

Janet Fraser

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October 24, 2011

Ms. Alanna Gillis
Acting Commission Secretary
British Columbia Utilities Commission
Sixth Floor – 900 Howe Street
Vancouver, BC 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
BC Hydro's Reply Submission regarding Confidential BCUC IRs**

As set out in the BCUC letter of October 17, 2011 (Exhibit A-14), BC Hydro provides its reply to the October 21, 2011 letter (Exhibit C5-10) filed on behalf of West Moberly First Nation (**WMFN**) in connection with the above referenced issue.

WMFN has taken no issue with BC Hydro's position relating to BCUC Confidential IRs 1.1, 1.1.1 and 2.1, and BC Hydro has no further submissions in regard to those questions.

With respect to BCUC Confidential IRs 2.2 and 2.2.1, BC Hydro agrees with WMFN that whatever response is provided to BCUC should be shared with WMFN. It is for that reason, BC Hydro objects to responding to the questions.

The BCUC has asked BC Hydro to speculate on why there is no TLUS agreement in place and to share its views on WMFN's proposed budget for a TLUS. BC Hydro has submitted that neither question will elicit evidence relevant in this proceeding.

In response, WMFN has suggested that the BCUC has a constitutional obligation to determine the adequacy of consultation and is required to "inquire into BC Hydro's conduct and positions taken in negotiations with WMFN to assess whether BC Hydro's bargaining was acceptable".

In reply, BC Hydro observes that the BCUC's jurisdiction to assess the adequacy of consultation is based on its enabling legislation and the notion that there is some overriding constitutional obligation on the BCUC has been squarely rejected by the Supreme Court of Canada (refer to *Rio Tinto Alcan Inc. and British Columbia Hydro and Power Authority vs. Carrier Sekani Tribal Council*, 2010 SCC 43, at paragraph 51). In exercising its jurisdiction, BC Hydro agrees that the BCUC will be called upon to assess all the Crown's conduct in its dealings with WMFN up to the

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point at which the BCUC determines whether that conduct has been honourable. However, that determination cannot be made at this time. Rather, all discussions between BC Hydro and WMFN as well as the public record of this proceeding up to the time of final argument will be part of the record the BCUC must consider. The evidence of the Crown's conduct and positions continues to evolve, and thus the situation is significantly different than existed in the *Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.*, which is the decision relied upon by WMFN. That decision will not provide guidance to the BCUC until the record is closed in this proceeding.

Perhaps more fundamentally, when the BCUC does come to assess the adequacy of consultation, it will be considering the conduct and positions taken by BC Hydro, not BC Hydro's speculation with respect to why those positions have not found favour with WMFN. In BC Hydro's respectful submission, what is objectionable about the BCUC's questions is their speculative nature. BC Hydro has shown no reluctance to fully disclose its conduct and positions taken with WMFN by sharing its consultation log (with the BCUC and WMFN) and responding to any questions that have been addressed in connection with it. However, in IRs 2.2 and 2.2.1, the BCUC did not ask BC Hydro what reason it gave WMFN for taking a particular position, but rather invited BC Hydro to speculate on the reasonableness of WMFN's position. It is that which BC Hydro wishes to avoid.

For further information, please contact Geoff Higgins at 604-623-4121 or by e-mail at bchydroregulatorygroup@bchydro.com.

Yours sincerely,



Janet Fraser
Chief Regulatory Officer

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