the  
8       submissions of First Nation intervenors, we could  
9       develop a consultation and accommodation protocol, a  
10      protocol that will look at both procedural and  
11      substantive consultation aspects.

12             We submit that the obligation to consult  
13      with First Nation being a constitutional imperative is  
14      a significantly higher priority than meeting the  
15      inquiry deadline for the draft report of June 30<sup>th</sup>,  
16      2010. And if circumstances require extra time, the  
17      Commission could request that, and if reasonable, and  
18      with the support of other intervenors, we would think  
19      that the government would possibly grant an extension  
20      of time. But that the priority is to meet that  
21      constitutional imperative, and it can't be done by  
22      June 30<sup>th</sup>, we think it's incumbent to at least make the  
23      effort to ask for that extension.

24             With respect to the matter in the tor that  
25      30 days are available for comment on the draft report,  
26      we note that for our perspective that's insufficient.

1           The B.C. Environmental Assessment office provides a  
2           45-day period for comments on its decisions respecting  
3           scope. So we would suggest at minimum 45 days,  
4           preferably 60 days' comment period following the  
5           publication of your draft report.

6                       With respect to funding, capacity funding,  
7           we would require and submit to you that a periodic  
8           interim release of monies, so that First Nations can  
9           attend the inquiry on a regular basis and be placed  
10          more on a level capacity playing field with B.C. Hydro  
11          and BCTC. So, interim funding doesn't mean once every  
12          four months or six months but perhaps bi-monthly,  
13          something like that.

14                      We submit that the existing PACA guidelines  
15          are informative but should not be determinative with  
16          respect to your policies that you may develop with  
17          regard to funding First Nations in that regard.

18                      Now with regard to capacity funds, we would  
19          submit to you that capacity funds are needed so that  
20          B.C. First Nations intervenors working collaboratively  
21          with -- can directly provide to the Commission and to  
22          B.C. Hydro and BCTC a separate evidentiary stream of  
23          value, value-added information, such as First Nations  
24          characteristic or filtered information to be layered  
25          on top of B.C. Hydro's and BCTC maps and scenario  
26          modeling. Characteristic or filter information that

1 reflects First Nation concerns respecting their  
2 territories. Their concerns respecting accommodation  
3 and matters like that.

4 Also, monies are required perhaps for  
5 individual First Nations to critique the E3 export  
6 demand scenario and provide their own perspectives on  
7 whether or not -- whether or how to respond to export  
8 demand. They need capacity funding to present their  
9 views on sustainability elements respecting generation  
10 and transmission planning.

11 The B.C. First Nations Energy and Mining  
12 Council support those First Nations who have the  
13 intent to obtain capacity funding to do their own  
14 technical scenario modeling. It's something beyond  
15 the Energy and Mining Council's capacity, and we  
16 ourselves at this time do not have any intent to do  
17 that.

18 Now, the other thing that I want to bring  
19 to your attention with respect to other key measures,  
20 we perceive that there will be a need to modify the  
21 confidentiality provisions of the Commission to  
22 protect access to, use of, and circulation of some  
23 aspects of First Nations evidence, some of which could  
24 be very sensitive. For example, I've spent -- well,  
25 many years, actually, at a local level working with  
26 First Nation communities doing impact assessments.

1 Two and a half years with one First Nations community  
2 in the Yukon Territory.

3 **Proceeding Time 2:29 p.m. T61**

4 And I know that it was a completely  
5 confidential process that we undertook for two and a  
6 half years that identified key areas of hunting, of  
7 fishing, of gathering, cultural sites, et cetera, and  
8 this is highly sensitive information. If it were to  
9 be circulated and made available to the public, those  
10 who are in the hunting and fishing community could  
11 then gain access to sites that would prejudice the use  
12 of those territories by First Nations.

13 So there needs to be, in our view, some  
14 modification of the confidential provisions that the  
15 Commission relies upon, because we understand that  
16 counsel can make application to have streams of the  
17 evidence made available to them, and we would need to  
18 know -- have in this consultation and accommodation  
19 protocol some safeguards for the protection of  
20 sensitive information. It's sometimes called  
21 traditional use information, as well as traditional  
22 ecological knowledge, and some of it is knowledge  
23 respecting plants, et cetera, and animal movements and  
24 all these kind of things.

25 These are our submissions and if there's  
26 any questions I'll take them.

1 THE CHAIRPERSON: Thank you, Mr. Dimitrov.

2 MR. DIMITROV: You're welcome.

3 MR. FULTON: FortisBC.

4 MR. McDONELL: I have no submissions on question 7, thank  
5 you.

6 MR. FULTON: British Columbia Hydro and Power Authority.

7 **SUBMISSIONS BY MR. GODSOE:**

8 MR. GODSOE: Just a general housekeeping matter. I knew  
9 this would happen. There was a request to break  
10 question 7 out from question 8, and with all due  
11 respect, several First Nation participants strayed  
12 into question 8.

13 So what I'm not going to address as part of  
14 question 7 is the advisory panel issue. I'm not going  
15 to address separate sections for hearings, which were  
16 put forward by the Squamish First Nation. I'm not  
17 going to comment on the request from Squamish Nations  
18 to comment on reasons, though I note paragraphs 11 and  
19 12 of the terms of reference I think are a complete  
20 answer to that. I want to leave that to question 8.

21 So obviously fair game for me to address  
22 the development of First Nations scenarios and I will  
23 do that as part of this question. Also fair game for  
24 me to address what are called First Nation community  
25 discussion forms or additional regional hearings of  
26 regional sessions. I think probably fair for me to

1 address capacity funding, as it seems to be so  
2 intertwined with everything. I would prefer to deal  
3 with the B.C. Hydro/BCTC parallel process as part of  
4 question 8. I don't see it in question 7, but I'm in  
5 your hands on that one.

6 THE CHAIRPERSON: I think we can wait until question 8.

7 MR. GODSOE: I will promise not to use the term  
8 "striptease", I promise.

9 Okay, so working backwards, let me first  
10 deal with First Nation community discussion.

11 Sorry, let me make some general comments.  
12 I agree with Weiweikei. I agree with the Treaty 8  
13 Tribal Association. It is imperative upon you to rule  
14 as soon as possible on your quasi-judicial status.  
15 We've outlined in Exhibit B2-7 the reasons for that,  
16 and I think you must do that because it does inform  
17 going forward. However, I strongly agree with counsel  
18 for BCSEA and counsel for JIESC and counsel for CECBC  
19 that what Hwlitsum has proposed is entirely consistent  
20 with your quasi-judicial status.

21 So let me first turn to First Nation  
22 community discussion forums, and Hwlitsum have  
23 helpfully included "that include the Commission,  
24 utilities and all interested stakeholders", and that's  
25 why I say this proposal is entirely consistent with  
26 your quasi-judicial status.



1 participant evidence and utility Information Requests.  
2 So I think you could schedule those additional  
3 sessions during that time frame. And in fact I urge  
4 you to do that.

5 I think those are my submissions on that  
6 issue. I'll now turn to the development of First  
7 Nations scenarios, and the broad question I'm going to  
8 put back to the First Nations -- and I can answer part  
9 of this question myself -- is, I'm having trouble  
10 distinguishing between inputs and filters, which I can  
11 address, and the actual scenario.

12 So let me turn to one of the filters that  
13 we are responsible for. And by way of background,  
14 you've made the decision in your scoping decision in  
15 Exhibit A-18 that First Nation interests were to be  
16 taken in account with respect to generation resources.  
17 You made it clear it wouldn't be specific projects,  
18 that's clear from the terms of reference, and that you  
19 didn't need to go through a detailed land use planning  
20 review.

21 Nevertheless, what you wanted was broad --  
22 information on broad-based concerns and issues  
23 regarding generation in First Nations territories.  
24 And B.C. Hydro fully intends to abide by that, and I  
25 don't see any need for you to make any further ruling  
26 on that.

1                   So what we plan to do as part of Stage 2 of  
2                   the consultation is to gather information on First  
3                   Nation views regarding "areas inappropriate for  
4                   development", and reflect those views in our late  
5                   November evidentiary filing. So we will have a  
6                   placeholder in a September filing, under each resource  
7                   option, and that placeholder would be filled at least  
8                   qualitatively on First Nations preferences for  
9                   generation resources. So there might be a strong  
10                  preference for clean versus gas, for example. And  
11                  that would be reflected, at least qualitatively. And  
12                  I want to underline "at least qualitatively". We're  
13                  struggling with how we would do that quantitatively,  
14                  but it will be used at least qualitatively.

