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May 13, 2021

BY EMAIL

British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC Canada
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Attention: Patrick Wruck, Commission Secretary

Dear Sirs/Mesdames:

Re: Pacific Northern Gas Ltd. – PNG-West Division – Application for a Certificate of Public Convenience and Necessity (“CPCN”) for the Salvus to Galloway Gas Line Upgrade Project (the “Project”) – Project Number 1599140

As previously noted, we are legal counsel for Pacific Northern Gas Ltd. (“PNG”) in the above-noted application (the “**Application**”).

We write further to the letter dated May 4, 2021 (Exhibit A-9) from the British Columbia Utilities Commission (the “**BCUC**”), which set May 10 as the deadline for intervener submissions in response to PNG’s submission of May 6 (Exhibit B-8) and May 13 for PNG’s reply. The registered intervener B.C. Old Age Pensioners’ Organization et al. (“**BCOAPO**”) provided a submission dated May 10, 2021 (Exhibit C1-3).

Counsel for the Lax Kw’alaams Band, which has not sought or obtained intervener status, also provided further correspondence dated May 10 (the “**May 10 Letter**”). The May 10 Letter, without enclosures, was posted as a letter of comment designated as Exhibit E-1-1. We address certain points related to the filing and content of the May 10 Letter before turning to the BCOAPO submission.

Lax Kw’alaams’ submission of the May 10 Letter

As noted above, Lax Kw’alaams provided further correspondence of May 10 (defined above as the May 10 Letter) with which it enclosed various additional materials.

The timelines for submissions on further regulatory process by the parties set out in Exhibit A-9 called for intervener submissions on or before May 10, 2021. Lax Kw’alaams is not an intervener in this proceeding. It did not seek intervener status in accordance with Order G-288-20 (Exhibit A-3) or at all.

Further, by means of the enclosures to the May 10 Letter, Lax Kw’alaams appears to have sought to pre-empt matters and engage in the further evidentiary filings that the BCUC has not yet decided whether or not to allow.

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To the extent that the BCUC may determine to consider the body of the May 10 Letter, with respect to process or at all, PNG notes the following.

First, the only correspondence on which Lax Kw'alaams relies in its May 10 Letter pre-dating the close of the evidentiary record on this Application is a letter dated November 2, 2020 from Lax Kw'alaams to PNG and the Oil and Gas Commission ("**OGC**"). This is Appendix A to Lax Kw'alaams' May 10 Letter. PNG filed the very same letter from Lax Kw'alaams dated November 2, 2020 as part of its response to BCUC IR1 41.1 (Exhibit B-2), although it did so confidentially for the reasons set out in its public response to that IR. In that public response, PNG wrote:

...In addition, for BCUC reference, PNG has provided a copy of its comprehensive Indigenous Communication Log. Given the sensitivity of this information, PNG has submitted the Indigenous Communication Log on a confidential basis along with the responses to BCUC Confidential IR No. 1.

The Indigenous Communications Log contains correspondence on PNG's engagement on the larger Salvus to Galloway Project (4 Work Phases based on 4 geographic areas) as well as the engagement on BC OGC Work Package 1 that includes integrity works started in 2020.

PNG notes that the log includes all communication with the individual First Nation groups with whom it has engaged on the Salvus to Galloway Project up until the end of December 31, 2020. Within each log are included details of all email exchanges, letters, information documents, photos and the like, as well as questions and concerns raised by the Nations and PNG / BC OGC responses to such. Certain of these items are embedded as attachments into the Excel spreadsheets. Also included is specific correspondence between the BC OGC and First Nations and PNG. The communication log is arranged in chronological order with earliest engagement at the top of the table and the latest at the bottom. Each subsequent entry in the log typically builds upon previous correspondence and details efforts to address any questions that may have been raised. In this respect, one cannot extract one particular email or letter without knowledge of the correspondence that led to it.

PNG further notes that a First Nation will typically not send a letter with statements to the effect they are satisfied with engagement. All the First Nations engaged on the Project fully understand the need for the repair and maintenance work associated with the Project and are supportive of such. Questions and concerns raised are generally more site specific and involve environmental management of waterways and terrestrial ecosystems. The BC OGC determines the adequacy of engagement on the behalf of PNG and their own efforts in consultation with various Nations. PNG has received all relevant permits to the BC OGC Work Package 1. PNG submits that this demonstrates that the BC OGC was satisfied that concerns raised by the First Nations were addressed to the satisfaction of a Provincial Designated Decision Maker along with existing environmental legislation in place. PNG will continue to engage with First Nations on subsequent work packages and will continue to update the Communication Log accordingly. [emphasis added]

This was followed by a summary table accompanied by PNG's express statement, immediately below its title, that "Table should be reviewed in conjunction with PNG's Indigenous Communication Log" (Exhibit B-2 – Table G-1, at p. 108 of the PDF).

