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January 20, 2016

VIA EMAIL

Ms. Erica Hamilton
Commission Secretary
British Columbia Utilities Commission
Sixth Floor – 900 Howe Street
Vancouver, BC V6Z 2N3

Dear Ms. Hamilton:

**Re: Project No. 3698854
British Columbia Hydro and Power Authority (BC Hydro)
W.A.C. Bennett Riprap Upgrade Project Application (Application)
Saulteau First Nations Written Submission on Process**

We are legal counsel to Saulteau First Nations (SFN). We write to express concern about the schedule that has been proposed by BC Hydro, and to propose adjustments to that schedule, pursuant to Commission Order G-182-15, dated November 24, 2015.

We respectfully submit that certain adjustments to the proposed schedule are reasonable and necessary so that the Commission can assess the potential adverse impacts of the Project on SFN rights and interests, and the adequacy of consultation with SFN in this instance. These adjustments need not unduly interfere with the proposed schedule and are primarily directed at allowing SFN to complete a traditional use study (TUS) for filing with the Commission.

The Utility of a Traditional Use Study

We respectfully submit that, if a written process is to be preferred, then the filing of a TUS is likely to be the most efficient and effective way for the Commission to receive information and evidence of SFN traditional use and treaty rights at and near the proposed Project sites. Further, the information provided in a TUS will likely be fundamental to the Commission's assessment of potential impacts and consultation,¹

¹ *Utilities Commission Act*, RSBC 1996, c 473, s. 24(b); *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] 2 SCR 650 at para 73.

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and will be key to the identification of effective avoidance, mitigation and accommodation measures.²

Capacity Funding

It is our understanding and experience that TUS work is time consuming and resource intensive. SFN has limited in-house capacity for such work and cannot commission a TUS without having the funding in place. It is our understanding that, as of the date of this letter, SFN has not received any funding from BC Hydro for the proposed TUS. In that connection, we offer the following observations based on our understanding of the sequence of events.

On or around July 7, 2015, SFN informed BC Hydro that SFN had engaged Firelight Group (a consultancy of applied anthropologists) to prepare the TUS and that work could begin the week of July 13, 2015. SFN submitted a proposal to BC Hydro that contained standard terms that have been accepted by other proponents in similar circumstances. It followed that several revised proposals or draft funding agreements were exchanged between SFN and BC Hydro in the summer and fall of 2015.

On September 18, 2015, BC Hydro stated that it was prepared to accept SFN's TUS proposal, subject to some revisions.³ In SFN's view, those revisions significantly changed the scope and focus of the proposed TUS and further discussion was required.

On October 29, 2015, BC Hydro provided SFN with a copy of a capacity funding agreement. However, contrary to the implication in the Application materials,⁴ this document was in fact only a draft agreement. Moreover, the draft was incomplete (e.g. proposed schedules were not appended), and it included various errors. For example, in various locations the draft did not even refer to SFN, but instead referred to the "McLeod Lake Indian Band" and "XXX's Aboriginal Title and Rights". The draft also referred to "Treaty No. 9" (and not Treaty No. 8). In addition, the draft introduced new terms and conditions that BC Hydro had not previously discussed with SFN. Further, the draft was provided to SFN with the express caveat that the document had not been reviewed or approved internally by the necessary individuals at BC Hydro.

Then, we are advised that sometime in November or December, for reasons that remain unclear, BC Hydro re-assigned the staff member (Rod Hill, Senior Coordinator of Aboriginal Relations) that had been liaising with Saulneau (and other First Nations), and introduced a new liaison person (Leah Manson) who seemed not to have been briefed on the discussions that had taken place up until then. In SFN's view, this represented a setback because of the loss of institutional memory and common understandings that had been developed with Mr. Hill.

²*First Nations Information Filing Guidelines*, Commission Order No. G-51-10, s. 3 (viii).

³ Exhibit B-1, Application, Appendix F at 35, paras 4-5.

⁴ Exhibit B-1, Application, Appendix F at 36, paras. 3-4.

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In any case, and in summary, we respectfully submit that SFN indicated to BC Hydro that it was ready to commission an early TUS pursuant to reasonable and standard terms. We further submit that BC Hydro could have been more efficient and effective in seeking agreement with SFN on the scope, terms and funding for that work, and that BC Hydro is responsible (or at least shares responsibility) for the delay in the commissioning of the TUS work.

Having said all of that, if BC Hydro can now expedite the provision of capacity funding, then we are advised that it is possible to complete much of the required TUS work on an urgent basis. In that regard, we are advised that TUS work on this type of project usually takes approximately six months, but could be condensed into about half that time if the Commission determines that urgency is desirable. If work can begin as soon as February 1, 2016, then a TUS Report could be filed with the Commission by about April 15, 2016. (We ask that the Commission please note that SFN may wish to file some TUS information confidentially). The proposed schedule set out below reflects these circumstances.

Proposed review process schedule

SFN can accept the outline of BC Hydro's proposed process,⁵ but with adjusted timelines and interim tasks, as follows:

Action	Date
Filing of Application	-
Post-Filing Stakeholder Workshop	-
Round 1 BCUC and Intervener Information Request (IR) Issued	-
BC Hydro responds to BCUC and Intervener IRs	-
Filing of Traditional Use Studies and First Nations Independent Technical Review (FNITR)	Friday, April 15, 2016
Round 2 BCUC and Intervener IRs Issued	Wednesday, May 4, 2016
BC Hydro response to BCUC and Intervener IRs	Wednesday, May 25, 2016
Procedural Conference (if required)	-

⁵ Exhibit B-1, Application at 1–22.

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Action	Date
BC Hydro Final Written submission	Wednesday, June 8, 2016
Intervener Final Written Submission	Wednesday, June 22, 2016
BC Hydro Written Reply	Wednesday, June 29, 2016
BCUC Decision	July-Aug 2016

Other Comments on Process

It is our understanding that SFN does not oppose proceeding by way of written submissions, provided the review process schedule allows for the completion and filing of the TUS and FNITR. We respectfully submit that the Commission should consider reserving the ability to hold oral hearings should it later determine later that some oral hearings would be useful and efficient. In any case, SFN intends to participate whether the Commission orders an oral hearing or streamlined review process.

Yours truly,

DONOVAN & COMPANY

p.p. 

James Hickling
JH/mav

cc: Tom Loski, Chief Regulatory Officer, BC Hydro
Registered Interveners