15                  In addition, we will have a filtering  
16                  section in our evidence, which the first layer will  
17                  be, "Here are the areas excluded through national  
18                  parks, provincial parks, by legislation". But we will  
19                  also intend to have a filter excluding areas that  
20                  First Nations tell us they wouldn't like to see  
21                  development in. And again, that will be qualitatively  
22                  reflected.

23                  So, that is definitely one filter that we  
24                  intend to reflect in our evidence. And of course, I  
25                  reiterate again and again, we hear that the B.C.  
26                  Hydro/BCTC parallel process is in and of itself not

1 sufficient. I agree. We've been clear that First  
2 Nations can make their views directly known to you  
3 through community hearings or through the regulatory  
4 review process. I'm just telling you what we're going  
5 to do as part of our parallel process.

6 Moving beyond that, I am not -- B.C. Hydro  
7 is not opposed in principle to a First Nations-  
8 specific demand scenario or First Nations scenario,  
9 but I'm struggling to better understand what that is.  
10 I need to be a bit clearer on the evidentiary break  
11 between B.C. Hydro and BCTC, and I think we need to do  
12 a better job of explaining that to First Nations and  
13 frankly to everybody.

14 What B.C. Hydro is providing is largely  
15 input. So we've already discussed the generation  
16 resources. We will also be providing a load resource  
17 balance. There will be a low-load, for example, a  
18 mid-load, a high-load. I'm not going to tell you  
19 exactly what scenarios will be built around that, but  
20 we'll be interested to hear from First Nations -- I  
21 think we have a general idea of what we're going to do  
22 on the generation resources without precluding exactly  
23 what we're going to say. We need to hear from First  
24 Nations on that.

25 I personally, and I think B.C. Hydro, have  
26 a less better grasp of how you would reflect First

1 Nation views in the demand scenarios, but we're open  
2 to doing that.

3 Those then go to BCTC and BCTC and E3 are  
4 responsible overall for the scenarios. So I'll leave  
5 it to BCTC's counsel to further address this scenario  
6 issue.

7 **Proceeding Time 2:39 p.m. T63**

8 Let me move to funding. And clearly this  
9 was an issue raised, I think, by all or virtually all  
10 First Nation participants making submissions for this  
11 procedural conference. And as has been noted, we have  
12 filed as Exhibit B2-9 a capacity funding letter sent  
13 to First Nations between 5 and 10 August, 2009. And  
14 as has been noted, addresses not only attendance at  
15 workshops but funding for technical studies.

16 It is true, as the representative of  
17 Shuswap has pointed out, that it is to address B.C.  
18 Hydro and B.C. Hydro's evidence, and that's entirely  
19 consistent with the instruction from the Ministers. I  
20 do quibble with the wording Shuswap used. It isn't to  
21 "serve" our evidence, it's to "address" our evidence,  
22 and there's a big difference there.

23 Now, turning to what I said at both the  
24 first and second procedural conferences, we have urged  
25 the Commission itself to be flexible with respect to  
26 the issue of participant assistance and cost awards.

1           We say the guidelines are guidelines only. BCSEA has  
2           pointed out we have too -- paragraph 3 allows for  
3           interim funding, and we urge you to move forward as  
4           prudently -- in a prudent fashion, but as quickly as  
5           you can on that.

6                         Sorry, I did mean to address this on --  
7           with respect to the evidentiary break. You've had  
8           from the Nations, Exhibit C97-5, and I do want to  
9           respond to that. First of all, to be clear, the  
10          scenario workshop addressed by that exhibit was BCTC's  
11          and not B.C. Hydro's. B.C. Hydro hosted a resource  
12          option workshop on 23 June and gave participants until  
13          14 August to respond. But I think more importantly,  
14          and I can't emphasize this enough, that the 18  
15          September filing is information for discussion  
16          purposes. And so I think it a little unfair to say  
17          that the deadlines proposed for responses with respect  
18          to the scenario workshops are it. They aren't. We  
19          know there's a round of Commission workshops. There's  
20          community hearings. There's the B.C. Hydro/BCTC  
21          parallel process. These all provide additional  
22          opportunities into both the B.C. Hydro and BCTC  
23          evidentiary filings of late November, and I can't  
24          emphasize that enough.

25                         So, I think we were clear, at least in our  
26          workshop, that this response time between 23 June and

1           14 August and resource options was the very first  
2           step, and there's many, many other steps. So I did  
3           want to respond to that letter. I frankly thought it  
4           was a little unfair and I wanted to clarify our  
5           respective roles as well.

6                         Just a minute, please.

7                         As I say, I'll have other things to say on  
8           different issues in question 8, but I think those  
9           conclude my submissions with respect to question 7,  
10          subject to any questions you may have.

11 THE CHAIRPERSON:    Thank you, Mr. Godsoe.

12 MR. GODSOE:         Thank you.

13 MR. FULTON:         BCTC.

14 **SUBMISSIONS BY MR. FELDBERG:**

15 MR. FELDBERG:       Thank you, Madam Chair, members of the  
16          Panel.

17                         This question has evolved a little bit from  
18          looking at the key measures of the -- that the  
19          Hwlitsum had proposed to discussions of the scenario  
20          development.

21 THE CHAIRPERSON:    This is just an example of the  
22          flexibility that we have.

23 MR. FELDBERG:       Actually, I don't mind the divergence  
24          because I think it's actually fairly helpful in the  
25          context.

26                         A couple of initial comments. I echo the



1       outset what the impacts are. And so to decide where  
2       you are conclusively on a spectrum at any given point  
3       in time is probably something we need to look at  
4       flexibly over time. And I just wanted to make that  
5       observation, because I think in our submissions we're  
6       actually very much on the same page as Ms. Gaertner on  
7       that point.

8                   I just wanted to talk a little bit, and  
9       I'll be very brief, in terms of the scenario  
10      development and the opportunities for First Nations  
11      input there. Mr. Godsoe has explained how Hydro will  
12      -- what Hydro is providing and effectively, as I  
13      understand the scenario development work, and I've  
14      explained this badly before, and I'll probably explain  
15      it badly again, but as I understand it, there are  
16      various elements that will form the inputs into the  
17      modelling, then the modelling exercise takes place  
18      essentially and the transmission planners from that  
19      will determine how you move the projected power to the  
20      project loads from the projected places that it's  
21      anticipated to take place, and so much of that  
22      exercise does take place within BCTC's bailiwick.

23                   The other thing that BCTC is doing is from  
24      the inputs that it receives, it is also framing a  
25      number of scenarios, and again, it's getting the help  
26      of experts like E3 to help do that.

1                   In the course of doing that there are  
2                   various assumptions that are made and I think this is  
3                   what some of the First Nation participants have  
4                   alluded to you. You take a look at different laws.  
5                   On the export side you take a look at the different  
6                   policies of, you know, jurisdictions close to Canada  
7                   to see what influence they have and you consider  
8                   various factors and you develop a story around them.

9                   What's been done to date has been very much  
10                  a preliminary set, and what was presented on the  
11                  August 5<sup>th</sup> meeting was intended to be a very much  
12                  "here's how the process works". You know, and so it  
13                  will be perceived and was intended to be very much an  
14                  information giving out, as opposed to information  
15                  receiving because the first step in any discussion is  
16                  to say, "Here's the process we are thinking of  
17                  embarking upon, here's what we are doing." And then  
18                  later when we actually have the information developed,  
19                  then you are giving people, you know, the proverbial  
20                  rock to comment on and say, "What do you think of  
21                  this? What do you think of that? What do you think of  
22                  this assumption, that assumption and the other  
23                  assumption."

24                  And so when I hear -- and I think my  
25                  friend, Mr. Godsoe alluded to this, you know, the need  
26                  to develop First Nation scenarios. There are two

1           questions that come to mind, I suppose, and one is:  
2           Do you want, necessarily, a separate scenario entirely  
3           or are there themes, assumptions, drivers that can be  
4           common to all or many scenarios that we are already  
5           using, can they be incorporated properly so that all  
6           scenarios reflect those issues, reflect those  
7           concerns. Does there need to be something separate?  
8           And these are things that, frankly, the planners are  
9           thinking about right now, how best to reflect that.  
10          This is what I've been told.

11                        What I want to convey and I want to convey  
12          most clearly, is that as I understand it, what we'll  
13          present on September 18<sup>th</sup>, the initial scenario is by  
14          no means the final formed view. What it is is a set  
15          of scenarios that hopefully will give participants the  
16          opportunity to take a look at what it is that is being  
17          produced to say, "We need something separate. Can we  
18          work with what is there? Have they got this thing  
19          wrong that I can add, and it will be common to all  
20          scenarios?" Those sorts of things.

