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BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF THE UTILITIES COMMISSION ACT
R.S.B.C. 1996, CHAPTER 473

and

RE: British Columbia Hydro and Power Authority
Project No. 3698854
W.A.C. Bennett Riprap Upgrade Project

Vancouver, B.C.
January 27th, 2016

PROCEDURAL CONFERENCE

BEFORE:

D. Morton,	**Chair**
N. MacMurchy,	**Commissioner**
H. Harowitz,	**Commissioner**

VOLUME 1

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CAARS

VANCOUVER, B.C.

January 27th, 2016

(PROCEEDINGS COMMENCED AT 9:30 A.M.)

THE CHAIRPERSON: Please be seated.

Good morning, ladies and gentlemen. My name is Dave Morton, and I'm the Panel Chair. With me are Commissioners Norm MacMurchy on my right, and Howard Harowitz on my left.

Welcome to this morning's proceeding to consider various matters related to the application to review BC Hydro's proposed W.A.C. Bennett riprap upgrade project. Since the application was filed on November 13th, 2015, we have had one IR round and BCUC Order Number G-182-15 established the preliminary regulatory timetable for the review of this application, including that round of IRs and this procedural conference.

In a Commission letter dated January 22nd, which you can find at Exhibit A-6, parties were invited to provide submissions on the following items. One, is the proceeding record sufficient for the Commission Panel to determine if the project is in the public interest. Secondly, is the proceeding record sufficient for the Commission Panel to assess the adequacy of aboriginal consultation, specifically

considering that the record does not include the joint First Nations independent technical review, and the proposed traditional use studies. Three, what further regulatory process is required, if the record is not sufficient, and fourth, the regulatory timeline proposed by the Saulteau First Nations.

After considering the submissions, the Panel will issue a new procedural order which will address the matters that are the subject of today's Procedural Conference.

At this stage, I'd like to introduce a number of individuals who play an important role in the review of the application. Seated at the front from the Commission are Joel Ronne, senior engineer of infrastructure. He's the lead staff for the application. With him is Todd Smith, director of infrastructure, and Alison Thorson, director of policy, planning, and consumer relations.

Seated also at the front is Commission counsel for the proceeding, Paul Miller and Lino Bussoli from Boughton Law Corporation. And over at the side there is Hal Bemister, our Hearing Officer.

Before Mr. Miller takes over, I'd like to ask you to please make sure that your submissions are directed to the issues that I have just outlined, together with any other issues that you or any of the

other participants identify, and that the Panel accepts as appropriate for addition to the agenda.

In identifying any additional issues, please bear in mind that it's not the purpose or the goal of this conference to compare or discuss the merits of the application, but to address the issues that I've just described.

After appearances, the order of submissions will begin with BC Hydro and then follow the order of appearances. Once we reach the end of the interveners, beginning with the last intervener to speak, interveners will have a right to reply to other interveners' submissions in reverse order. BC Hydro will have the final right of reply.

In the view of the Panel, the issues are most effectively canvassed collectively as opposed to issue by issue. But if anyone disagrees, we're prepared to consider any alternative approach you may suggest. However, please address this during your appearance.

I'm now going to ask Mr. Miller to call for appearances. As you enter your appearance, please state your name for the record, the party you represent, and identify any additional issues at that time, and also advise whether you prefer that the issues be dealt with all together or if you require or

recommend a separate round.

Mr. Miller, please go ahead.

MR. MILLER: Thank you very much, Mr. Chair. The first in the order of appearances is BC Hydro and Power Authority.

MS. JONES: Thank you, Mr. Miller. Good morning, Panel. Michelle Jones for BC Hydro and Power Authority. I have with me Jennifer Agnolin, who will be here throughout the proceeding today.

In addition to the four questions proposed by the Commission, BC Hydro thinks that it is necessary to address the letter it filed yesterday in response to Saulteau First Nation's letter of January 20th. That letter speaks to the facts underlying Saulteau First Nation's request.

THE CHAIRPERSON: Thank you.

MR. MILLER: Commercial Energy Consumers.

MR. WEAFER: Good morning, Mr. Chairman, members of the Panel.

THE CHAIRPERSON: Good morning.

MR. WEAFER: Chris Weafer, spelled W-E-A-F-E-R, appearing for the Commercial Energy Consumers. And I don't think this is so much an addition to the agenda but a suggestion that is part of this process. If the Commission has any thoughts or suggestions as to how to improve the consultation process such that we don't

end up in a position like this, where we have a bit of a last-minute challenge, that may be helpful. And I just leave that to the Commission for its decision, but we may have some comments on that in our submissions.

THE CHAIRPERSON: Thank you, Mr. Weafer.

MR. WEAFER: Thank you.

Proceeding Time 9:35 a.m. T2

MR. MILLER: B.C. Old Age Pensioners' Organization *et al.*

MS. KHAN: Sarah Khan, K-H-A-N, representing Active Support Against Poverty, B.C. Old Age Pensioners' Organization, Coalition of Senior Citizens' Organizations of B.C., Disability Alliance B.C., Together Against Poverty Society, and Tenants' Resource and Advisory Centre.

THE CHAIRPERSON: Thank you, Ms. Khan.

MR. MILLER: McLeod Lake Indian Band.

MR. DAVIS: Good morning and thank you. My name is Clayton Davis out of the McLeod Lake Indian Band. I've been working out of the tribe for a number of years. I'm worried about their safety and I'm worried about some of the issues with the First Nations.

THE CHAIRPERSON: I'm sorry, I didn't catch your name. Mr. Davis?

MR. DAVIS: Clayton Davis.

THE CHAIRPERSON: Clayton Davis? Thank you.

MR. DAVIS: Thank you.

MR. MILLER: Saulteau First Nation.

MR. HICKLING: Good morning, I'm James Hickling spelled H-I-C-K-L-I-N-G, and with me is Mary-Anne Vallianatos, V-A-L-L-I-A-N-A-T-O-S, with Saulteau First Nation. It's pronounced almost with a D, Saulteau.

THE CHAIRPERSON: Sorry. Thank you.

MR. HICKLING: My pleasure. I'd also like to address the letter submitted by BC Hydro yesterday.

THE CHAIRPERSON: Very well. We'll look forward to hearing about that.

MR. HICKLING: Thank you.

THE CHAIRPERSON: The end of appearances?

MR. MILLER: That concludes the order of appearances, Mr. Chair.

THE CHAIRPERSON: Okay. BC Hydro, are you ready to go?

MS. JONES: We are.

THE CHAIRPERSON: Thank you.

SUBMISSIONS BY MS. JONES:

So what I propose to do is to first take you through the letter exchanges -- I should say the letter that BC Hydro filed yesterday with the Commission. Before I do that, I do note that there was a public and a confidential version of the letter filed. The confidential version had a number of attachments, a number of e-mails that were exchanged

between the parties from September 18th until January 7th. They were filed confidentially originally because BC Hydro wanted to ensure that Saulteau First Nation had the opportunity to review them so that it could voice any objections to filing it publicly. I had spoken with counsel for Saulteau First Nations. They have no objection. And on that basis we're happy to circulate a copy of the confidential filing that was filed yesterday.

THE CHAIRPERSON: Please do.

MS. JONES: We'll have it perhaps entered as an exhibit. Would that be best? As Exhibit B-6?

THE HEARING OFFICER: Marked Exhibit B-6.

(LETTER FROM BC HYDRO DATED JANUARY 26, 2016 WITH "ATTACHMENT A…CONFIDENTIAL - BCUC ONLY" MARKED EXHIBIT B-6)

MS. JONES: So before I get into the letter, before I take you through the facts that are -- and BC Hydro's response, I want to first set out for the Commission the purpose of BC Hydro in filing this letter.

In reviewing the letter from Saulteau First Nations, BC Hydro identified an omission and it believed that its previous record stated that there had been an agreement on scope of the TUS. That remains true. But Saulteau First Nation's letter of January 20th put into question that. It did not

expressly say no scope was -- no agreement was reached on scope. However, it left it open to interpretation that an agreement on scope of the TUS was not actually reached.

