

October 14, 2009

BC Utilities Commission  
Box 250, 900 Howe Street  
Sixth Floor  
Vancouver, BC V6Z 2N3

**Attention: Erica Hamilton, Commission Secretary**

Dear Ms. Hamilton:

**Re: British Columbia Utilities Commission Section 5 Transmission Inquiry**

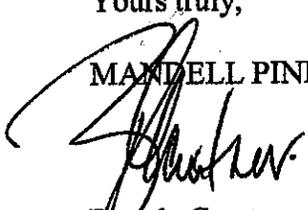
We have been instructed to write to the Honourable Blair Lekstrom, Minister of Energy, Mines and Petroleum Resources, on behalf of our clients, the Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance, the shíshálh Nation and the Tahltan Central Council regarding some of their outstanding concerns related to the Crown's obligations with respect to this Inquiry. A copy of that letter is attached for your immediate consideration.

On the basis set out in the attached letter, please find enclosed the proposed Terms of Reference for the First Nations Panel which we have been instructed to submit to the BCUC on behalf of the Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance, the shíshálh Nation and the Tahltan Central Council.

We are still taking steps with our clients to develop a list of potential members of this First Nations Panel and will endeavor to provide that list on or before the procedural conference set for October 28, 2009.

Yours truly,

MANDELL PINDER

  
Brenda Gaertner  
Barrister & Solicitor

BG/mp  
Enclosures

cc: Nlaka'pamux Nation Tribal Council  
Okanagan Nation Alliance  
shíshálh Nation  
Tahltan Central Council

October 14, 2009

Ministry of Energy, Mines and Petroleum Resources  
PO Box 9060  
STN PROV GOVT  
Victoria, BC V8W 9E2

**Attention: The Honourable Blair Lekstrom**

Dear Minister Lekstrom:

**Re: BCUC Section 5 Inquiry**

We write on behalf of our clients the Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance, the shíshálh Nation, and the Tahltan Central Council who are each intervenors in the B.C. Utilities Commission's ongoing inquiry into long-term electricity transmission in the Province under s. 5 of the *Utilities Act* ("the Section 5 Inquiry"). While our clients each have specific and unique interests and concerns arising from the subject-matter of the Inquiry, they share the concerns expressed in this letter.

While each of our clients agree with the pressing need for the development of a long-term strategic level plan for electricity transmission, they have been, and continue to be, deeply troubled by both how the Section 5 Inquiry was mandated and how it has functioned to date. The nature of the concerns place into serious doubt whether the outcomes of the Inquiry – as currently mandated and progressing – will have any practical utility or legal viability.

The genesis of the concerns stem from the manner in which the Inquiry was constituted. Despite the fact that the Section 5 Inquiry is intended to create a blueprint for electricity transmission in the Province that will affect our clients' Aboriginal title and rights for many years to come, our clients were not in any way consulted regarding the Terms of Reference ("TOR") which is the basis for the Commission's work. This was a serious omission on the Province's part which evidences a complete disregard for the established case law, as well as the fundamental principles of the New Relationship. Furthermore, it draws into question whether the Commission or any Crown actor can discharge the Terms of Reference in accordance with the Crown's constitutional requirements under section 35.

In a good faith effort to remedy and make workable what appears to be a flawed process, our clients intervened before the Commission and urged the Commission to accept the Crown's legal responsibility to consult and accommodate with First Nations in regard to the

determinations they have been directed to make under the TOR. Unfortunately, based on arguments advanced by Crown agents (BC Hydro and BCTC) with your Ministry's support and relying also on deficiencies in the TOR, the Commission decided that it does not owe First Nations an independent duty to consult and accommodate as part of the Section 5 Inquiry.

Given that the Commission has decided that it does not owe our clients an independent duty to consult and that BC Hydro and BCTC are not, and realistically and legally could not, consult on the Commission's determinations, there exists a fundamental flaw in the current proceedings. Namely, there is no Crown decision-maker engaging in a clear manner in order to discharge the Crown's obligations to consult and accommodate with respect to the Commission's determinations. If this flaw is left un-remedied our clients seriously question whether the Inquiry or its outcomes will be constitutionally valid.

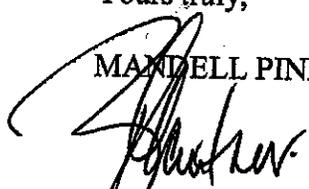
It is our clients' position that the responsibility to address the concerns expressed herein resulting from the TOR clearly lies with the Province, and your Ministry in particular. The fact that the Province is contemplating issuing a regulation under s. 5(7) of the *Utilities Act* effectively 'locking in' the Commission's Section 5 Inquiry determinations, adds further seriousness to the need to ensure that real consultation and accommodation takes place before the Commission makes its determinations.