21                        And the reason initially why we thought  
22          we'd get that rock out was because we were going to  
23          have the workshops in October/November where First  
24          Nations and other participants, together with whatever  
25          help the funding ultimately gives them, can comment on  
26          those, can decide if they need to do their own

1           separately for this process or whether they simply can  
2           provide the input into the scenarios that are  
3           developed and have them adjusted, reformed, et cetera.

4                       So the bottom line is essentially, heard  
5           many of the comments. Those comments may not be  
6           reflected quickly by September 18<sup>th</sup>, but there is a  
7           significant opportunity after that work within the  
8           scenario development work that's going on to  
9           incorporate comments, suggestions and certainly ideas  
10          that we've never heard of.

11                      So that's where we are in the scenario  
12          development work and why we think working within the  
13          current process we can probably incorporate the issues  
14          that many of the First Nations have and are raising.

15   **Proceeding Time 2:49 p.m. T65**

16                      I don't have anything further to add on the  
17          PACA funding issues. And comments with respect to the  
18          process for having draft reasons go out, et cetera, I  
19          agree with my friend Mr. Godsoe that that's already  
20          provided in the terms of reference. There will be a  
21          draft report go out. There will be opportunity to  
22          comment. I think that's an answer to that step.

23                      We don't have anything to add on a  
24          community -- further community sessions. I adopt what  
25          Mr. Godsoe would say about that.

26                      So those are -- unless there's any

1           questions, that's what I was going to say on this  
2           question.

3 THE CHAIRPERSON:    Thank you, Mr. Feldberg.

4 MR. FELDBERG:       Okay.

5 THE CHAIRPERSON:    It's ten to three.  It's soon time for  
6           a coffee break, or shall we hear some replies first?

7 MR. FULTON:         Well, we started about 15 minutes later  
8           today, Madam Chair, so --

9 THE CHAIRPERSON:    I'm looking at Mr. Bemister here.  I'm  
10           looking at his wishes, too.

11 MR. FULTON:         So Mr. Bemister said it's all right if we  
12           consider going until quarter after three.

13 THE CHAIRPERSON:    All right, that's fine with the Panel,  
14           then let's go.  Mr. Bemister knows.

15 MR. FULTON:         It's always nice to obtain the approval of  
16           Mr. Bemister.

17 THE CHAIRPERSON:    That's right.

18 MR. FULTON:         B.C. Hydro.

19 MR. GODSOE:         No reply.

20 MR. FULTON:         FortisBC Inc.

21 MR. McDONELL:       No reply.

22 MR. FULTON:         First Nations Energy and Mining Council.

23 **REPLY BY MR. DIMITROV:**

24 MR. DIMITROV:       Yes, a brief reply.

25                       We'd like to thank Mr. Godsoe, B.C. Hydro,  
26           for renewing and refreshing my memory.  Indeed we are

1 seeking that the Commission go out to the non-metro  
2 parts of the province commencing January 11<sup>th</sup> to  
3 sometime in February 2010.

4 I want to address another issue that was  
5 raised in some way by counsel for BCTC. And he said  
6 something to the effect of this, that if you decide to  
7 go down the road of consultation, direct consultation  
8 yourself with First Nations, that we should do it  
9 gradually and I think assess it as we go along,  
10 because we don't have any evidence right now and we  
11 don't really -- those were his words, I think, in  
12 part. I haven't got transcripts here.

13 The topic I'm trying to raise with you,  
14 that with respect to trying to -- if you decide there  
15 is a duty yourself to consult, because of the  
16 uncertainty of the evidence that will be filed and the  
17 uncertainty that exists with regard to the nature of  
18 your determinations and their impacts on First  
19 Nations, I'd like to submit to you that you ought to  
20 not shift the costs of that uncertainty to First  
21 Nations. What I mean by that is that the benefit  
22 should not fall to B.C. Hydro or BCTC, but rather  
23 because of that uncertainty that you ought to consider  
24 that rather than just a slight duty to consult, that  
25 it ought to be larger than that because of the  
26 uncertainty.



1 MR. FULTON: IPPBC.

2 MR. AUSTIN: No reply, thank you.

3 MR. FULTON: Sto:lo Tribal Council. Shuswap Arrow Lakes  
4 Division and the Splats'ln First Nations.

5 **SUBMISSIONS BY MR. LEBOURDAIS:**

6 MS. LEBOURDAIS: Wej Kukgai.

7 Just in response to *ESVI et al*, he asked a  
8 specific question about when we attended the workshop  
9 in Vancouver, and how they asked for comments after  
10 that workshop, and whether or not we had submitted any  
11 comments by August the 12<sup>th</sup>. And our response is no.  
12 And the reason why is because you're looking at the  
13 only person that works on this inquiry for our whole  
14 Lakes Division, and when it comes down to the number  
15 of hours that we work, we have to be accountable for  
16 all of them. And if we don't have a funding source  
17 for them, we don't get paid. So, we weren't able to  
18 supply comments, for example, or provide any of that  
19 back-up time after the fact, because there was no  
20 support for it.

21 Thank you.

22 THE CHAIRPERSON: Thank you.

23 MR. FULTON: Haisla Nation and the Weiweikei Nation.

24 MS. GRIFFITH: No response.

25 MR. FULTON: The Nations.

26 **SUBMISSIONS BY MR. STADFELD:**

1 MR. STADFELD: I had thought until the very end that I  
2 wouldn't have a reply for once, but I do have to make  
3 one quick point in reply to my friend Mr. Godsoe's  
4 comments on the letter on behalf of our clients,  
5 that's C97-5. That was in regards to the Vancouver  
6 workshops, and I do stand corrected, if it was BCTC  
7 and not B.C. Hydro's door that we should have laid the  
8 critique at. But we do stand by those submissions.

9 And the only thing I could say further is  
10 that the submissions of Ms. Lebourdais yesterday I  
11 thought did a very good job of describing, at least  
12 from her clients' point of view, her First Nations,  
13 what the experience of that workshop was like, and  
14 just for your reference, that can be found at pages 46  
15 -- 462 to 463 of yesterday's transcript. Okay?

16 Thank you.

17 THE CHAIRPERSON: Thank you, Dr. Stadfeld.

18 MR. FULTON: Squamish Nation and Carrier Sekani Tribal  
19 Council.

20 MR. KIRCHNER: No reply.

21 MR. FULTON: Toquaht Nation.

22 **SUBMISSIONS FOR MR. CHRIST:**

23 MR. CHRIST: If I could for a minute, I'd like to return  
24 to the genesis of this question, paragraph 13 in the  
25 Hwlitsum submission. Under "Other key measures", they  
26 mention the development of a First Nation scenario

1           that addresses First Nation perspectives in their own  
2           words and language.

3                         And I want to pick up on Commissioner  
4           Cote's original question regarding First Nations  
5           scenarios. And a question that's been registered, I  
6           note, by several other parties here. What can I say?  
7           Perhaps my comparative inexperience with scenario  
8           development process is reflected in these comments.  
9           And I note that the Toquaht Nation was not able to  
10          attend the workshop on scenario development, so I'm  
11          speaking from that perspective.

12                        Toquaht generally adopted the comments of  
13          the Hwlitsum First Nation, for which reason I want to  
14          qualify that slightly. I believe that any problematic  
15          aspects surrounding a First Nations scenario exist  
16          only in the varying language with which our diverse  
17          interests and parties are coming here, and approaching  
18          this matter. I believe that what may be meant by  
19          First Nations scenario is the appropriate integration  
20          of First Nations values and interests and concerns  
21          into the overall task of a scenario development,  
22          whether or not that results in a unique so-called  
23          First Nation scenario or not.

24   **Proceeding Time 2:59 p.m. T67**

25                        If I'm mistaken in this, I would appreciate  
26          any comments from other First Nation counsel on this

1 issue, because I think it need clarification. And  
2 that's the extent of my comments.

3 THE CHAIRPERSON: Thank you, Mr. Christ.

4 MR. FULTON: Treaty 8 Tribal Association.

5 **REPLY BY MR. DEVLIN:**

6 MR. DEVLIN: I have a few comments in reply.

7 Madam Chairperson, you raised the issue of  
8 capacity funding when Mr. Kirchner was making his  
9 submissions, and you referred to B2-9 and you asked,  
10 well, would this money be coming from B.C. Hydro or  
11 the Commission, and you sort of posed a general  
12 question there.