BC Hydro filed the letter to ensure that the factual record is complete.

THE CHAIRPERSON: Ms. Jones, excuse me just for a moment.

MS. JONES: Of course.

MR. HICKLING: We don't dispute that there was an agreement on scope.

MS. JONES: Okay. Well, I think I'd still like -- Mr. Hickling has just informed me that his client doesn't dispute that there was an agreement on scope. I still think I would like to take the Commission through the facts --

THE CHAIRPERSON: Okay, please go ahead.

MS. JONES: -- of the letter, if the Commission will entertain that. I'd like to take the Commission through that because I think it is necessary to see the primary documents that were exchanged between the parties during the relevant time period, because it's BC Hydro's position that they speak for themselves as to what the intent of the parties was. While having the factual record before the Commission is important, that is not what today's procedural conference is about. Today's procedural conference is about whether

or not the record is sufficient for this Commission to decide the application, and BC Hydro submits that it is.

We will be responding to Saulteau First Nation's request that the BCUC not proceed in the absence of a completed TUS or First Nation independent technical review. But BC Hydro submits that whether or not consultation needs to be complete before the BCUC can render a determination is a substantive issue that goes to the merits of the application, and should not be determined here before the procedural conference.

Proceeding Time 9:40 a.m. T03

So I'm going to start -- in Saulteau's letter of the 20th, they state: "On September 18th …"

THE CHAIRPERSON: Could you point to the page, please?

MS. JONES: Of course. Exhibit B-5 --

THE CHAIRPERSON: Page?

MS. JONES: -- dash 3, at page 2. So this is not this exhibit.

THE CHAIRPERSON: Okay.

MS. JONES: This is the exhibit that Saulteau filed --

THE CHAIRPERSON: Okay.

MS. JONES: -- on the 20th.

THE CHAIRPERSON: Okay.

MS. JONES: And I'm just referencing it because it's the

paragraph that caused concern for BC Hydro, and led BC Hydro to file the subsequent filing that you have before you.

The paragraph in question reads:

> "On September 18th, 2015, BC Hydro stated that it was prepared to accept Saulteau First Nation's TUS proposal subject to some revision. In Saulteau First Nation's view, those revisions significantly change the scope and focus of the proposed TUS and further discussion was required."

Now, the letter from Saulteau First Nation's legal counsel goes on and is silent as to whether or not an agreement as to scope was reached. However, it then goes on to suggest that the funding for the TUS did not -- was not in place, and the TUS did not commence, in part because of BC Hydro's actions. And that is what I want to go through -- the issue I want to go through the record with the Panel on.

So, starting at page 1 of Attachment A to the document you have before you, Exhibit B-6. I won't go through this at length, but pages 1 to pages 38 are four e-mails in which Saulteau First Nation, their representative within Saulteau First Nation that was speaking to TUS, and the representative within BC

Hydro that was also dealing with TUS; it's an exchange of four e-mails wherein they are discussing the scope of what the TUS should be.

And finally, on October 7th at page 38 of the filing before you --

THE CHAIRPERSON: Sorry, page 37?

MS. JONES: Thirty-eight.

THE CHAIRPERSON: Thirty-eight.

MS. JONES: So there's been a number of exchanges back and forth on scope. Here, at page 38, you have an e-mail from October 7th from Saulteau First Nation to BC Hydro, and it says, "Please find attached version 2 of the proposal." So they are offering -- there is a revised proposal.

If you go to page 42 of that attachment -- I apologize. Page 40 -- yeah, 42. At the bottom of that page you see "Scope". So the proposal is setting out what exactly the scope of the TUS is going to be. And then over the page -- over two pages on page 44, we see that the proposal lays out the work plan and the budget.

Over the page again we have the costs that will be associated with this TUS, particular Table 1 addresses consultant costs, and Table 2 addresses Saulteau First Nation's costs.

So, over the page to page 48, this is an e-

mail from BC Hydro to Saulteau First Nations, wherein it says,

> "Thank you for your TUS proposal. We agree to the scope of review."

You then see he has -- BC Hydro has some discussions as to potentially getting a draft version of the TUS a bit sooner. And at the very bottom, you see the very -- second-to-last line. It reads,

> "I think we are ready to start the work."

So BC Hydro gives the green light, we're in agreement on the scope, we're ready to start the work. That's on October 9th.

Following that, on page 49, we have an e-mail exchange dated October 29th between Saulteau and BC Hydro again. And the first e-mail was actually the e-mail at the bottom of page 49. It commences,

> "Hi Carmen,
>
> I was hoping to talk to you prior to sending this template off to you. It is my attempt to draft a capacity funding agreement that aggregates all of our previous discussions with respect to GMS Riprap."

Proceeding Time 9:44 a.m. T4

It goes on to say:

> "We haven't had the chance to touch base on this for some time, so I was hoping to

explain the rationale and how I arrived at the numbers (they are based off our previous conversations, but there are some key modifications).

Also, this draft has yet to be vetted by BC Hydro's legal [counsel]. I'm hoping that we can use this draft as a document to get some mutual understanding on our requirements at this stage."

So BC Hydro reaches out and says "Let's formalize the funding for the TUS to do the capacity funding agreement. Here's a draft, let's talk about the substance of it."

I am going to take you through that capacity funding agreement because I think it raises -- you'll see that it directly incorporates what was set out in the TUS proposal, but before I do that I want a just quick look at the responses from Saulteau. Immediately on the same day we see a response from Saulteau wherein they say:

"The agreement looks straightforward. The agreement has MLIB…"

McLeod Lake Indian Band,

"…instead of Saulteau First Nation as a recipient of the funds."

So it's the only feedback BC Hydro receives

from Saulteau at this point. Having just received it, Saulteau says, "Hey, it looks straightforward but there is an error in it."

And then we see Rod follows up the same day, "Are you in the office tomorrow? If so could we take some time to discuss this?"

So I want to take you through the capacity funding agreement quickly, starting at page 51. We see it's drafted as between Saulteau First Nations and BC Hydro.

THE CHAIRPERSON: Ms. Jones, I wonder if we could just ask a question, please.

MS. JONES: Yes, of course.

THE CHAIRPERSON: So the e-mail says that the agreement has McLeod Lake Indian Band.

MS. JONES: Yes.

THE CHAIRPERSON: And I'm looking at the agreement and it doesn't have McLeod Lake. So is this the agreement that in fact Hydro sent over?

MS. JONES: Yes, and I will show you where the reference to McLeod Lake Indian Band is as I take you through the CFA, yes.

THE CHAIRPERSON: Okay.

MS. JONES: So we see here clearly it's between Saulteau and British Columbia Power -- British Columbia -- BC Hydro, sorry. If we go over to page 56 of the

attachment we see it's Section 9 there.

THE CHAIRPERSON: Okay.

MS. JONES: This is the single reference to McLeod Lake Indian Band. So throughout the agreement it's specified to Saulteau. It looks like there was an error in that here it technically should have been Saulteau. But McLeod Lake Indian Band was listed as who notice should go to and who the payment should go to.

If we go over the page to page 56, which is Appendix A of the agreement, this is really a table setting out the components of the -- or the categories of funding that the capacity funding agreement was meant to address. So the table starts at page 58. You'll see a number of categories of types of funding, particularly on page 59 at the very end of that table. On the far left there is -- the last category of funding is "Studies". And we say, "Undertake a Traditional Land Use Study as outlined in Appendix C." And when we go over to the second to last column it says, "Per the schedule as included in Appendix C."

So Appendix C is within this document as well and I'm going to take you to it. It is at page 65. And you'll see what it does is it directly incorporates the costs and the schedule as outlined in the agreed to proposal.

So BC Hydro's capacity funding agreement addresses several different components of capacity funding for the consultation process, one of which was studies. But this capacity funding agreement in no way changed the cost that was already agreed to. In fact it directly incorporates the cost of the proposal as was agreed to by the parties.