BCOAPO would have been entitled to access the confidential portion of this IR response, including the Indigenous Communication Log and the letter dated November 2, 2020, had it filed an undertaking in the usual form. BCOAPO chose not to do so and as such did not access the full record that PNG filed.

In the May 10 Letter, Lax Kw'alaams says that "the Consultation Log is confidential and Lax Kw'alaams staff have not been able to see what has been claimed or disclosed".¹ This simply illustrates the problems with Lax Kw'alaams' approach. Lax Kw'alaams did not seek intervener status or request access to confidential filings in accordance with the BCUC's processes, as it was entitled to do. Nor did Lax Kw'alaams take the step of asking PNG, less formally, what it had filed. Rather, Lax Kw'alaams simply proceeded to allege in its letter of April 30, 2021 (the "**April 30 Letter**", which is Exhibit E-1) that it appeared PNG had misstated or failed to disclose matters to the BCUC.

Parenthetically, Lax Kw'alaams takes issue with PNG's characterization of the April 30 Letter as a "letter of comment", but this is how the letter is identified on the BCUC website.

Second, in the May 10 Letter Lax Kw'alaams now appears to suggest that a central foundation of its April 30 Letter has been called into question by the OGC. In the April 30 Letter, Lax Kw'alaams wrote:

We have recently been advised by the BC Oil and Gas Commission in respect of their permitting process for this project that the OGC does not consider itself to have any authority to assess or regulate the amount of damage and impacts within the pipeline right of way (which is where the majority of the impacts will occur), and that any duty of consultation that arises from those impacts falls on another Crown agency. They have not specified that agency, but we believe the only other permitting authority with the power to consider that damage and therefore the potential duties in relation to consultation is your Commission. At the very least, we understand you have the obligation to consider the adequacy of consultation that has occurred.

In the May 10, 2021 Letter, Lax Kw'alaams now states that the OGC denies having asserted that the duty to consult on those impacts lies elsewhere. The May 10, 2021 Letter states on p. 3:

It was only in their meeting of April 23, 2021 that Lax Kw'alaams learned that the OGC regarded itself as dealing only with the permitting outside the right of way and stream crossings and otherwise did not regard itself as having the responsibility or jurisdiction to address the impacts of activities inside right of way. Lax Kw'alaams also contends that they were told in that meeting that if there was a duty on the Crown to consult on those impacts it would fall elsewhere (**although the OGC now denies having said that**). [emphasis added]

¹ This comment appears in brackets at the end of the second bloc quote on p. 2 of the May 10 Letter.

As the OGC's denial reflects, there is no consultation gap for the BCUC to fill with regard to activities within PNG's right of way. To the extent that a duty to consult arises, PNG's understanding is that it is being satisfied by the OGC. Further, Lax Kw'alaams does not address in its May 10 Letter the OGC's continuing consultation with First Nations, or BCUC's continuing oversight further to the conditions requested by BCOAPO and agreed to by PNG.

Third, Lax Kw'alaams claims on p. 3 of the May 10 Letter that it only recently obtained legal counsel and that Lax Kw'alaams only learned after April 23, 2021 about statements made by PNG in the Application or PNG's responses to IRs. With respect to the first point, Lax Kw'alaams has been represented in communications with PNG by a person with apparent legal training, Lax Kw'alaams' Director of Lands, Resources and Stewardship, who signs her name "Neegann Aaswaakshin, JD"; please see p. 2 of the April 30 Letter in this regard. Although to the best of our knowledge Ms. Aawaakshin is not a practising lawyer in B.C., "JD" is a Juris Doctor degree in law. With respect to the second point, Lax Kw'alaams had notice that the Application would be filed, notice was publicly advertised in affected communities, and PNG's Application and non-confidential IR responses were publicly available on BCUC's website.

Lax Kw'alaams more generally responds to our comment of May 6 that "[h]ad Lax Kw'alaams believed statements that PNG was making were inaccurate, it had ample opportunity to challenge them" (Exhibit B-8) by stating:

This submission requires the Commission to assume 1) that First Nations cannot rely upon the Commission to fulfill its duties and/or the proponent to accurately file complete evidence if they are not watched; and 2) that Lax Kw'alaams (and any First Nation) will be closely following the evidence and submissions before the BCUC in a proceeding in which they are not a participant.