13 On review of the exhibit, I think it's  
14 clear that the limited capacity funding that B.C.  
15 Hydro was proposing to make available is in relation  
16 to B.C. Hydro and B.C. Transmission Corporation's  
17 evidence. So it is limited in scope to that. And so  
18 any additional evidence outside of their evidence  
19 would not be funded by them under the terms of this  
20 letter. That's the first point.

21 And then in terms of additional funding,  
22 yes, there's the PACA funding, but you know, people  
23 have been discussing that that's an end of process  
24 formula, if you will. I support the encouraging  
25 comments by Mr. Godsoe to encourage the Panel and the  
26 Commission to be very flexible in the PACA funding and

1 making that available on an interim basis.

2 One of the challenges with the interim  
3 funding, of course, is that you need to satisfy  
4 exceptional circumstances as one of the tests, and  
5 that can be a difficult hole to find oneself squeezed  
6 into. I think that given this third procedural  
7 conference and what's been discussed over the last two  
8 days, it would be helpful if the need for this  
9 consultation process specific to First Nation was  
10 deemed to be an exceptional circumstance such that  
11 interim funding could be made available through PACA.

12 And the last point on this thing, on this  
13 issue, I don't believe is before you but the Panel  
14 does have the power under the Act to direct that one  
15 party pay for another party's costs and expenses. And  
16 it could well be that if you decide you have an  
17 independent duty to consult, and if you decide that  
18 it's useful and helpful to have First Nations have  
19 funding for their own evidence to bring forward,  
20 there's nothing stopping you from ordering one of the  
21 utility companies to provide that funding, in addition  
22 to what they're prepared to voluntarily pay at this  
23 point under B2-9.

24 Mr. Bursey encouraged you to consider that  
25 you need to weigh the probative value of evidence  
26 before devoting time and energy to it. And Mr. Godsoe

1           talked about questioning the First Nation scenarios as  
2           well, and offered to you that one of the filters that  
3           is going to be placed on the scenarios will be the  
4           areas that First Nations identify where they don't  
5           want to see development. And that got me -- first of  
6           all I was very happy to hear that they have this  
7           filter.

8                        But I have to say I've been thinking about  
9           this quite a bit, listening to the submissions. My  
10          experience has been that Crown actors generally, and  
11          with the experience that I've had in other matters  
12          with B.C. Hydro in particular, don't always see eye to  
13          eye with First Nations on how to look at the  
14          landscape, and that First Nations, certainly in Treaty  
15          8 territory, are very much interested in -- when they  
16          look at the landscape they say, "We have a treaty  
17          right to take a harvestable surplus of wildlife or  
18          fish." And so when they look at the landscape, that  
19          is the first perspective that they're looking at.  
20          What habitat is required for us to be able to exercise  
21          that right.

22                       And when you look at it from that  
23          perspective, all the cumulative impacts of all the  
24          other development in the area become critical to  
25          consider. And what habitat is left and is it a viable  
26          habitat?

1 **Proceeding Time 3:04 p.m. T68**

2 And is it a viable habitat, not just for  
3 the survival of the species, but so that there is  
4 enough of the different things that we wish to hunt  
5 and fish and trap such that there is a harvestable  
6 surplus both at a subsistence level for food, as the  
7 grocery store, and also for a commercial basis, so  
8 that people can earn a moderate livelihood for that.

9 And while I don't -- because we haven't  
10 seen what this filter is going to look like, I do  
11 think that the Panel shouldn't be left with the  
12 impression that that filter in and of itself would be  
13 sufficient, and that one of the opportunities that a  
14 First Nations scenario would have would be to approach  
15 the whole issue of where to locate generation  
16 facilities and how to structure transmission  
17 facilities and where to locate them from that  
18 landscape perspective that First Nations bring, which  
19 is radically different than the perspective that the  
20 proponents of such facilities would bring, right? And  
21 that really has a regional local flavour and it really  
22 has a flavour from the needs of the First Nations for  
23 that landscape. And I think that the probative value  
24 of that would be quite high and quite useful for the  
25 Commission.

26 The last point is just to note that Mr.

1           Feldberg referred to that August 5<sup>th</sup> meeting as an  
2           information session, where it was sort of one way  
3           information. You know, here is how the process works.  
4           My note is that to date there has only been one  
5           official consultation meeting in Treaty 8 country in  
6           Fort St. John and that was in June. The B.C. Hydro  
7           meeting at the end of the July and the BCTC meeting at  
8           the beginning of August were public stakeholder,  
9           public interest meetings only, and we really can't  
10          count those meetings towards consultation. And I  
11          think it's important that, even though that's the only  
12          place where some of this information is available, the  
13          fact is there hasn't been -- that First Nations  
14          specific process has only touched ground once in  
15          Treaty 8 country, and we've only had one opportunity  
16          to have that one-on-one dialogue with Hydro and the  
17          Transmission Corporation on First Nation specific  
18          issues.

19                         Subject to your questions, those are my  
20          reply submissions.

21   THE CHAIRPERSON:    Thank you, Mr. Devlin.

22   MR. FULTON:          Hwlitsum First Nation?

23   **REPLY BY MS. MUIR:**

24   MS. MUIR:          The Hwlitsum First Nation was referred to in  
25          this question, but as you see from all the  
26          presentations, many of the First Nations have ideas

1 for other measures.

2 Since we are the last, I'd like to just  
3 thank all their parties for their comments and just  
4 recognize the positive tone of comments from all  
5 parties and the discussion from all parties. All  
6 these comments are very helpful and designed to move  
7 this process forward.

8 At this point the Hwlitsum First Nation was  
9 not proposing to provide any further detail on issues  
10 such as the First Nation scenarios which have been  
11 raised, but suggest that we'd be willing to do this in  
12 the future if necessary in writing in collaboration  
13 with First Nations and as requested by the Commission  
14 itself.

15 Just a brief comment. We had mentioned  
16 with respect to the First Nation that the development  
17 of the First Nation scenario that addressed First  
18 Nation perspectives in their own words and language,  
19 and that comment about "own words and language" was  
20 very carefully thought out despite the brief nature of  
21 this, because that might be the aspect that's going to  
22 make it most unique.

23 And the very last point just on the First  
24 Nation scenario, we did mention the qualitative and  
25 the quantitative, so the numbers and the social and  
26 cultural impacts. That being said, that's all our

1           comments and we are happy to lead on this one.

2                           Thank you.

3 THE CHAIRPERSON:    Thank you, Ms. Muir.

4 MR. FULTON:         Madam Chair, that concludes the cycle on  
5           question 7. So we have five minutes to spare and I  
6           suggest that this would be an appropriate time to take  
7           the afternoon recess.

8 THE CHAIRPERSON:    I believe the Panel agrees with that,  
9           so let's reconvene in fifteen minutes time, please.

10           **(PROCEEDINGS ADJOURNED AT 3:09 P.M.)**

11           **(PROCEEDINGS RESUMED AT 3:26 P.M.)**

**T69/70**

12 THE CHAIRPERSON:    Please be seated.

13 MR. FULTON:         We're now at question 8, Madam Chair, and  
14           Treaty 8 Tribal Association is first.

15 **SUBMISSIONS BY MR. DEVLIN:**

16 MR. DEVLIN:         Madam Chair, Commissioners, this will be  
17           very brief.

18                           You've heard over the last two days many,  
19           many references to your governing statute and the  
20           terms of reference. You've heard how those -- that  
21           governing statute and the terms of reference give you  
22           all sorts of mechanisms to hear from all sorts of  
23           participants, including First Nations, and I don't  
24           intend to go through all of those. Obviously all of  
25           those mechanisms are in place whether you're a quasi-  
26           judicial body or you're not a quasi-judicial body.

1                   But I want to leave you with this. The  
2 Treaty 8 Tribal Association submits that if you rule  
3 that you are a quasi-judicial body and you do not have  
4 an independent duty to consult, then in our view any  
5 ensuing determinations that you make at the end of  
6 this inquiry may be unlawful. And let me explain  
7 that.

8                   If the Panel, as a quasi-judicial body  
9 assessed that B.C. Hydro and BCTC failed to consult  
10 adequately, and that the Crown's duty to consult is  
11 not discharged, and that you don't consult --

12 MR. GODSOE: I hesitate, but the question is clear.  
13 You're to assume that you have ruled you're a quasi-  
14 judicial body. We've heard a lot of argument about  
15 why you aren't or are, and I really do need to object  
16 to this. We're getting back into it. The question is  
17 framed -- you find you're quasi-judicial, you owe no  
18 independent duty to consult, what measures can you  
19 take. And I think counsel should confine himself to  
20 that question.

21 MR. DEVLIN: If counsel for B.C. Hydro would allow me to  
22 finish, he would hear the answer to that question, and  
23 his objection wouldn't be sustained.