Consequently, our clients are seeking an immediate meeting with you to discuss these concerns and identify possible solutions. Given that this Inquiry is underway, there is a real urgency to holding such a meeting as soon as possible. While our clients are prepared, in the interim, to make good faith efforts to work within the Commission's proposed process, they cannot do so indefinitely without these concerns being addressed. If at all possible it would be helpful if this meeting occurred prior to the next procedural conference before the BCUC scheduled for October 28<sup>th</sup>.

We look forward to hearing from your staff with suggested dates for the urgently required meeting.

Yours truly,

MANDELL PINDER



Brenda Gaertner  
Barrister & Solicitor

BG/mp

cc: Nlaka'pamux Nation Tribal Council  
Okanagan Nation Alliance  
shísháhlh Nation  
Tahltan Central Council

## **First Nations Advisory Panel Section 5 Inquiry**

### **Terms of Reference**

These Terms of Reference are proposed by the Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance, the shishálh Nation and the Tahltan Central Council in response to BCUC Order No. G-108-09 dated the 16th of September, 2009.

#### **Purpose**

The purpose of the First Nations Advisory Panel (the "Panel") is to assist in ensuring that meaningful engagement of First Nations occurs throughout the British Columbia Utilities Commission Section 5 Inquiry, including through providing suggestions and recommendations on how First Nations engagement might take place, and assisting in facilitating certain aspects of that engagement.

#### **Scope of Work**

The Panel is an independent Advisory body that will provide input and recommendations to the Commission on issues of concern to First Nations in the Inquiry, including assisting or facilitating First Nations participation. The Panel does not replace any of the roles, functions, or authorities of the Commission or any other participant. The Panel is not a holder of Aboriginal Title and Rights or Treaty Rights and is not a body with whom consultation and accommodation takes place.

The Panel will bring independent expert input and assistance to the Inquiry on issues of First Nations engagement through the following:

- providing recommendations on a transparent method for Commission engagement with First Nations at a community and Nation level;
- providing recommendations to the Commission for First Nations participation in the decision-making process in the Inquiry;
- assisting the Commission to develop collaborative approaches, where appropriate, amongst the First Nations Intervenors;
- providing recommendations to the Commission on the scope, structure and implementation of the First Nations phase of the Inquiry, and facilitating the implementation of the First Nations phase including assisting to facilitate meetings;
- providing recommendations within the Inquiry on issues of concern to First Nations, including providing public responses (i.e. filed in the Inquiry) on any

specific issue or question about which the Commission might seek the expertise of the Panel; and

- providing a public report on First Nations issues arising in the Inquiry, including recommendations, at the conclusion of the oral hearings, and prior to the Commission draft report. All intervenors would have the ability to file responses to this report.

Upon appointment, the Panel will begin its work by:

- reviewing the Inquiry Terms of Reference, and relevant decisions and submissions within the Inquiry;
- meeting with the Commission; and
- meeting with the First Nations Intervenors.

Based on its initial document review and meetings, the Panel will develop a draft Workplan for how it intends to complete the work assigned to the Panel through these Terms of Reference, including how it will interact with the Commission, the First Nations Intervenors, and other participants in the Inquiry.

### **Membership**

The Panel would be appointed by the Commission based on the recommendations of the First Nations participants in the Inquiry. First Nations participants will provide recommended names for the Panel along with relevant biographical information by October 28, 2009.

The Panel will be made up of three (3) members, with demonstrated expertise in the following areas:

- First Nations engagement;
- legal and policy frameworks relating to Aboriginal title, rights, treaty rights and interests; and
- energy infrastructure and policy.

The Commission will appoint one (1) of the three (3) members of the Panel as Panel Chair.

### **Remuneration**

The reasonable costs of the Panel will be fully covered by the Commission, including the necessary travel costs and secretarial assistance

Upon appointment, the Panel and Commission staff will meet to review these Terms of Reference and discuss estimated budgets for the work of the Panel. Given that it may be hard to estimate accurately in detail the work of the Panel – for example, the degree to which the Commission might pose questions to the Panel is unknown – it is acknowledged that funding for the Panel may have to occur in phases, or be revisited as the Inquiry proceeds.