So over the page on page 66 -- recall this was sent on the 29th and Saulteau's comment back was there was an error from -- reference to McLeod Lake Indian Band but it looked pretty straightforward. We have on November 3rd BC Hydro following up saying, "Can we --" you see the Re? This was actually a follow-up to say Mr. Hill took the previous e-mail of the 29th and re-sent it to Ms. Marshall saying, "Do you think we could get a chance to discuss this, being the capacity funding agreement, prior to our meeting on Friday?" There was no response to that e-mail.

Proceeding Time 9:49 a.m. T05

Over the page, at page 67, we're at December 3rd now. These are the meeting minutes from a meeting between BC Hydro, Saulteau First Nation and McLeod Lake Indian Band. It was to discuss a variety of issues related to the project. Of particular importance here is on page 68 over the page. The second paragraph there. And I know it's really small

font. It says:

> "The parties' discussion turned to the McLeod Lake and Saulteau traditional land use studies. CM …"

Which is Carmen Marshall, who is the representative from Saulteau.

> "… stated that she had hoped Saulteau's study would be complete in time for the submission to the BCUC, but she was not sure this would occur. She confirmed that while the marine option for transporting riprap had not triggered the need for a land use study, the road transport option had."

And then they go on to indicate and discuss the First Nation independent technical review.

So at the December 3rd meeting we get a status report. That's the information that's given on the traditional use study. And then over on page 70, we have again an e-mail from BC Hydro on January 6th discussing a number of topics about the project. But the third bullet provides

> "An update on the status of McLeod Lake and Saulteau's traditional use studies (started? expected date of agreement signing? expected completion date?)"

BC Hydro is following up to see -- to say, "Where is

this at? Where is your capacity funding agreement at?"

And over the next page again, on page 71, the e-mail response to that previous e-mail is actually at the bottom of the page. You have Ms. Marshall again from Saulteau advising BC Hydro,

> "On point 3 TUS status has been sent to BC Hydro for review in October."

And the response from BC Hydro is the top e-mail.

> "Thanks Carmen.
>
> It looks like Rod may have sent you a capacity funding agreement to cover these expenses at one point (I believe the attached version is the latest). I think you mentioned at our meeting in December that the agreement has passed Saulteau's legal review. Any word on when it might be signed?"

So BC Hydro again on January 7th saying, "We're following up on the funding on the CSA, where is this at? We understood what you said in December was that it was going through your legal review, where are we at?"

And that's really all the communications up until Saulteau's letter of January 20th to the Commission. And it's BC Hydro's position that the

primary documents really speak for themselves. And in particular --

THE CHAIRPERSON: Ms. Jones? Another quick question. I see when the agreement was re-sent, it still has the McLeod Lake Indian Band. Was that another oversight, or was that --

MS. JONES: That's correct. What -- if you look at the e-mail what Leah -- so, there is, there was, as Saulteau points out in their letter of January 20th, there was a change as to who the coordinator was assigned to this file for BC Hydro. It was Rod Hill up to a point, and it switched, I believe, in mid-November to Leah. So there is a new person in the mix here. What she's saying, if you look at the e-mail, she says, "I am attaching what Rod already sent you."

THE CHAIRPERSON: Okay.

MS. JONES: So, yes, it is exactly that.

THE CHAIRPERSON: Thank you.

MS. JONES: So with that in mind, those are all the documents that BC Hydro has on the issue of TUS between this time period. We submit that it's clear from these documents that the parties worked diligently together between September 18th and October 9th to reach an agreement on the TUS scope. They did reach an agreement on that scope. It was reached on October 9th. It included not only the scope of the

study, but it also included cost of the study.

BC Hydro sent Saulteau First Nation a capacity funding agreement on October 29th, to finalize how the money would get to Saulteau. It in no way changed the amounts provided or agreed to. It also didn't change the conditions. It simply adopted what had already been agreed to.

The direct response from Saulteau was that it looked straightforward, but that there was an error in that there was a single reference in it to McLeod Lake Indian Band.

Proceeding Time 9:53 a.m. T6

BC Hydro followed up on the capacity funding agreement in November, December and January, and all the indications were that everything from Saulteau to BC Hydro was that it was straightforward, it was undergoing legal review, there were no major concerns raised.

The first time that BC Hydro heard Saulteau's complaints regarding the BCUC process proceeding in the absence of a TUS, and also the concerns about the capacity funding agreement, the substantive concerns except for the one reference to McLeod Lake Indian Band, was in Saulteau First Nation's letter to the Commission on January 20th. That is the first time that BC Hydro heard either of

those concerns.

I can advise that since the filing -- since having received Exhibit C5-3, BC Hydro has provided Saulteau First Nation with a revised draft capacity funding agreement for their review, and we have incorporated -- oh, sorry, we're in the process of, we've got it prepared, we'll be providing it today, we had intended to provide it this morning. It addresses the concerns raised in terms of the substantive issues with the CFA. It will be provided to Saulteau today. Again though, it does not change the cost or the amount of the TUS proposal.

So BC Hydro has taken steps, after receiving Saulteau First Nation's letter, to try to rectify, to try to get the funding issue moved forward. It's moving as proactively as it can. It was not, however, aware of the substantive concerns that Saulteau had in respect of the CFA until it received Saulteau First Nation's letter to the Commission on January 20th.

That's the factual record as we understand it. We will note that we understand there's a lot of documents here. All of the documents, though, were exchanged as between BC Hydro and Saulteau First Nation with the exception of the meeting minutes, the three-page meeting minutes from December 3rd.

Therefore we believe that the documents speak for themselves and let the Commission draw their own conclusions from them.

BC Hydro has taken the opportunity to correct the factual record on this point, but it's our position that today's Procedural Conference does not require the Commission to determine facts. What it is about is whether or not the record is sufficient.

And with that, I'd like to now move on to the Commission's questions, subject to any questions on the factual record.

THE CHAIRPERSON: I just have one question about the meeting on December 3rd.

MS. JONES: Yes.

THE CHAIRPERSON: There are no issues or concerns, or it wasn't -- the capacity funding agreement wasn't discussed at that meeting, is that correct?

MS. JONES: It was not raised, no, although you do see from Ms. Manson's -- BC Hydro's representative's e-mail following that meeting, if you look at page 71, so she's following up on the capacity funding issue and you see her second sentence there, "I think you mentioned at our meeting in December," which is referring to the December 3rd meeting, "that the agreement has passed Saulteau's legal review. Any word on when it may be signed?"

THE CHAIRPERSON: Okay. Thank you.

MS. JONES: That's the only indication we have that there was any reference to it.

THE CHAIRPERSON: Do you have any questions?

Please go ahead.

MS. JONES: No further questions from Panel?

THE CHAIRPERSON: Yeah, yeah.

MS. JONES: I'd like to now turn to the four questions that have been posed by the BCUC.

It is BC Hydro's position that the proceeding record is sufficient for this Commission Panel to proceed with the determination on its merits. The application before the Commission is a request under Section 44.2(1)(b) of the *Utilities Commission Act.* This section requires the Commission to consider whether or not to accept the expenditure schedule associated with the project configuration selected. The Commission can accept the expenditure schedule if, having regard to all of the evidence before it, it considers that making the expenditures referred to in the schedule would be in the public interest.

Proceeding Time 9:58 a.m. T07

The public interest is obviously key to the Commission's determinations.

In addition to considering the interests of persons in British Columbia who receive or may receive

service from BC Hydro, the Commission considers and is to be guided by British Columbia's applicable energy objectives and an applicable authorized RIP.

BC Hydro's application for the project, as filed with the Commission on November 13th, addresses each of the issues in a fulsome and substantive way. Where additional details or explanations were required, BC Hydro filed further evidence in the form of substantive IR responses from both the Commission and interveners.