24                   So you're a quasi-judicial body, you find  
25 that. But B.C. Hydro and the Transmission Corporation  
26 don't discharge the Crown's obligation to consult.

1           You, of course, haven't consulted yourselves because  
2           you've found you're quasi-judicial and you're not in  
3           that -- that isn't part of your duty.

4                       The challenge for you is this. You then  
5           wouldn't have the authority to -- under your terms of  
6           reference, to tell B.C. Hydro and the Transmission  
7           Corporation to go away and consult properly. Your  
8           mandate is still to make those determinations, and  
9           you'd be making those determinations on the basis of  
10          inadequate consultation. And in our view, it really  
11          sets up the inquiry for ultimately a waste of time and  
12          energy, because you've still got to issue those  
13          determinations at the end of June next year, and if  
14          it's on the basis of inadequate consultation, that's  
15          highly problematic.

16                       Those are our submissions on question 8.

17 THE CHAIRPERSON:    Thank you, Mr. Devlin.

18 MR. FULTON:        Toquaht Nation.

19 MR. CHRIST:        The Toquaht Nation has no submission on  
20          question number 8, but would reserve the right to  
21          reply.

22 THE CHAIRPERSON:    Thank you.

23 MR. FULTON:        Squamish Nation and Carrier Sekani Tribal  
24          Council, and the Lakwolams Indian Band.

25 **SUBMISSIONS BY MR. KIRCHNER:**

26 MR. KIRCHNER:      On this question, if the Commission finds



1 duty exists, I guess, becomes irrelevant, and you were  
2 just fulfilling all the indicia of it. So in  
3 substance it would be met in those circumstances.

4 COMMISSIONER ANDERSON: So just to follow along, if we  
5 end up deciding that we are quasi-judicial, and I  
6 think we're hearing that in that event we may not  
7 carry with that the duty to consult, but we could  
8 still as quasi-judicial do the consultation.

9 MR. KIRCHNER: Well, I think that fires us back into  
10 question 2, I think, or one of the earlier questions,  
11 and re-engages the debate about whether, if you are a  
12 quasi-judicial body you can get into the kind of  
13 direct dialogue with First Nations that we say is  
14 necessary in order to meet the duty. So I think -- I  
15 don't want to open this all up again.

16 COMMISSIONER ANDERSON: Nor do I.

17 MR. KIRCHNER: No, I know you don't. But I think that  
18 would re-ignite the debate about what you can do while  
19 maintaining procedural fairness. And so if you find  
20 that you're quasi-judicial but you can still fulfill  
21 all the elements that we say are necessary to meet the  
22 duty, I suspect that my friends for Hydro and BCTC  
23 would have something to say about that.

24 COMMISSIONER ANDERSON: I'm sure they will. Thank you.

25 THE CHAIRPERSON: Thank you, Mr. Kirchner.

26 MR. FULTON: The Nations.

1 **SUBMISSIONS BY MS. GAERTNER:**

2 MS. GAERTNER: Madam Chair, Commissioners, I'd like to  
3 respond actually to Commissioner Anderson's last  
4 question if I may start with that.

5 Consultation can't occur by accident.  
6 Consultation in the Section 35 perspective is not  
7 simply a robust public engagement process, and that I  
8 think is an extremely important distinction. It's not  
9 that if you just through your own processes ensure  
10 robust public engagement of process that asks First  
11 Nations to participate, that somehow you've consulted.  
12 You can't consult by accident because there is an  
13 iterative process where First Nations engage with the  
14 decision maker about the issues that will affect them  
15 directly and have inputs, substantive inputs on the  
16 outcomes of those decisions. It's not a robust public  
17 engagement process. They are not stakeholders in the  
18 manner that other stakeholders before. They are  
19 holders of constitutional rights.

20 The consultation that we're talking about  
21 here is a constitutionally protected consultation  
22 process. It's no just the public engagement process  
23 that you are trying to do with all members of the  
24 public under this inquiry. And that's why we need a  
25 ruling from you to be clear on what legal obligations  
26 you need to practically make in order to meet that

1 obligation.

2 I appreciate the honour and honourable  
3 intention behind the question, i.e. can we get  
4 everybody involved and how can we get everybody  
5 involved? I really do appreciate that and I know many  
6 of my clients would also appreciate that, because they  
7 want to be involved in these processes. But the  
8 reason why they have struggled and have worked so hard  
9 to ensure that Section 35 is not empty is because they  
10 are decision makers in their territories, and they  
11 hold those titles, and they are not just members of  
12 the public.

13 **Proceeding Time 3:36 p.m. T72**

14 And so, I have to say, then, in answer to  
15 the question that was asked, and I -- with all respect  
16 to B.C. Hydro's objection and the last speaker, it's  
17 not -- we can't provide you a list at this time of  
18 other measures you may take, if you have decided that  
19 you don't have an obligation to consult, for two  
20 reasons.

21 The first is that if you conclude you have  
22 no duty to consult, if you make decisions which have  
23 the potential to adversely affect the Nations' title  
24 and rights, and have not consulted, then those  
25 decisions will not have constitutional validity. They  
26 will not be reliable, including not being reliable by

1 the Minister under Section 5(7). And so this process,  
2 as I began my opening comments yesterday with, will  
3 become a colossal waste of time with respect to the  
4 true reliability of those -- any of the determinations  
5 that you make.

6 And the second reason why I'm in the  
7 position to say that is that, to the nations we  
8 represent, it's clear in law, and it should be clear  
9 in law now to you, that in order to do strategic-level  
10 decision-making within their territories, they must be  
11 consulted, and that they can't be reduced to mere  
12 stakeholders. And so the nations cannot condone the  
13 Crown unilaterally setting out the terms of reference  
14 with respect to this kind of planning process, and  
15 then giving the decisions with respect to those to  
16 decision-makers who won't -- can't consult. They  
17 can't condone such a process. It would be un-  
18 honourable. If you make that conclusion, they will  
19 have to make other decisions about this process.

20 And so that's why we've been here trying to  
21 recommend and create a doorway for you to see how you  
22 can take on the constitutional obligations that are  
23 before you and make this an honourable process.

24 Those are my submissions on this question.

25 THE CHAIRPERSON: Thank you, Ms. Gaertner.

26 MR. FULTON: Hwlitsum First Nation, and Chief Raymond

1 Wilson will make a presentation, Madam Chair.

2 **REPLY BY MR. WILSON:**

3 MR. WILSON: Good afternoon. Chief Raymond "Rocky"  
4 Wilson, Chief of the Hwlitsum First Nation. I'd like  
5 to thank Madam Chair and the Commissioners for hearing  
6 us the last couple of days. I think the days have  
7 been very productive.

8 I'd like to start by welcoming everyone to  
9 Coast Salish territory, and in particular I'd like to  
10 thank the Squamish, the Slawatooh and the Musqueam for  
11 allowing us to use this particular territory today.

12 I'm going to be very, very brief. I'm just  
13 going to address question number 8. It starts out,  
14 "If the Commission were to determine that it is acting  
15 in ..." You all have it in front of you there.

16 Our brief answer is "No." The Hwlitsum  
17 First Nation asserts and believes that the Commission  
18 has a constitutional duty to consult First Nations in  
19 the Section 5 inquiry. And we reserve the right to  
20 reply. Obviously we support Dr. Stadfeld, Ms.  
21 Gaertner, Mr. Kirchner, Mr. McDade -- who's not here  
22 today, I don't think. Mr. Devlin, Ms. Rana, and all  
23 the rest of the First Nation technicians, and those  
24 would be our submissions and subject to any questions,  
25 thank you.

26 THE CHAIRPERSON: Thank you, Chief Wilson.

1 MR. FULTON: Haisla Nation and the Weiweikei Nation.

2 **SUBMISSIONS BY MS. GRIFFITH:**

3 MS. GRIFFITH: Madam Chair and Commission Panel, I would  
4 like to endorse the submissions of Mr. Kirchner and  
5 Ms. Gaertner on this point.

6 In response to Commissioner Anderson's  
7 question, could there be consultation despite a  
8 finding that there is not an independent duty to  
9 consult, and consultation within a quasi-judicial  
10 process, I think the consultation that could take  
11 place within the confines of a quasi-judicial process  
12 would be an impoverished consultation process that  
13 would not meet the honour of the Crown.

14 **Proceeding Time 3:40 p.m. T73**

15 And the reason I say this is that because  
16 consultation has to be able to demonstrably integrate  
17 the concerns of First Nations, and our concern would  
18 be that within the confines of a quasi-judicial  
19 process, it wouldn't be possible to do that.

