



Our File No.: 1010-003  
October 21, 2011

**VIA EMAIL**

Ms. Alanna Gillis  
Acting Commission Secretary  
British Columbia Utilities Commission  
Sixth Floor – 900 Howe Street  
Vancouver, British Columbia V6Z 2N3

Dear Ms. Gillis:

**Re: Project No. 3698640  
British Columbia Utilities Commission (BCUC)  
British Columbia Hydro and Power Authority (BC Hydro)  
Application for a Certificate of Public Convenience and Necessity (CPCN) for the  
Dawson Creek/Chetwynd Area Transmission Project (DCAT)  
West Moberly First Nation (WMFN) Request for Access to BCUC Confidential IR2  
WMFN's position on BCUC Confidential IR 2 ((Exhibit A-9)  
and BC Hydro Comments (Exhibit B-12)**

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With respect to the positions put forward by BC Hydro in its letter of October 18, 2011 (Exhibit B-12) West Moberly First Nations (WMFN) makes the following response:

**BCUC IR 1.1 and 1.1.1.**

WMFN agrees with BC Hydro's position that these questions should be made on the public record.

**BCUC IR 2.1**

WMFN agrees to BC Hydro's proposal that it answer this IR in confidence to BCUC and WMFN.

**BCUC IR 2.2 and 2.2.1**

WMFN disagrees with BC Hydro objection, and that it can avoid answering this question.

Firstly, BC Hydro has mischaracterized the question asked in IR 2.2. The question asks BC Hydro why a TLUS agreement has not been concluded, *not* why funding for a TLUS has not been agreed to.

Contrary to BC Hydro's assertion, answering the questions posed (identification of the issues between the parties and an assessment of the study budget proposal) does not require the ongoing negotiations to be held in public, nor that BC Hydro divulge information that would be harmful to the negotiations.

The BCUC is under a *constitutional obligation* to assess the adequacy of the Crown's consultation with respect to the DCAT project and to determine if the Crown's constitutional duty of consultation has

been fulfilled with First Nations, including WMFN. See *Kwitwetlem First Nation v. British Columbia (Utilities Commission)* 2009 BCCA 68 at para 13; *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* 2009 (BCCA) 67 at 41; *First Nations Information Filing Guidelines for Crown Utilities* (Order G-51-10 and Appendix A thereto).

The duty to consult is based in law and equity and is a constitutional duty. "The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people with respect to the interests at stake." *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (*Haida Nation*)

BC Hydro, in its application and in the IR responses to date, has identified that it has not incorporated WMFN interests and concerns into the project planning due to lack of specific information on those interests and concerns. Thus the issues preventing BC Hydro and WMFN from concluding a study to identify WMFN interests are directly relevant to the BCUC's inquiry into the adequacy of consultation.

WMFN does not deny that the Crown may engage in a bargaining process in connection with consultation with First Nations, however, the bargaining must be in good faith, and sharp dealings are not permitted; *Haida Nation* at para 42. The Crown's assessment of the proposals made, and whether the proposals were meaningfully assessed at all, are indicative of whether the Crown was engaged in good faith negotiations, or in fact took an intransigent position through passive resistant negotiations: *Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.*, 2005 BCSC 697 at para 124.

BCUC must inquire into the issues between BC Hydro and WMFN, and BC Hydro's conduct and positions taken in negotiations with WMFN to assess whether the BC Hydro's bargaining was acceptable, or infringed on the honour of the Crown.

Furthermore, it does not assist the negotiation process or the goodwill between the parties for BC Hydro to ask that its conduct be shielded from the scrutiny of those charged with assessing the adequacy of the Crown's consultation, which imports a duty to engage in meaningful, good faith, consultation.

Principles of natural justice require WMFN to be apprised of representations made by BC Hydro involving its dealings with WMFN.

Accordingly, WMFN strongly submits that BC Hydro's objections are unfounded, and requests that BC Hydro answer IR 2.2 and 2.2.1 in confidence to BCUC and WMFN.

Sincerely,  
RANA LAW



Emily A. Grier

CC: BCUC Distribution list