None of the interveners, including -- and this is important -- including Saulteau First Nations have provided any indication that the proceeding record as currently filed is incomplete or insufficient. Now, I will get substantively to what our response to Saulteau First Nations' request is, but as we understand it, they are not arguing that what is currently on the books as the record is insufficient. What they are arguing is that the Commission should not proceed in the absence of further consultation.

They are arguing the substantive issue now as opposed to the end. They are not saying that our chronology at Appendix F of our application is deficient. They are not saying that we are missing meeting minutes, e-mails, or a key aspect of

consultation on the record. Instead, what are they -- what they are saying is that you should wait until consultation is complete. You should wait until we have the results of these studies.

In addition, none of the registered interveners have requested a second round of Information Requests or an oral hearing, and on this basis BC Hydro believes that no further rounds of Information Requests are necessary. Nor are there any factual conflicts based on the record as it currently sits that would require an oral hearing.

In the alternative, if the Commission is of the opinion that further evidence is required, then BC Hydro submits that the most effective and efficient process to achieve this is a short focused round -- second round of Information Requests. BC Hydro requests that any second round be limited in scope to unresolved evidentiary issues.

BC Hydro does not oppose the filing of written evidence by interveners, but reserves the right to ask Information Requests that -- of any evidence that's filed. BC Hydro's overall request as to procedure is that in determining what the procedure going forward should be, the Commission should adopt a schedule that preserves BC Hydro's overall intended project schedule as set out in the application.

Now, turning specifically to the arguments and the requests made by Saulteau First Nations. BC Hydro submits that the record on the adequacy of consultation is adequate. The application in this proceeding contains a fulsome account of the consultation undertaken with each potentially affected First Nation up to just prior to the filing of the application. So, the application says everything that was undertaken with First Nations up to the beginning of November. BC Hydro has supplemented where necessary through its responses to Information Requests, and through the letter filed yesterday.

Collectively, these three sources, the application, the responses to Information Requests, and the letter filed yesterday, present an adequate and sufficient record on which the Commission can proceed to assess the adequacy of consultation up to this point in time. Nowhere in its letter of January 20th has the Saulteau First Nation alleged the evidentiary record is incomplete.

Saulteau First Nations' request is that the BCUC delay its process pending the outcome of further consultation. In particular, they don't want this to go forward until the results of the TUS and the First Nation independent technical review have been received. In support of its request, Saulteau First

Nation argues that the studies are necessary so that the Commission can assess the potential adverse impacts of the project on Saulteau First Nations' rights and interests, and the adequacy of consultation with Saulteau First Nation in this instance.

BC Hydro submits that whether or not a completed TUS or any other study is required for consultation does not go to the sufficiency of the record before the Commission. It goes to the sufficiency and the requirements of the consultation itself.

Proceeding Time 10:02 a.m. T8

Put another way, to accept Saulteau First Nations' position that the BCUC process should not proceed until these studies are complete, is to find that the Crown consultation undertaken up to this point in time is incomplete, it's inadequate.

This is an issue of substance that goes to the heart of whether or not the expenditures are in the public interest, it is not a simple procedural request. In order to decide whether completed studies are required at this stage of the project development process, the BCUC must first assess the scope of consultation. Again, this is a substantive issue that merits full legal argument and should be determined as part of the overall public interest. It would be

inappropriate to decide the scope and adequacy of consultation at this of the process in the absence of such substantive legal argument.

In addition to requiring the determination of substantive issues, Saulteau First Nations' letter also requests that the Commission delay its proceeding pending the completion of consultation. Such an approach is contrary to the current jurisprudence and a marked departure from this Commission's past approach. The law is clear that the public interest determination requires a consideration of whether or not the Crown's consultation has been adequate up to the point of the Commission decision. The courts and the BCUC have consistently held that projects develop in stages and consultation must be found to be adequate having regard to this stage of the process in which the project currently lies.

For instance, in *Taku*, the Supreme Court of Canada found that because the project certificate in that case, which was under review, was only one stage of a multi-stage process, it was all right that there were outstanding issues remaining in the consultation as they would be dealt with at a later stage or even in a more appropriate separate process.

The B.C. Court of Appeal in *Coquitlam* also recognized the staged decision making of project

development and found that this Commission's role specifically in the context of that case was to determine whether the Crown's honour had been maintained up to that stage of the Crown's activity. Again, up to the stage.

The law is clear, there is no requirement that consultation be complete prior to a regulator issuing its decision on a particular stage of a project. Instead, what is required is that the consultation must be adequate having regard to the stage of the project development process in which the project currently lies.

The Commission has consistently applied this approach and found that consolation need not be complete before -- for it to render a decision. This was the approach taken in the Commission's reconsideration of the Interior to Lower Mainland CPCN proceeding. Same approach in respect of the CPCN for the Ruskin Dam and Powerhouse upgrade project, and also the same approach taken in respect of the Dawson Creek/Chetwynd Area transmission project.

Turing to the specific stage in which this project currently is, BC Hydro is requesting that the Commission approve the expenditure for the project, but this is one stage in a several stages process. The project has already progressed through a number of

other stages. Most notably it has progressed through the regulatory process of the Ministry of Forests, Lands and Natural Resources operations, and the Ministry of Energy and Mines. Both of those regulators issued the requisite permits for the project. It is notable that those permits and approvals were obtained in the absence of a completed TUS or First Nations' independent technical review, were issued having a finding of adequate Crown consultation and those permits remain valid and unchallenged.

As described in BC Hydro's response to BCUC IR 1.15.4, this is not the final stage of this project's development. This is not like an application under section 45, where there's a CPCN and it permits it activity to occur. In this case there remains quite a bit of work to be done, and in particular the final decision that will be made on implementation is with BC Hydro.

Proceeding Time 10:07 a.m. T09

BC Hydro, as a Crown agent, has a duty to act honourably in all dealings with First Nations. BC Hydro has committed already, it will use the TUS results to inform the implementation decision, provided they are available at the time.

Saulteau First Nation, in their letter of

January 20th, has indicated that they can have the TUS completed by April 15th. BC Hydro says that -- BC Hydro will have the time -- provided this is done, BC Hydro will have the time to consider and to consult on the results of the TUS and the First Nation independent technical review prior to its decision to implement the project.

As such, irrespective of what you decide in respect of Saulteau First Nation's request, the TUS, if it is done on the timeline that Saulteau has committed to in their letter, will be considered as part of BC Hydro's implementation decision, and can be consulted on prior to that decision. Again, provided that Saulteau meets the April 15 timeline that they have proposed.

In sum, BC Hydro respectfully submits that Saulteau First Nation's request asks the Commission to require that consultation be complete before it moves on with its process. This is contrary to the jurisprudence and would be a marked departure from the Commission's usual approach.

I'd now like to provide some submissions on the schedule as proposed by Saulteau First Nation. The first comment we have is that although the letter of January 20th, Exhibit C5-3, speaks uniquely to Saulteau First Nation's TUS, if you actually look at

the schedule that's proposed, and in particular at page 3 of their letter, and it's in bold. This is again the Friday, April 15th timeline they have given. But if you look at what they've worded as the action, it says, "Filing of Traditional Use Studies". Studies, not just contemplating one, but several.

BC Hydro can advise that there are other First Nations involved in this application that either are undertaking or have requested to undertake a TUS. At this point in time there are -- I believe are agreements with one other First Nation to undertake a TUS, or it's close to being finalized. With another First Nation that's involved, there is no agreement at this point to undertake a TUS. The parties are still engaged on reviewing -- or BC Hydro is waiting for a proposal, and we'll have to review the scope and the costs associated with that.

So in respect of what Saulteau is requesting, although they have given a timeline that they say won't unduly delay the process, the reality is that they're asking for this process not to proceed until the TUSs, all of the studies, are received. One, there is no commitment at this date for every First Nation to undertake a study. We haven't been able to reach that yet. And two, we're not sure what the timeline of that would be. So, the schedule as

currently proposed in fact will push us out likely beyond what Saulteau is requesting, if their position is that all of the studies need to be completed.