20 I would like to just add that I have  
21 addressed this in our submissions in reply at page 8.  
22 Ultimately, with the Commission making determinations,  
23 there is no other place for the consultation to take  
24 place and the honour of the Crown to be discharged.

25 Subject to any questions, that's my  
26 response.

1 THE CHAIRPERSON: Thank you, Ms. Griffith.

2 MR. FULTON: Shuswap Arrow Lakes Division and the  
3 Splats'In First Nations.

4 **SUBMISSIONS BY MS. LEBOURDAIS:**

5 MS. LEBOURDAIS: Wej kukgai.

6 To consult or not to consult, that is the  
7 question. Even if you decide that you don't have the  
8 duty to consult, I still think that there is a  
9 responsibility to ensure that we have both the  
10 opportunity and the capacity to present our evidence  
11 and submissions. We've dealt with talking about  
12 opportunity, whether or not that means having this  
13 Commission come out to the regions, come out to our  
14 communities and hear evidence in those types of  
15 formats. We've talked about our capacity and the fact  
16 that right now we are working at a serious  
17 disadvantage, without the funding and the expertise  
18 that we need to not only hire technical experts as  
19 they've been talking about, but also to go back and  
20 talk to our own nation members, to go back and talk to  
21 the knowledge keepers, to talk to the people that hold  
22 all of our traditional laws and policies, not within  
23 books but within themselves.

24 We're just looking to be able to have some  
25 of the resources that both B.C. Hydro and BCTC have at  
26 their disposal, so that we can bring our evidence up

1 to the same level so that we're on the same playing  
2 field with them.

3 So even if you decide that you don't have  
4 the duty to consult, they also are talking about how  
5 you have the ability to assess the adequacy of  
6 consultation. And with that, you've been provided a  
7 number of ideas and options that you may look at,  
8 whether it is through a working group or panel of  
9 First Nations members to help you decide maybe what  
10 that consultation should look like, how to assess that  
11 consultation and ensure that it is done in the proper  
12 and honourable way.

13 But right now, what I feel like is that  
14 we're all painting you pictures, and that's what we're  
15 doing throughout this process. And right now, Hydro,  
16 BCTC, a number of the other energy sectors probably  
17 have the resources to be able to go out and paint you  
18 a Monet and it's very complex and it's very big and  
19 it's very beautiful, and right now we have stick  
20 people and we can give you a stick drawing.

21 So what we would just like to do is to have  
22 the right time to bring that together so that we can  
23 turn our stick people into a big, beautiful complex  
24 format that is at the same level as everybody else  
25 that's going to be presenting that evidence to you.  
26 [native phrase], thank you very much for hearing me.

1 THE CHAIRPERSON: Thank you, Ms. Lebourdais.

2 MR. FULTON: Sto:lo Tribal Council.

3 **SUBMISSIONS BY MS. HEASLIP:**

4 MS. HEASLIP: I will once again support the submissions  
5 of the Shuswap Arrow Lake Division, as well as the  
6 comments made previously by counsel for the Nations  
7 and Treaty 8's. Sto:lo Tribal Council maintains that  
8 the Commission does have an independent duty to  
9 consult and there are not other measures that can take  
10 away from that.

11 THE CHAIRPERSON: Thanks, Ms. Heaslip.

12 MR. FULTON: Independent Power Producers Association of  
13 British Columbia.

14 MR. AUSTIN: No further submissions, inadvertently or  
15 advertently. We're just getting into reargument.

16 THE CHAIRPERSON: Thank you.

17 MR. FULTON: Energy Solutions for Vancouver Island  
18 Society *et al.*

19 MR. BERTSCH: We have no further submissions from what's  
20 already on the record, but would like to reserve the  
21 right for reply. Thank you.

22 THE CHAIRPERSON: Thanks.

23 MR. FULTON: Consumer Energy Consumers Association of  
24 British Columbia.

25 **Proceeding Time 3:46 p.m. T74**

26 **SUBMISSIONS BY MR. WEAVER:**

1 MR. WEAFFER: Thank you, Madam Chair.

2 I would firstly like to commend the  
3 comments of the representative from the Shuswap Arrow  
4 Lakes Division, in the sense that what we are  
5 supporting is the opportunity to improve the picture,  
6 for all to understand the First Nations position.

7 And just to respond to Commissioner  
8 Anderson's question, if at law -- and we say this is  
9 the case, there is not an independent duty to consult,  
10 and you say there's a quasi-judicial body, what could  
11 be more honourable for a representative from the Crown  
12 but to implement all meaningful stages and steps to  
13 ensure a deep engagement with First Nations in this  
14 proceeding?

15 So, to turn to the question, we do believe  
16 that the Commission has the tools to engage in deep  
17 consultation with First Nations in this process. And  
18 just to provide some indication of what we think the  
19 issues that need to be covered, there's three areas,  
20 in terms of First Nations issues. There's coverage,  
21 in terms of meeting the objective of having input from  
22 First Nations across the province. And as has been  
23 discussed, you've got the ability to hold regional  
24 hearings, regional town hall meetings and we  
25 understand B.C. Hydro is supporting that approach.

26 Secondly, you need to achieve aggregation,

1           which is an attempt to try and consolidate the First  
2           Nations issues as best we can, given the timeline you  
3           have, and given the diversity of interests. And  
4           therein we have discussed the First Nations panel and  
5           we see that, the CEC sees that, as a very effective  
6           way to try and encourage aggregation of the issues.

7                         And lastly and most importantly, there's  
8           integration of those issues into your recommendations.  
9           And again, the inquiry process, the terms of  
10          reference, provide you with tools to cause that to  
11          occur.

12                        We are impressed with the representation by  
13          First Nation counsels in this proceeding the last two  
14          days. We believe they are well capable of assisting  
15          the Commission, as are other First Nations  
16          representatives, in terms of giving you effective ways  
17          to integrate the First Nation concerns into your  
18          recommendations. We would encourage you to do that,  
19          and we believe you'll behave honourably if you do do  
20          that.

21                        In terms of the simple processes the  
22          Commission has, they're straightforward. You can  
23          receive written submissions. You can have hearing  
24          processes and gather evidence. You can have workshops  
25          with Commission present, which you already have done  
26          in this proceeding, so that you can engage directly

1 with First Nations. You have -- well, you have  
2 processes of negotiated settlement processes. The CEC  
3 would encourage, if there are issues that are  
4 appropriate for negotiated settlement discussions,  
5 that Commissioners be present, given the nature of  
6 this inquiry. We think that may be an appropriate way  
7 to engage.

8 And lastly, we do believe, albeit it would  
9 appear to be deficient at this point, that B.C. Hydro  
10 and BCTC are making efforts to have a parallel process  
11 of engagement. Clearly their capacity funding letter  
12 filed last week is a step in the right direction.  
13 They may not be all the way there yet, but there are  
14 efforts being made. And at the end of the day, the  
15 test as to whether they have consulted adequately will  
16 be determined by you at the end of this process, not  
17 at the beginning.

18 Those are our submissions.

19 THE CHAIRPERSON: Thank you, Mr. Weafer.

20 MR. FULTON: British Columbia Old Age Pensioners'  
21 Organization *et al.*

22 **SUBMISSIONS BY MR. QUAIL:**

23 MR. QUAIL: We agree with the main thrust, at least, of  
24 what Mr. Weafer has said.

25 I suggest that if the Commission finds it  
26 necessary to rule on the constitutional issue, that

1           either way this court is -- this issue is going to go  
2           to the Court of Appeal and probably on an  
3           interlocutory basis. May not wait for the inquiry  
4           even to complete.

5                        I say if the Commission finds it necessary  
6           to rule, because in my submission it is not necessary.  
7           It is not obligatory for the Commission to rule on the  
8           question. And it's a general principle, for example,  
9           that courts will decline to rule on constitutional  
10          issues if there are other legal principles that get to  
11          the same point and resolve the issue. There is  
12          nothing compelling you. What you are on -- what you  
13          are required to do is to produce a net result that  
14          passes muster legally. If you look at it, and walk  
15          around it, and see how it operates, then it meets the  
16          test.

17                       You are not under any specific duty to  
18          formulate any particular language, in my submission,  
19          explaining why you're getting there. And this  
20          addresses the question that Commissioner Anderson  
21          posed. If the Commission were to say "We don't find  
22          it necessary to rule on whether we have a duty to  
23          consult, because we're going to do it," in my  
24          submission the only thing that really that's left to  
25          do with that is reconcile that with the other  
26          requirements of the hearing in terms of fairness, and

1 I agree with what Mr. Weafer has said, that these are  
2 reconcilable. That it is not an impossible task, and  
3 most of the arguments that it is have been on a very  
4 abstract level.