Lax Kw'alaams' point is circular: Lax Kw'alaams has ample opportunity to seek to intervene or at least register as an interested party where it chooses. If its interests are engaged, one might expect it to monitor the proceeding. If it chooses not to engage or monitor a proceeding, that is of course fine as well. The issue is changing its mind at this stage: if it chooses not to participate over the entirety of the evidentiary and submissions portion of a proceeding but later seeks to intercede in the same proceeding, that becomes a problem.

Fourth, on p. 4 of the May 10 Letter, Lax Kw'alaams argues that the duty to consult arises not only with respect to applications brought by Crown utilities, but more broadly whenever the Crown exercises a permitting authority which permits an applicant to undertake works which impact Aboriginal rights or title. It appears that Lax Kw'alaams has assumed that the BCUC's CPCN decision is a Crown action capable of triggering a duty to consult even where the utility applicant is not the Crown or a Crown agent or Crown corporation. Lax Kw'alaams states on p. 4 of the May 10 Letter: "The duty of the Crown to consult arises whenever **the Crown exercises a permitting authority** which permits a non-Crown applicant to undertake works which impact aboriginal rights or unextinguished aboriginal title....We note that **the BCUC authorization is the only Crown authorization** sought for that portion of the project within the right of way, where the primary impacts will occur" (emphasis added).

In support of its position, Lax Kw'alaams asserts on p. 4 of the May 10 Letter that in *Rio Tinto Alcan Inc. v. Carrier Sekani*, 2010 SCC 43 ("**Carrier Sekani**") it was the private party Rio Tinto Alcan which was causing impacts from which the Crown duty to consult arose. That submission by Lax Kw'alaams counsel, who argued for the First Nation in *Carrier Sekani*, is incorrect in two respects.

First, the court held that the proposed Crown conduct or decision at issue was Crown corporation BC Hydro's proposal to enter into an agreement to purchase electricity from Alcan. The court wrote at paragraph 42 that for a duty to consult to arise, there must be "Crown conduct or a Crown decision that engages a potential Aboriginal right... [and] may adversely impact on the claim or right in question", and specifically continued as follows at paragraph 81:

Nor need the second element – proposed Crown conduct or decision – detain us. **BC Hydro's proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct.** BC Hydro is a Crown corporation. It acts in place of the Crown. No one seriously argues that the 2007 EPA does not represent a proposed action of the Province of British Columbia. [emphasis added]

Second, the court upheld the reasonableness of the BCUC's decision that the Crown had no duty to consult in the circumstances of that case: *Carrier Sekani* at paras. 92-93.

Neither BCOAPO nor Lax Kw'alaams cites any case in which a BCUC decision on an application by a private applicant triggered a duty to consult.

In *Kwikwetlem First Nation v. B.C. (Utilities Commission)*, 2009 BCCA 68 ("**Kwikwetlem**"), which BCOAPO cites on a different point in Exhibit C1-3, the BCUC's decision on whether to grant a CPCN, with or without conditions, did not trigger a duty to consult. Instead, a Crown duty to consult was triggered by Crown corporation BCTC's application for a CPCN in connection with a project supported by Crown corporation BC Hydro. In these circumstances, it was not at issue that the project proposed by BCTC had the potential to adversely affect the asserted rights and title of the appellant First Nations, and that the project invoked the Crown's duty to consult and accommodate: *Kwikwetlem* at para. 11. Because the activity in question was a "Crown project", the appellant First Nations were "entitled to be consulted and accommodated with regard to the choice of the ILM Project by BCTC" in the context of the BCUC CPCN application process: *Kwikwetlem* at paras. 58-60. The BCUC's obligation to assess the adequacy of Crown consultation in that case arose only because it was a Crown project advanced by BC Hydro and BCTC.

Relatedly, Lax Kw'alaams' characterization of the CPCN that PNG seeks in this Application as a "Crown authorization" (May 10 Letter, p. 4) is also incorrect and inconsistent with the premise on which the BCUC's *First Nations Information Filing Guidelines for Crown Utilities* (Appendix A to Order G-51-10) proceed. Those guidelines state at p. 1 of 7:

The Commission, in its **role as a quasi-judicial tribunal**, does not itself have an independent duty to consult First Nations (*Carrier*, para. 56). **Rather, it is the Crown** who has a legal duty to consult First Nations when making decisions that may affect Aboriginal and treaty rights. [emphasis added]

The BCUC itself is not characterizing itself above as the Crown. To the contrary, it is contrasting itself, as a quasi-judicial tribunal, with the Crown, which is why the second of the above sentences starts “Rather, it is the Crown...” The *Utilities Commission Act*’s description of the BCUC and its powers and duties is completely unlike the *BC Hydro and Power Authority Act*’s treatment of BC Hydro, for example. Correspondingly, as paragraph 81 of *Carrier Sekani* reflects, the Crown conduct at issue in that case was not the BCUC decision pursuant to s. 71 of the *Utilities Commission Act* as to whether the proposed energy supply contract was in the public interest; rather, it was BC Hydro’s proposed entry into the contract.