A Commission decision -- the schedule contemplates a Commission decision being rendered in July or August. This would have the practical effect of delaying the start of the project by approximately one year. It's just because of the short construction window in the north.

If BC Hydro is unable to commence operation of the quarry in June, 2016 the risk exists that insufficient riprap materials will be available to complete the riprap placement work during the low reservoir period from March to June of 2017.

The expected financial impact of a delay of one year is estimated to be in the range of $3.5 to $5.5 million dollars.

Proceeding Time 10:11 a.m. T10

You'll see this is discussed in the application at Exhibit B-1, page 1-23. This estimate of 3.5 to 5.5 million dollars represents additional interests on sunk costs, an increase in direct costs, inefficiency costs associated with restarting the project, costs for delaying procurement, and costs associated with a longer regulatory process.

Most importantly for BC Hydro, any delay in

the project adds risks of exposure from a dam safety perspective. BC Hydro expects that the proposed schedule would have the practical effect of adding another entire year of risk. BC Hydro submits that such risk is not in the public interest.

Subject to any questions the Panel may have, those are our submissions.

THE CHAIRPERSON: Thank you. Thank you, Ms. Jones.

MS. JONES: Thank you.

THE CHAIRPERSON: Mr. Weafer?

MR. WEAFER: Thank you, Mr. Chairman.

SUBMISSIONS BY MR. WEAFER:

Mr. Chairman, members of the Panel, the Commercial Energy Consumers bring to the table today the ratepayers' perspective, which is -- our interest is in safe, reliable and cost-effective delivery of service by BC Hydro while being in compliance with their legal obligations, including the duty of consultation and accommodation of First Nations. So we're stepping back. The bottom line is we're the ones who pay the bills. The costs incurred by the process ultimately fall to the ratepayer, so we come to the proceeding from that perspective. But we can be fairly brief in our response to the direct questions now, but just -- that is the perspective.

The CEC responded in a letter, Exhibit C2-

3, on January 20th, 2016, indicating on process that we were satisfied that we didn't need a further round of information requests and that we were prepared to proceed to a proceeding, and that remains our position. We think that the process has been fair and open and we have what we need on all matters except for -- and we will have some comments with respect to the First Nations' issue which has arisen in the last week or two.

And in fairness, that First Nations consultation process was fairly elaborately described by BC Hydro in Appendix F of its application and we took comfort in that, that there had been an ongoing consultation that commenced with a notice in December of 2011. So there has been some time spent and some effort spent by the First Nations' representatives and by BC Hydro understanding and consulting on this project, and to that the ratepayers are appreciative for the efforts of both sides. There's clearly been significant resources expended on the consultation process.

And so moving to question 2, based on what we've seen on the record, including what was filed today, there's a fair body of evidence on the sufficient consultation, but I do adopt the submissions of BC Hydro that that is a substantive

question and the law is that the consultation can occur during the stages of the project.

So from a CEC perspective, there's been a fair bit of work done and it appears there's still work being done and there's consultation still ongoing. And so we accept Hydro's position that as the applicant, if they believe they've done what they need to do and they're continuing to do what they need to do, the responsibility ultimately is on them to satisfy that requirement. And our view is that they are certainly working on it and will be continuing to work on it.

With respect to what needs to be done, we are satisfied with what is on the record, but we also do understand BC Hydro commits to fund the ITR and the TUS for Saulteau. And that can happen and it can happen in parallel with the Commission dealing with the application before it in a timely manner, and we say that both processes could occur concurrently, and if matters arise from the TUS or the ITR at a later time and they cause something unanticipated for BC Hydro, that they'll come back to the Commission because there may be a cost or a substantive issue that arises that we're not aware of today, and that's a fair way to deal with it, in our view.

Proceeding Time 10:16 a.m. T11

So, from our perspective, the Commission, in answer to question 3, you can proceed with this process and allow the company to continue with its commitment to deal and consult with First Nations issues, including the TUS and ITR, and still meet a timely process to allow BC Hydro to proceed with the project this year.

As ratepayers, we are not particularly enamoured with the three and a half to five million dollar cost resulting from a potential one-year delay, if the schedule proposed by the Saulteau Nation is followed.

Now, on that point, we haven't heard Saulteau's comments this morning, and we're hopeful that they can come up with some submissions to this Commission based on what they've heard this morning, that they condense their timeline and help all parties achieve a reasonable timeline to complete the project.

So in dealing with the question 4, in terms of the regulatory timeline, if Hydro was saying that's not workable -- and again, we are mindful that the first contact with Saulteau Nation was in December of 2011. There has been a fair bit of time -- and based on the record that we've seen for the first time this morning, there was actually agreement on a TUS study and funding in October. Our concern is, this should

have been dealt with some time ago. And ratepayers shouldn't be prejudiced by the delay, particularly if the efforts are going to be undertaken and the funding is going to occur to facilitate the studies.

Those are the four questions. The other issue that I raised in the beginning, in terms of how do we avoid this in the future, I'm not sure. And I just would urge the Commission to assist BC Hydro and/or First Nations who have material issues to deal with, in terms of interacting with Hydro. We accept that. That there be some form of timeline created in terms of the consultation process to avoid sort of the last-minute challenge of unanticipated procedural challenges.

And those are our submissions.

THE CHAIRPERSON: Thank you, Mr. Weafer.

MR. WEAFER: Thank you.

THE CHAIRPERSON: Ms. Khan, are you ready? Thank you.

SUBMISSIONS BY MS. KHAN:

MS. KHAN: With respect to the first question posed by the Commission, we have reviewed the IR responses in this proceeding and we don't believe that another round of IRs would solicit any additional information that is currently available, at least. And so, we don't think that another round of IRs, based on the information currently available, would be useful in

determining whether or not the project is in the public interest.

We also don't see the need for an oral hearing, or as being able to solicit any additional information that would be of use to the Commission. Having said that, of course, we don't yet have the First Nation's independent technical review, which I'll refer to as the FNITR, or the traditional use study that's being undertaken.

So the question -- I'll just turn to the second question posed in the Commission's letter.

Overall, based on its assessment, as we've heard from Hydro, Hydro believes that the seriousness of the potential impacts arising from the project on First Nations' treaty rights is low, and this leads Hydro to the conclusion that the project triggers a duty to consult at the low end of the spectrum, the low end of the *Haida* spectrum. BC Hydro also believes that consultation to date has been adequate to identify potential impacts arising from the project. It views the FNITR and the traditional use study as part of a continuing consultation process, the outcomes of which will be used to identify -- or, sorry, to refine its existing mitigation measures.

And at the same time, it acknowledges that, should the continuing consultation identify potential

significant impacts, then it would have to reassess its scope of consultation to determine whether further consultation and a potential change in the project plan is required.

Finally, it sees the -- Hydro sees the results of the FNITR and the TUS as providing additional information that will inform its decision about whether to proceed with implementation of the project. And Hydro also notes that it doesn't need the Commission's approval to proceed with the project.

Hydro has also pointed out that the Ministry of Forests, Lands, and National Resource Operations has consulted with First Nations before -- had consulted with First Nations before issuing the permits for the project. And that the FLNRO had determined that consultation had been adequate.

We also note that BC Hydro's decision to proceed with the project is required by the end of May, 2016, in order to meet a construction schedule such that the project can be in-service by the fall of 2019.

Proceeding Time 10:22 a.m. T12

A delay beyond the end of May could result in a delay of one year in the completion of the project, due to the short construction period for setting the riprap materials, which could cost in the

range of three and a half to five and a half million dollars. And Hydro has set out the reasons for the costs due to delay in BCUC IR 1.7.2. We aren't clear as to whether BC Hydro has entered into any external contracts to date that could lead to equipment standby or lost opportunity costs. Perhaps BC Hydro could address this when they're giving their reply.

But having settled the status of the FNITR and the TUS is -- you know, is still a bit in question, we understand that the FNITR could be ready before the end of February and that the TUS could be ready by the middle of May -- or sorry, the middle of April.