5 There's been a lot more argument over the  
6 last two days about what we're going to label what  
7 we're doing, and what we're actually going to  
8 undertake on the ground. Differences in terms of  
9 opinion. You know, the scope of some kind of a panel  
10 and so on. But the basic elements of it don't really  
11 seem to be in great dispute. And regardless of the  
12 position people have been taking on the constitutional  
13 question, several parties have said, "But regardless  
14 of that, we want you to engage with First Nations."

15 Now, it's essential in that that that  
16 engagement is an engagement that is acceptable to  
17 First Nations or it's like shaking hands with  
18 yourself. It's just not going to go anywhere.

19 **Proceeding Time 3:53 p.m. T75**

20 But we would urge the Commission to pursue  
21 that route if that's possible, and you do have a wide  
22 range of mechanisms and more flexibility in terms of  
23 process than would be the norm in a formal hearing of  
24 an application under the Act. Not any question about  
25 that.

26 Now, if push comes to shove and finally

1           it's legally settled that there is no duty on the  
2           Commission to consult and no jurisdiction to appoint  
3           an advisory council, which I must say that piece I  
4           find strange, the idea that there is -- whatever the  
5           shape of it, that that's something you don't have the  
6           jurisdiction to do; we'd say that the Commission  
7           should still engage First Nations as meaningfully as  
8           possible in the process, because you can't fulfill the  
9           mandate of this inquiry without doing that. And  
10          that's sort of the alternate route from point A to B.

11                         One is being sort of beaten along the route  
12          with the stick of constitutional compulsion. The  
13          other is undertaking it willingly as a way to enhance  
14          the process and make it better, and not by accident  
15          but deliberately, and calling it what it is,  
16          consultation, but not ruling on whether or not you're  
17          under any obligation to do so. In my submission, the  
18          given -- all of the different hazardous waters that  
19          you find yourselves right now, I suggest that that is  
20          probably the safest and best route to get an end  
21          result that is going to meet the objectives of this  
22          inquiry process.

23                         Those are my comments at this point.

24   THE CHAIRPERSON:    Thank you, Mr. Quail.

25   MR. FULTON:         British Columbia Sustainable Energy  
26                         Association *et al.*

1     **SUBMISSIONS BY MR. ANDREWS:**

2     MR. ANDREWS:     First I'd like to commend the comments made  
3                     by Ms. Lebourdais. I think they are very important  
4                     and very suitable in response to question 8, and  
5                     acknowledging that question 8 has a premise which  
6                     isn't necessarily agreed to by other parties and has  
7                     been argued already. And I won't go farther than that  
8                     about the present -- the premise of question 8.

9                     Regarding Mr. Quail's suggestion, while I  
10                    don't dismiss that the concept of not making a  
11                    decision on an independent duty to consult is  
12                    available to the Commission, I suggest that it would  
13                    not be helpful to the parties or to the process to  
14                    leave that question in abeyance. I think that one way  
15                    or the other the Commission does need to grasp the  
16                    nettle and move forward, and I'm sure the Commission  
17                    is fully capable of doing that and has now had a very  
18                    thorough round of both written and oral submissions on  
19                    which to make that decision.

20                    Subject to any questions, those are my  
21                    submissions.

22     THE CHAIRPERSON:     Thank you, Mr. Andrews.

23     MR. FULTON:     Joint Industry Electricity Steering  
24                     Committee.

25     MR. BURSEY:     Has nothing to add, thank you.

26     MR. FULTON:     First Nations Energy and Mining Council.



1 the obligation to consult with First Nations in a  
2 constitutionally-mandated manner.

3 Those are my submissions, thank you.

4 THE CHAIRPERSON: Thank you, Mr. Dimitrov.

5 MR. FULTON: FortisBC Inc.

6 MR. McDONELL: I have nothing new to add, thank you.

7 MR. FULTON: British Columbia Hydro and Power Authority.

8 **SUBMISSIONS BY MR. GODSOE:**

9 MR. GODSOE: Well, I am going to express my dismay at  
10 having to get back into this. I'm going to keep it  
11 very short, because I don't want to re-open reply.

12 I don't agree that the only  
13 constitutionally valid way is for the Commission to  
14 assume an independent duty to consult. I rely on my  
15 submissions with respect to questions 1, 2, 3 and 4  
16 for that proposition. I'm going to move quickly  
17 along, because as I say, I don't want to get into this  
18 again. I think we've dealt with this.

19 I agree completely with counsel for BCSEA.  
20 I urge you to rule on this issue. I think we need  
21 certainty. I don't agree with counsel from B.C. Old  
22 Age Pensioners'. I think your ruling will inform the  
23 process going forward.

24 I echo CECBC and BCSEA's comments with  
25 respect to Shuswap, and in response to Commissioner  
26 Anderson, two things. I think we've been clear that

1 if the duty to consult is triggered, and we've said in  
2 our submission it's likely triggered, and we should  
3 all operate under the assumption it is triggered, that  
4 you will have a duty to assess the consultation at the  
5 end of the process. And by that I mean, assessing  
6 your own regulatory review process, and also the  
7 parallel B.C. Hydro/BCTC process and that is why we've  
8 decided we will be filing with you at least two  
9 consultation reports and those -- and also our letters  
10 to the Minister reporting back on our process. So you  
11 can assess that.

12 I think what's been overlooked in hearing  
13 most of the First Nation participants is that I think  
14 there's a tremendous amount of flexibility for you  
15 assuming you rule that you are a quasi-judicial body  
16 and that you do not have an independent duty to  
17 consult. Now, I tackled some of these earlier in  
18 question 7, and I completely adopt the submissions of  
19 counsel for CECBC on those.

20 So, first, additional regional hearings.  
21 And in response to Commissioner Anderson, that's where  
22 you will hear directly from First Nations, in addition  
23 to the other hearing -- the more structured hearing  
24 process to occur in March.

25 Second, I agree with Shuswap that the  
26 funding issue is something you need to address, even

1 if you find yourself to be a quasi-judicial body. And  
2 I've made submissions on that with respect to question  
3 7.

4 Turning to the First Nation advisory panel,  
5 I wanted to lay out what I think would be helpful for  
6 the Commission, assuming you find yourself to be a  
7 quasi-judicial body, and I would urge you to set out  
8 the following principles in addition to that finding.

9 First, I think the terms of reference can't  
10 be drafted in consultation with the Commission. I  
11 think what should occur is the First Nations take the  
12 first draft. It gets circulated to all other Section  
13 5 participants for comment, and then everything goes  
14 to the Commission for a decision. And I think that  
15 you should set out broad timelines for this to occur.  
16 I would urge you to ensure that these terms of  
17 reference are in place prior to the next procedural  
18 conference, the fourth procedural conference, some  
19 time in late October.

20 I would also like you to set out in guiding  
21 the terms of reference the following. I think they  
22 should identify the specific problems that the panel's  
23 designed to address. I think you want to confirm that  
24 this process must be transparent in all aspects, and  
25 that's, I say, certainly all Section 5 participants  
26 must have an opportunity to comment on the draft terms

1 of reference.

2 While I've urged broader representation on  
3 the advisory panel, I do hear the Nations' concern,  
4 and I don't want to dilute the First Nation aspect. I  
5 urge you to make no finding on that and let the  
6 parties resolve that themselves if they can.

7 **Proceeding Time 4:02 p.m. T77**

8 But I do again urge you, consistent with  
9 the quasi-judicial status, to make it clear that this  
10 advisory panel is not a decision maker, it's in no way  
11 going to be involved in the determination delineations  
12 as we've given our submissions on jurisdiction with  
13 respect to that point.

14 Some other suggestions that have come up  
15 earlier in this procedural conference, and counsel for  
16 JIESC submitted that you have held your hearings in  
17 phases, and I agree and I'd be interested in hearing a  
18 bit more from First Nations on that, but B.C. Hydro  
19 supports any flexible implementation of the actual  
20 hearing process in March. We don't agree that Section  
21 4 offers the solution. I've already made my  
22 submissions on that. I don't agree that there should  
23 be separate panels, Commission Panels hearing separate  
24 issues, First Nations and then the rest of it. And I  
25 think counsel for JIESC did an admirable job  
26 explaining the problems of integration. That doesn't

1 mean there can't be considerable flexibility in how we  
2 structure the hearing itself.

