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March 2, 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 / Order G-182-15
British Columbia Hydro and Power Authority (BCH)
W.A.C. Bennett Dam Riprap Upgrade Project Application (Application)
Response to BC Hydro Exhibit B-4**

As requested by the Commission, we write in response to BCH's objection to our request made on behalf of Saulneau First Nations (SFN) for access to confidential information in the record of the proceeding (Undertaking).¹

The Undertaking is Valid and Effective

To briefly address BCH's request that the Undertaking be rejected by the Commission "as drafted", we note that SFN provided the Commission with confirmation that James Hickling, and the law firm, Donovan and Company, represent SFN in the above matter by letter dated January 25, 2016 – a day before BCH filed its complaint.² Further, by enclosure with this letter we propose to file a revised confidential undertaking that alleviates BCH's concerns with respect to compliance with s. 24.02 of the *Rules of Practice and Procedure*, established by Commission Order No. G-1-16.

We note that BCH reserves its right to object to providing SFN with three filings that contain confidential information, on the basis that to do so would threaten the integrity of the procurement process. BCH asserts that a SFN business or SFN joint venture has

¹ Exhibit A-7, Panel Request for Response to Exhibit B-4, February 1, 2016; Exhibit B-4, BC Hydro Response to Exhibit C5-2, January 26, 2016; Exhibit C5-2, Confidential Undertaking filed by James Hickling, January 12, 2016.

² Exhibit C5-1-1, SFN Confirmation of Legal Counsel, January 25, 2016.

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or may bid on contracts in relation to the Project and that SFN, as a First Nation, is not separate from those businesses “but forms an integral part of them”.

We maintain that Saulteau First Nations is legally a separate and distinct entity from any business that may be at issue. We would be pleased to provide the Commission with an explanation of the relevant corporate structures and relationships should the Commission wish further information on that subject. We would propose to do so in confidence and not as part of the public record. We invite the Commission to advise us how best to proceed.

In any event, if BCH were to provide the information to SFN’s counsel, it is our view that the Undertaking adequately addresses BCH’s concerns. The substance of the undertaking is not to disclose the confidential information at issue to any person who has not been granted access by the Commission – this includes any bidder in BCH’s procurement process. We also note that the Undertaking is a legal document that is enforceable by the Commission under the *Administrative Tribunals Act*.

BCH has already acknowledged that this is how undertakings work. BCH’s response to BCOAPO’s Information Request (IR) 1.12.1 contains the express restriction that the MWH Report is to be “provided to the BCOAPO’s legal counsel and consultant only”.

In sum, the original and revised Undertakings filed by counsel on behalf of SFN are valid and effective and pose no threat to the Project’s procurement process.

Reasons for Requesting, and Relevance of, the Confidential Information

There are three BCH confidential filings at issue:

1. Appendix B-1, the Preliminary Design Level Cost Estimate for the Project;
2. Preliminary Design Level Cost Estimate Review Report (“MWH Report”);³ and
3. Appendix D-1, pages 51 and 52 from the Preliminary Design Report.

The Commission has requested an explanation of how access to these confidential filings is relevant to SFN’s participation in the proceeding. In our view, these confidential filings are relevant to SFN’s concerns with respect to an assessment of potential adverse impacts on SFN’s Treaty rights, the adequacy of Crown consultation, the review of the Application, the hearing process and schedule, and the merits of the Application.

³ The MWH Report was provided by BCH in response to BCOAPO’s IR 1.12.1.

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In particular, and for example, the MWH Report identifies “key constructability issues” and “errors, omissions, ambiguities and/or conflicts” in BCH’s engineering support documentation. Moreover, MWH’s findings in relation to Part 3, “constructability review” and Part 4, “project risks” are of concern to SFN.

At the Procedural Conference on January 27, 2016, BCH was clear that cost is a significant, if not leading, reason for BCH’s opposition to SFN’s request for a review process timeline that would allow for a full and meaningful consideration of SFN’s concerns and determination of whether BCH has fulfilled its duty to consult and accommodate. BCH has also repeatedly relied on cost as a reason to expedite the review process throughout its responses to the Commission’s IRs. Consequently, information on cost and design issues in the MWH Report and Appendices B-1 and D-1 are relevant to consultation processes, the hearing procedure and schedule, and the merits of the Application.

Moreover, it is our understanding that the MWH Report is a peer review of BCH’s analysis and conclusions. Given the fact that the Executive Summary of the MWH Report states that one purpose of its evaluation was to validate the project’s “execution timeline”, these confidential materials are clearly relevant to understanding BCH’s concerns about proposed timelines. This ties directly to the hearing procedure and schedule, and the merits of the Application.

We also note that the MWH Report includes a table on BCH’s “Project Budget and Schedule Estimates” and addresses BCH’s “implementation schedule” in Part 6 of the report. Additionally, SFN is concerned about MWH’s recommended action that BCH “Consider revising the schedule for noted logic and duration comments”. As a registered intervener in these proceedings, SFN is entitled to know the basis for MWH’s recommendation.

Since the MWH Report is based on BCH’s own findings, we believe MWH’s peer review cannot be read in isolation, but will be best understood having regard to the underlying data available in Appendices B-1 and D-1. Should BCH provide the confidential information to counsel for SFN, we believe the greater detail on how BCH assessed and incorporated the MWH recommendations into BCH’s project plan, including how BCH’s mitigation plans were or could be adjusted, and would enable us to better understand BC Hydro’s concerns, and to better articulate SFN’s concerns with respect to the Project, the hearing procedure and schedule, and the merits of the Application.

Yours truly,

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James Hickling

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JH/mav

Enclosure

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

Undertaking

I, James Hickling, am a participant representing Saulteau First Nations, an intervener in the matter of the BC Hydro W.A.C. Bennett Riprap Upgrade Project.

In this capacity, I request access to the confidential information in the record of this proceeding. I understand that the execution of this undertaking is a condition of an Order of the Commission, and the Commission may enforce this Undertaking pursuant to the provisions of the *ATA*.

I hereby undertake

- a) to use the information disclosed under the conditions of the Undertaking exclusively for duties performed in respect of this proceeding;
- b) not to divulge information disclosed under the conditions of this Undertaking except to a person granted access to such information or to staff of the Commission;
- c) not to reproduce, in any manner, information disclosed under the conditions of this Undertaking;
- d) to keep confidential and to protect the information disclosed under the conditions of this Undertaking;
- e) to return to BC Hydro, under the direction of the BCUC, all documents and materials containing information disclosed under the conditions of this Undertaking, including notes and memoranda based on such information, or to destroy such documents and materials and to file with the Commission a certification of destruction at the end of the proceeding or within a reasonable time after the end of my participation in the proceeding; and
- f) to report promptly to the Commission any violation of this Undertaking.

Dated at Vancouver, British Columbia this 29th date of February, 2016.

Signature: _____

Name: _____

(please print)

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