The question as to whether the record is sufficient for you to make a determination on the adequacy of BC Hydro's consultation appears to rest on Hydro's determination that the impacts of the project are low -- low and mitigable with respect to no lasting effect, and whether this conclusion could change as a result of the two proposed studies. In the materials provided so far, one of the issues that we -- the issue that we have seen that has been identified as non-mitigable is the road upgrades which will facilitate access and development to the First Nations territory. BC Hydro says that there will be no residual impacts, however.

Because the studies haven't been completed, the FNITR and the TUS studies haven't been completed, we don't know whether or not we -- we aren't able to assess whether -- the adequacy of BC Hydro's studies in this regard. And so for that reason we think that at a minimum, the First Nations Independent Technical Review should be completed in order to provide an independent assessment as to the adequacy of BC Hydro's studies, and therefore the merits of its conclusion that all identifiable environmental impacts from the projects are mitigable and no residual impacts are anticipated.

We also recognize that BC Hydro has a duty to consult and support the -- and our clients support the principle of reconciliation that informs all Section 35 jurisprudence on the duty to consult. We would support putting some filing timelines on the FNITR and the TUS so that we can determine -- so that the mitigation measures can be determined and so that the project can move forward, because we understand that the First Nations who have intervened in this proceeding are not looking necessarily to stop the project, but they're concerned about the mitigation measures.

So it is unfortunate that we're hearing the First Nations talking about their discontent with the

funding negotiations, but our clients' interests are really, as already stated to some extent by Mr. Weafer, that we are looking to make sure that we understand all the potential costs that could arise from this project and we don't want to have any further last minute challenges, so we want to have an understanding of what the costs might be for residential ratepayers.

So turning to the third question about what further regulatory process is required, we would suggested that at a minimum the First Nations Independent Technical Review be completed and filed as soon as possible, and that a procedural conference be held shortly thereafter, ideally in late February, to determine if any serious concerns have been raised such that there is room to question Hydro's conclusions regarding the impacts of the project. If serious concerns are raised by the FNITR, then we suggest that -- or sorry, if no serious concerns are raised by the FNITR, then we suggest that we proceed to written submissions on the project, recognizing that the TUS could still influence BC Hydro's decisions regarding the project's implementation. If serious concerns are raised by the FNITR, then we could decide at the Procedural Conference -- we suggest that we could decide at the Procedural

Conference or that you could decide what further steps are needed, and including waiting on the completion of the TUS.

Proceeding Time 10:27 a.m. T13

But we also recognize that of course BC Hydro isn't required to await the Commission's approval to proceed with the project, so that Hydro could decide to proceed in any event.

Regarding the fourth question, the regulatory timetable proposed by Saulteau First Nation, would not see a Commission decision until after the end of May 2016, and this would mean that the project would be delayed and there could be costs incurred to ratepayers as a result of that dely. And of course, you know, Hydro is free to decide whether or not it wants to proceed with the project and Hydro would have to make that assessment, but we also recognize that Hydro would have the benefit of having the -- both the FNITR and the TUS by the time it was going to make the decision about whether or not it was going to proceed in any event.

So, of course we haven't yet heard from the First Nations what their positions are this morning about the timelines and the regulatory process, so subject to hearing from the First Nations, those are our submissions.

THE CHAIRPERSON: Thank you Ms. Khan. Any questions? Okay.

Mr. Davis?

SUBMISSIONS BY MR. DAVIS:

MR. DAVIS: Good morning.

THE CHAIRPERSON: Good morning.

MR. DAVIS: Question one, the public interest. The public interest is safety, that's the way I look at this project. The dams are on the cusp of failure. I mean, if you have a hundred -- thousand-year storm or an earthquake, that dam will fail. That's safety. That supersedes any and all things. It should be -- it has to be addressed quickly and now. They should start working on it this summer if at all possible. That's the way I look at it.

Two, address the adequacy of aboriginal consultation. I've dealt with Leah's predecessor, Rod Hill, for quite a while on this project, and she just stepped in. I was with BC Hydro on this whole project, like, as long as -- like, since I started working at my job. I'm satisfied, we've done our CCFA, we got everything signed off. It took a while. Timeline was problems, because the marina option got loaded -- opted out right at the end. So we said we need a TLUS. So the timeline come to the crunch. CCFA came down. Like we did a lot of work in good

faith before these agreements were signed. I just got them signed myself just last week, by my council. And I've talked with my counterparts who are doing the TLUS and the FNITI, and I've dealt with Leah, and we got our stuff figured out.

So, it's late in the game, there are potentials for impacts, we're well aware of that. However, Hydro has said, yeah, let's stop and we'll look at these mitigations and we'll do some adaptive monitoring plans, and we'll get this stuff figured out down the road. So, I'm happy with that. So, yeah, let's get going on this project.

My concern is if something pops up on this TLUS or FNITI that nobody foresaw, this is going to cause problems, yes or no? But I have to go back to the main view, safety. That dam fails, we're all hooped. We'll die up there. You guys will lose your power, but we will die up there. We'll lose our land, we'll lose lots. So, I go back to the safety issue, let's take care of that first.

Treaty is important, but if there's no land left, if there's no members left, you can't exercise your treaty rights. That's the bottom line. So, I say to you folks, make a decision, get going on this, and then down the road make sure that we -- any information comes out of the FNITI and out of the TLUS

is incorporated as we work of Hydro, and proceed with this project.

And I can't answer number four, because that's -- my co-workers have done that. I am a member of Saulteau, but I have somebody who is representing us on that end. I'm working for McLeod Lake here, so. Thank you very much.

Proceeding Time 10:32 a.m. T14

THE CHAIRPERSON: Thank you very much, Mr. Davis.

Mr. Hickling? Sorry, go ahead.

SUBMISSIONS BY MR. HICKLING:

Thank you. James Hickling for Saulteau First Nations.

I'd just like to respond to a couple comments this morning. Mr. Weafer and others described Saulteau's concerns as a last minute challenge. We don't look at it as a last minute challenge. Here is how we look at it. BC Hydro submitted an application. The Commission determined that there should be a hearing. The application contained a proposed hearing procedures and schedules. The Commission invited Saulteau and other interveners to provide comments on the same, and on the appointed day we provided comments on the hearing procedures and the schedule, in particular with respect to the work yet to be done on the TUS and the ITR. So this is not

a last minute challenge.

I would agree with Mr. Weafer that the chapter in BC Hydro's application on consultation is elaborately described. I think that's an apt phrase. I also agree with him that this should have been dealt with long ago. I'll explain what I mean by that in a minute.

Before I go there I think it's important for me to say a few words about why a traditional use study is important, because for lay people it may not be immediately obvious. But for Saulteau, traditional use studies are a very important part of the consultation process and this is in large part because, and this is a cliché, but treaty and aboriginal rights are held communally but they are exercised individually. So as a consequence of that, specific information on Saulteau traditional use activities and treaty rights are sourced from individual members. And in order to collect that information and to respond to requests from agencies and proponents, Saulteau needs to interview individual members and describe and map their activities, their cultural sites, their traditional resources.

Moreover, this information needs to be collected and recorded in a systematic way by people who are trained professionals, so that it's collated

and analyzed in a way that is credible to proponents and regulatory agencies. This is the reason why First Nations do traditional use studies. Now, the process doesn't need to be overly elaborate, but it does take time and resources, takes a lot of organization, and this is especially true for Saulteau because Saulteau is the largest First Nation in the region and they have over a thousand members. So to conduct a traditional use study is quite an undertaking. In our January 20th submission we explained that normally a study like this would take six months, but as a matter of urgency we're advised by the consultants that they could condense it into two.

In any respect, in light of all this, what a traditional use study and an independent technical review do, the value they bring is they provide the aboriginal perspective on the project and the rights at issue. They identify potential impacts on the exercise of those rights. They identify potential avoidance and mitigation measures, and they serve to review and confirm or refute project proponent or agency assumptions. And they facilitate an assessment of the adequacy of consultation.