3 I think that brings me to the B.C.  
4 Hydro/BCTC parallel process, and I'm certainly not  
5 intending to respond to the criticism point by point.  
6 I do want to assure the Hwlitsum this is not  
7 unilateral. It is true that Phase 1 was largely the  
8 provision of -- well, was the provision of information  
9 by the utility to the First Nations, but that's to be  
10 expected. We were explaining what the Section 5  
11 inquiry is and how our process fed into that.

12 Phase 2 will be much more interactive so it  
13 won't just be the utilities providing information.  
14 We'll be welcoming feedback, and I've already told you  
15 that with respect to the resource options and in  
16 particular the filters, that's something we're looking  
17 to First Nations for in Phase 2.

18 It is true a number of First Nations  
19 participants requested one-on-one consultation with  
20 B.C. Hydro. In our reply, found at Exhibit B2-8, page  
21 11, lines 4 to 16, we say that it was not practical to  
22 meet on an individual basis with over 200 First  
23 Nations and tribal councils. Nevertheless, I do want  
24 to convey to you that B.C. Hydro is flexible in how it  
25 carries out this parallel process.

26 And what do I mean by that? In our

1        submission, we were clear that if the determinations  
2        become more geographically specific, and I think we  
3        will know the answer to that in October, then we might  
4        depart from our regional sessions and meet with First  
5        Nations in those geographically defined areas one on  
6        one. So for example, the Northwest, as the Nations  
7        have pointed out and the Tahltan in particular, there  
8        is in paragraph 6(b)(ii) of the terms of reference a  
9        specific mention to the Northwest Transmission Line,  
10       for example. So it might be appropriate for us to  
11       meet individually with First Nations in that region.  
12       But I'm also going to point out that in fact that  
13       consultation is occurring right now. And we will  
14       consult further with the Nations on to what extent we  
15       bring that consultation process into this hearing  
16       process. I'll be guided by their views certainly on  
17       what we do with that.

18                    Another example would be the Northeast.  
19       Certainly Commissioner Harle will be familiar with  
20       this from the 2008 LTAP. There is a lot of oil and  
21       gas development up there. It might be an area that  
22       certainly B.C. Hydro wants to focus on, and then I  
23       think that brings up Treaty 8.

24                    What I don't agree with from Treaty 8 is  
25       the fact that while we do have this parallel process,  
26       I say that our resource options workshop on 23 July --

1 and for the record it was 23 July. It's rare I miss a  
2 date, I have photographic memory, but I admit I got  
3 that one wrong. I say that is part of consultation.  
4 Just because it's part of a public process doesn't  
5 mean it isn't also part of consultation. It's not the  
6 full answer to it, but I think the *Taku River* case  
7 supports what I'm saying. And to be clear, I'm not  
8 saying in and of itself it's sufficient. But it is  
9 one element, and to be clear, most of the parallel  
10 process is for First Nations only.

11 I think that is all I have to say on  
12 question 8, subject to any questions you may have.

13 **Proceeding Time 4:09 p.m. T78**

14 THE CHAIRPERSON: Thank you, Mr. Godsoe.

15 MR. GODSOE: Thank you.

16 MR. FULTON: British Columbia Transmission Corporation.

17 **SUBMISSIONS BY MR. FELDBERG:**

18 MR. FELDBERG: As you can tell from the dearth of a thick  
19 or thin binder, I have nothing to add and I support  
20 the comments of counsel for B.C. Hydro.

21 THE CHAIRPERSON: Thank you, Mr. Feldberg.

22 MR. GODSOE: I can't wait till the order's reversed and I  
23 can do the same.

24 MR. FULTON: Well, I hate to disappoint counsel for B.C.  
25 Hydro, but it looks to me that when we reverse the  
26 order, in any event, BCTC will always be first. So,

1 subject to us exhibiting some flexibility.  
2 Reply by B.C. Hydro.  
3 MR. GODSOE: I have no reply.  
4 MR. FULTON: FortisBC.  
5 MR. McDONELL: No reply, thank you.  
6 MR. FULTON: First Nations Energy and Mining Council.  
7 MR. DIMITROV: No reply, thank you.  
8 MR. FULTON: Joint Industry Electricity Steering  
9 Committee.  
10 MR. BURSEY: No reply, thank you.  
11 MR. FULTON: British Columbia Sustainable Energy  
12 Association.  
13 MR. ANDREWS: No reply.  
14 MR. FULTON: British Columbia Old Age Pensioners'  
15 Organization *et al.*  
16 MR. QUAIL: Nothing further.  
17 MR. FULTON: Commercial Energy Consumers Association of  
18 British Columbia.  
19 MR. WEAVER: No reply, thank you.  
20 MR. FULTON: ESVI *et al.*  
21 MR. BERTSCH: No reply.  
22 MR. FULTON: IPPBC.  
23 MR. AUSTIN: No reply, thank you, but we'd like to thank  
24 the panel for showing a lot of patience in terms of  
25 allowing counsel to express their views on all these  
26 questions. I think you've bent over backwards to

1 allow everybody a decent opportunity to be heard.

2 MR. QUAIL: Hear, hear.

3 MR. FULTON: Sto:lo Tribal Council.

4 MS. HEASLIP: No reply, thank you.

5 MR. FULTON: Shuswap Arrow Lakes Division and the  
6 Splats'ln First Nations.

7 MS. LEBOURDAIS: No reply.

8 MR. FULTON: Haisla Nation and the Weiweikei Nation.

9 MS. GRIFFITH: No reply. Thank you.

10 MR. FULTON: Hwlitsum First Nation.

11 MR. MUIR: No reply, thank you.

12 MR. FULTON: The Nations.

13 MR. STADFELD: No reply.

14 MR. FULTON: I'll let you savour the applause.

15 The Squamish Nation, Carrier Sekani Tribal  
16 Council and the Lakwolams Indian Band.

17 **SUBMISSIONS BY MR. KIRCHNER:**

18 MR. KIRCHNER: I'm sorry to break the flow, but I'll be  
19 brief.

20 I just want to make a couple of comments in  
21 reply to Mr. Quail and Mr. Bursey's submissions in  
22 respect to Commissioner Anderson's question to me.  
23 Because I've also been reflecting on Commissioner  
24 Anderson's question a little bit, and I think I  
25 perhaps could have handled it better.

26 Looking at it from hindsight, that is to

1 say, when all the work is done, then we might be able  
2 to say that the duty was filled, even if we didn't  
3 know if the duty existed. But looking at it from  
4 foresight, in my submission, it would not uphold the  
5 honour of the Crown for First Nations to be asked to  
6 engage in a process and invest the time and energy and  
7 resources into a process that they don't know, at the  
8 end of the day, whether it's fulfilling the duty to  
9 consult or not, and they don't have the ability,  
10 through legal means, to hold the body consulting to  
11 the duty, as a matter of law.

12 So, if the consultation that's being done  
13 for practical reasons or as a courtesy, or a way to  
14 bring First Nations in, that's not going to do it,  
15 because in my submission to fulfill the honour of the  
16 Crown, a First Nation really has to know, "Is this the  
17 body that's fulfilling the duty?" And they wouldn't  
18 know that if (a) the question wasn't answered, as Mr.  
19 Quail suggests; or (b) if the question is answered in  
20 the negative, but we're going to do this process  
21 anyway.

22 **Proceeding Time 4:13 p.m. T79**

23 So in other words, you really can't tell  
24 whether the duty is going to be fulfilled until it's  
25 all done, and First Nations ought not to be required  
26 to be involved in a process where they don't know

1           where it's going as a matter of law.

2                           So, subject to that, that is my only reply.

3 THE CHAIRPERSON:    Thank you, Mr. Kirchner.

4 MR. FULTON:        Toquaht Nation.

5 MR. CHRIST:        No reply.

6 MR. FULTON:        Treaty 8 Tribal Association.

7 MR. DEVLIN:        No reply, thank you.

8 MR. FULTON:        Madam Chair, I believe that that completes  
9           the submissions on all eight questions. I've got X's  
10          in all my boxes now for the questions and the parties,  
11          so subject to any matters that the Commission Panel  
12          has, that's the end of the round of questions and  
13          answers on the eight questions.

14 THE CHAIRPERSON:   Thank you, Mr. Fulton. I think you  
15          have conducted this quite complex two-day session  
16          quite well and in an orderly fashion.

17                        So I believe this two-days session into  
18          this First Nations issue is now coming to a  
19          conclusion, and the Panel intends to issue the process  
20          order in due course. And on behalf of this Panel I  
21          would like to thank you all very much for attending  
22          and making your meaningful and articulate submissions.  
23          Thank you.

24                        **(PROCEEDINGS ADJOURNED AT 4:13 P.M.)**

25

26