Fifth, it is instructive to see what Lax Kw’alaams does and does not do in the May 10 Letter. What it does is re-word or re-characterize points made on behalf of PNG in our May 6 letter, presumably because they are not supportive of Lax Kw’alaams’ position in their original form. We ask the BCUC to have regard to the content and emphasis of our letter rather than others’ restatements of it. What Lax Kw’alaams does **not** do is address issues of regulatory compliance by the Western Gas Transmission Line and how any procedural delay will impact Project construction windows and potentially impact the safe, reliable delivery of natural gas to PNG customers, including First Nations. PNG’s evidence on these points remains unchallenged.

BCOAPO submission (Exhibit C1-3)

We set out below several points in reply to the BCOAPO submission of May 10 (Exhibit C1-3). We note that we continue to rely as well on our letter of May 6 (Exhibit B-8), and as such will not repeat below the points therein.

With respect to new points, we note the following. **First**, in Exhibit C1-3, BCOAPO appears to accept and adopt portions of Lax Kw’alaams’ April 30 Letter without independent consideration or inquiry. BCOAPO has not viewed the entirety of the evidentiary record, having chosen not to seek access to confidential materials in accordance with the BCUC’s procedures. As noted above, had it filed a confidentiality undertaking, BCOAPO – as a registered intervener – would have had access to PNG’s full IR filings including the Indigenous Communications Log and embedded documents such as the letter dated November 2, 2020 that is referred to above. BCOAPO’s suggestion that PNG’s filings were deficient is inappropriate given it has not taken steps to access the confidential portions of them.

Second, BCOAPO states that at least two Crown agents are involved in the permitting process relating to the Project, the OGC and the B.C. Archaeology Branch. Our understanding is that the Crown duty to consult under the *Heritage Conservation Act* rests with the OGC. Under the *Oil and Gas Activities Act*, for the regulation of oil and gas activities and related activities, the OGC has all the powers and responsibilities relating to a discretion, function or duty referred to in specified provisions including the permitting powers normally exercised by the Minister of Forests, Lands, Natural Resource Operations and Rural Development under ss. 12.4 to 12.8 of the *Heritage Conservation Act*.²

Third, BCOAPO contends that the BCUC “has power to assess the adequacy of the OGC consultations – adequacy that is seriously in question given the Lax Kw’alaams representations to the BCUC that the OGC referred the Band to another unnamed Crown agency”. As noted earlier in this letter, Lax

² *Oil and Gas Activities Act*, S.B.C. 2008, c. 36, s. 1 (definition of “specified provision”) and s. 8.

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Kw'alaams stated in the May 10 Letter that the OGC disagrees with the suggestion that it referred the Band elsewhere. (PNG acknowledges that BCOAPO may not have had the benefit of the May 10 Letter from Lax Kw'alaams at the time it prepared and submitted Exhibit C1-3.) If BCOAPO or Lax Kw'alaams nonetheless persist in alleging inadequacy of OGC consultation, the statutory review and appeal mechanisms of the *Oil and Gas Activities Act* are potentially available as may be the courts.

Fourth, BCOAPO points to PNG's past statements regarding its consultation and engagement with First Nations. For clarity, PNG's statements were made to address the requirements of the BCUC's CPCN Guidelines (not the guidelines specific to Crown utilities) and further to the importance and value PNG places upon its relationships with First Nations in and around PNG service areas or potentially impacted by PNG's activities. Nothing here detracts from that. It is a different nature of issue than Lax Kw'alaams argues, which is specifically constitutional in character.

Conclusion

As previously stated, PNG requests that the BCUC issue its decision on the evidentiary record before it on this Application.

In the alternative, if any further process is undertaken, it should be consistent with PNG's request that a BCUC decision on the Application be issued in June 2021. In terms of dates, PNG notes that BCOAPO seeks unspecified "further process on this Application" (Exhibit C1-3, p. 6). Lax Kw'alaams in its May 10 Letter seeks an unspecified extension of deadlines. Neither BCOAPO nor Lax Kw'alaams has challenged PNG's position that the Project is required to align with current regulatory requirements and ensure the continued safe, reliable delivery of natural gas to PNG customers, and that there are timing constraints in performing the work proposed.

Yours truly,

FARRIS LLP

Per:



Ludmila B. Herbst, Q.C.

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c.c.: Lax Kw'alaams Band (Greg McDade, Q.C. and Jeffrey Nicholls)
BCOAPO
client