I'd like to turn to the exchanges of e-mails that were discussed this morning. So I informed Michelle Jones, we don't dispute that an agreement was

reached on the scope of the TUS. Hydro seemed annoyed that our letter was silent on that point, but it was silent on that point because it's not a point in dispute. Nor do we take issue with any of the documents that they submitted via letter yesterday and this morning. However, we'd say that a lot of those documents are irrelevant because we're not disputing the fact that there was an agreement on the scope of the TUS.

Proceeding Time 10:37 a.m. T15

There are two key documents in the exchange of e-mails that are illustrative. So, having reached agreement on the scope of the TUS, BC Hydro then needed to conclude a capacity funding agreement. I'm going to refer to that as a CFA. In order to flow the funding for the TUS from BC Hydro to Saulteau, the CFA is BC Hydro's funding mechanism. And without the CFA there is no funding for Saulteau to commission the work. These are expensive undertakings. I sometimes regret I'm not an anthropologist, but they require a lot of resources to marshal, and it's not possible to just start the work on a whim and get covered later.

The record of the e-mail correspondence indicates that there was some confusion within BC Hydro with respect to the CFA. Saulteau does not allege bad faith on the part of BC Hydro. We only say

that the CFA was BC Hydro's document and BC Hydro was responsible for finalizing that document and preparing it for signature. And in that regard, we note the following.

I am -- I would invite the Commission to turn to the attachment to BC Hydro's letter of yesterday or this morning. I think it's B -- Exhibit B-6. And I am at page 49. This is the same e-mail that my colleague brought you to earlier. So it's the bottom e-mail on the page. And I was reflecting, as I was sitting back there, how curious it is that two people can look at the same words and find completely different meaning. But I want to provide you with our perspective on this.

So if you're with me, October 29th, 3:57 p.m. This is from Rod Hill to Carmen. I'm going to skip the first paragraph, because you've seen it. But he is saying he is sending this template agreement. He thinks it aggregates previous conversations, and so on. "…I was hoping to explain the rationale on how I arrived at the numbers…" Fine.

Second paragraph.

> "Also, this draft has yet to be vetted with BC Hydro's legal."

There was some discussion this morning about, has it passed legal review.

"…this draft has yet to be vetted by BC Hydro's legal. I'm hoping we can use this document to get some mutual understanding on our requirements at this stage. Do you have any thoughts on what is included here?"

Carmen responds. And I have worked for Saulteau for seven years, I know Carmen very well. Carmen responds:

"Hi Rod,

The agreement looks straightforward, the agreement has [MLB] instead of [Saulteau] as a recipient of the funds."

She is saying, "Rod, it looks straightforward. You've got some simple errors to correct."

In our January 20th letter, we also pointed out that the attachment, the appendix, hadn't been attached. That's the proposal. There was a placeholder for it, but the proposal wasn't attached. We're not making an issue of that, except to say that the draft that Rod Hill sent to Carmen was incomplete and had some errors in it, but it looked straightforward. Right?

So at this point, as far as Saulteau is concerned, the draft CFA looked fine, but it was incomplete and it still needed vetting by BC Hydro legal counsel.

So at this stage, it's open to Mr. Hill to clean up and complete the draft and have it vetted by BC Hydro legal counsel, assuming it passed, and then assuming it passed legal review, provide a final copy to Saulteau to review and sign. It was clearly Mr. Hill's responsibility to do this. The CFA was BC Hydro's document and it was subject to review by BC Hydro legal counsel. Only Mr. Hill, not Ms. Marshall -- only Mr. Hill could have taken the steps required to finalize the CFA. But he didn't proceed with that important task.

Proceeding Time 10:43 a.m. T16

As referenced in our January 20th letter, it's our understanding that BC Hydro removed Mr. Hill from the project team shortly thereafter. We note that BC Hydro didn't address this point in their letter dated January 26th.

In any case, it appears from the record that in the absence of Mr. Hill, BC Hydro did not contact Saulteau again about the CFA until December 3rd, and I don't mean to skip over Mr. Hill's "can we talk about this" e-mails leading up to the -- apparently there was a meeting on November 6th. And I will take you to the minutes from December 3rd in a minute. But I just like to jump to the January 6th -- let me take you to the minutes now.

Page, forgive me, page 68 of the attachment. I'd like to take you to the same paragraph that my colleague took you to this morning, it's the second full paragraph on page 68. Now, these are minutes, if you flip back a -- if you flip back a page you'll see, it's about the sixth block down from -- box down from the top. These are summary minutes recorded by Leah Manson. So these are BC Hydro's minutes. I don't know that they were ever shared with Saulteau for vetting but -- and I hadn't seen them before, but here they are. Turn the page, second full paragraph,

> "The parties' discussion turns to the MacLeod Lake and Saulteau traditional land use studies. CM…"

C.M., Carman Marshall, from Saulteau,

> "C.M. stated that she had hoped Saulteau's study would be complete in time for submission to the BCUC, but she was not sure this would occur. She also confirmed that while the marine option for transporting riprap had not triggered the need for land use study the road transport option had."

I'm going to come back to the difference between the marine and the road option in time.

At that point my friend stopped and she

said, "and then they went on to discuss the FNITR." But read what it says here, the next sentence that she left out. "MD", that's Marc d'Entremont, the consultant who's performing the FNITR.

> "[Marc d'Entremont] indicated that the FNITR would remain in 'draft' form until the traditional land use studies were complete and incorporated into the FNITR."

That's because part of his mandate is to do social economic impacts as part of his FNITR.

So if I could just -- I've taken you through detailed view of this paragraph but just as an overview, Carmen says she hopes that the study would be completed in time for submission to BCUC but she wasn't sure this would occur. And then later, Marc, in the same conversation says, "And we're not going to get our FNITR finalized until the TUS is done."

I read this, the way I read this is Carmen is complaining and she's warning BC Hydro, we're not going to be able to get this studies done in time for the BCUC, and Marc is saying the same thing. Why? Because the CFA is in BC Hydro's court, because the ball has been in their court since October 29th.

Then if we jump forward to -- turn the page to page 70, this is the January 6th, email from Leah Manson. I'm going to skip the -- well maybe I won't

skip the first paragraph. The fist paragraph is a reference to BC Hydro. I'm not sure if you've read the headlines about BC Hydro being in some hot water with the BCUC from a filing from 2008. And then she goes on and she says,

> "For the meeting next week I have a couple of thoughts."

I'm going to skip bullet one, I'm going to skip bullet two. Bullet three, "an update" -- she's looking for clarity.

> "An update on the status of the MacLeod Lake and Saulteau traditional use studies (started? expected date of agreement signing? expected completion date?)"

This is at 12:40 on June 6th.

The next --

THE CHAIRPERSON: January 6th.

MR. HICKLING: I beg your pardon, January 6th. If you turn the page, now I'm down at the bottom of the page, this is January 7th, the next day at 11:13. Carmen responding to bullet number three. I think she's being appropriately terse. She says,

> "On point 3 TUS status has been sent to BC Hydro for review in October."

That is a reference, I submit, to the fact that Carmen told Rod Hill on October 29th, "it looks

straightforward, you've got some errors to correct." And it was a reference to the fact that Mr. Hill had said that it was up for BC Hydro legal review. Leah asks, "What's up with the TUS?" Carmen responds tersely, "It was sent back to BC Hydro for review in October."

Later that day, later that afternoon, Ms. Manson writes again, she says,

> "It looks like Rod may have sent you a capacity funding agreement to cover these expenses at one point (I believe the attached version is the latest)."

Proceeding Time 10:49 a.m. T17

And as the Chair pointed out, she forwarded the same draft CFA that Rod Hill had forwarded to Carmen on October 29th. The ball was in BC Hydro's court on October 29th. The CFA, the mechanism to flow the funds on the TUS since October 29th. Then she says to address a point, "I think, I think you mentioned at our meeting in December that the agreement had passed Saulteau legal review." I think. I'm not sure if you mentioned that. I think you mentioned it. Well, I don't know, maybe Carmen did mention it. Maybe Carmen was saying it's passed legal review here, get on with it. Maybe Carmen was saying you guys said you needed legal review. Maybe Leah didn't quite understand what

was happening. Maybe that's why she said, "I think you mentioned."

In any case, the draft that Ms. Manson forwarded was exactly the same draft that Mr. Hill had sent on October 29th. It was not ready for signature then because it had still not been finalized by BC Hydro. We heard today, after a little bit of shuffling, that they still haven't done it, but apparently it's coming later today. And I would say that I will be happy to work with BC Hydro later today or tomorrow to finalize the CFA. I'll help you, happy to help. I talk to a lot of people at BC Hydro. A lot of people in Aboriginal Relations call me about Saulteau in the northeast. If you guys, if you get stuck next time give me a call and I'll help you move it along. But if you don't know where it is, I can't help you. We also heard that McLeod Lake just signed theirs last week.

So the reason why the TUS work has not been commissioned is because BC Hydro neglected to finalize the CFA and provide copies for signature. This delay is particularly egregious in the circumstances because BC Hydro is -- they're the party who's intimately familiar with their regulatory schedule and the construction schedules and they should have been working at least reasonably diligently to facilitate

the TUS, if they were concerned about having a TUS ready for the BCUC process.

I'd also like to observe that BC Hydro is pretty quick to commission their own studies, like the 2014 Ecofor studies on environmental values. But when Saulteau wants to commission a study to actually investigate and report on impacts on treaty rights, BC Hydro is frustratingly slow in putting funding in place. I don't mean to allege bad faith, but I have to say I think it's a delay bordering on negligence.

Now, I understand -- I like BC Hydro. I've got friends there like Clayton does. But it's a large organization, a lot of people. Everybody's moving in different directions. To some degree it's natural that there would be some systemic confusion in BC Hydro. So we're not alleging bad faith. But we do question whether BC Hydro's delay and failure to act diligently, and I think that's a fair comment, failure to act diligently in facilitating the TUS work, we do wonder if that's consistent with the honour of the Crown, given the way that it's backed up into this regulatory process. I don't think it sits well in BC Hydro's mouth to say now that there can't be any adjustment in the hearing process or the schedule to facilitate the TUS work.

On that point the courts have noted that

hard bargaining may be consistent with the honour of the Crown but sharp dealing never will be. And I don't think that BC Hydro was dealing sharply. But to rely on its own delay to the prejudice of Saulteau before the Commission, that might be sharp.

I'm just going to close this section because I can't help but observe that BC Hydro's delay in facilitating the TUS belies some of the platitudes in BC Hydro's notification letters, which routinely begin, "BC Hydro is mindful of the challenging consultation workload experienced by First Nations in the area."

Proceeding Time 10:54 a.m. T18

And they routinely conclude "Your participation in the consultation process and your feedback are extremely important to BC Hydro." Surly if those statements are true then it would not be unreasonable to expect BC Hydro to be more efficient and more effective in facilitating the TUS work in a timely way.

I'm going to -- with the Commission's permission, I'm going to turn to what I hope are going to be brief answers on the questions in the agenda. I'm afraid they might be a little longer than you might like, but I'll do my best.

THE CHAIRPERSON: Okay. Did you want to break before

you go on, or are you okay?

MR. HICKLING: It's entirely up to you.

THE CHAIRPERSON: Please go ahead.

MR. HICKLING: So, I am actually taking -- there's four questions. I'm actually taking them two at a time, because I think they blend together.

THE CHAIRPERSON: Thank you.

MR. HICKLING: Thank you. So is the proceeding record sufficient, and is it sufficient considering that it doesn't include the First Nations studies. My first point is that public interest inquires under 44.23, include an assessment of the adequacy of Crown consultation with First Nations, and I don't think that point was made clear enough this morning. But, you know, we rely on case law and on previous Commission decisions regarding the approval or rejection of proposed expenditure schedules for that.

An inquiry into the public interest includes an inquiry into the adequacy of consultation. I'll give you a few examples. In *Rio Tinto*, this is at paragraph 70, the court said:

> "The constitutional dimension of the duty to consult gives rise to a special public interest surpassing the dominantly economic focus of consultation under the *Utilities Commission Act*."

As Mr. Justice Donald of the Court of Appeal said:

> "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?"

And with respect to the Commission's decisions, Orders G-87-09, I'm going to refer to that as "BCTC"; and G-3-10, I'm going to "BCTC reapplication". In those decisions, Commissioners O'Hara and Cote, reviewed expenditure schedules for a number of non-CPCN projects proposed by BCTC. The Commissioners determined that where the duty to consult was triggered, the record of the First Nation consultation had to be considered. And according to the Panel:

> "If the evidence discloses a duty to consult exists, then BCTC, in order to maintain the honour of the Crown with respect to expenditures and any related potential adverse impacts affecting asserted title and rights of First Nations, BCTC must provide the Commission with sufficient evidence to allow the Commission to decision whether consultation efforts to the point of the Commission's Panel decision have been adequate."

As an aside, we submit that if the

Commission agrees that BC Hydro's delay and failure to act diligently in facilitating the TUS in a timely way, if the Commission agrees that that was inconsistent with the honour of the Crown, then we would respectfully submit that it is not open to the Commission to piggyback on that problem. It's not open to the Commission to make a determination on their application based on their record currently before it. The Commission must reset the honour of the Crown by taking positive steps to remedy the delay and the failure, and those steps may include, we would submit, making adjustments to the hearing process and the schedule.

Proceeding Time 10:59 a.m. T19

On that point, I want to be very clear that I've heard this morning people expressing worry about a year's delay, 3.5 to 5 million dollars in added costs. I heard -- or I felt a bit wounded, actually, by the claims that we were making a last-minute challenge. Nothing could be further from the truth.

We are taking appropriate steps, following the Commission's process, in the circumstances, and we look to the BCUC to maintain the honour of the Crown, and to BC Hydro.

In any case, in the decision I'm referring to as BCTC, the Commission confirmed that an

assessment of the adequacy of consultation is part of the Commission role in 44(2) applications, to approve expenditure schedules. In particular, and this is a quote:

> "The Commission Panel must assess the adequacy of consultation with First Nations."

Similar -- I won't take you to it, but similar statement in BCTC re-application, where the Commission found that if there wasn't evidence to support such a finding, then the application could be rejected and re-filed.

In summary, we submit that the same legal framework, public interest inquiry, adequacy of consultation inquiry, linked -- the same legal framework applies in the present case. The Commission's public interest determination on the expenditure schedule is subject to the honour of the Crown, and an assessment on the adequacy of Crown consultation with Saulteau First Nations.

And I want to be clear while I'm on that point. My friend made an observation about the table that we provided in our January 20th letter, and she referred to the traditional use studies. And the implication was, we were trying to open things up so that everybody and their dog could have a traditional

use study and where is it going to end? You know why it was "studies", plural? Because when I drafted that, I previously had traditional use and independent technical review studies, and I found that clunky, so I cut and pasted to separate them, and I didn't un-pluralize the word "studies". Okay? I'm here for Saulteau First Nation, not for anybody else. We've got one traditional use study we'd like to undertake.

So, I'm going to keep going.

THE CHAIRPERSON: Just before you keep going. So, just to clarify, then, it -- you're saying you'd like to correct the record so that your proposed timetable has the word "study" singular?

MR. HICKLING: I'd be happy to, thank you for that.

THE CHAIRPERSON: Okay. Please keep going.

MR. HICKLING: So, given that the Commission has to make a public interest inquiry, and as an appendage to that has to make a determination about the adequacy of consultation, I thought it would helpful if we looked at the steps in an inquiry into the adequacy of consultation.

And Saulteau submits that these are well-established steps. They're not controversial. Is the duty triggered? What rights are at stake? What's the strength of claim? What are the potential impacts? All that goes into a soup called the scope of the duty

to consult, somewhere on the *Haida* spectrum. And was the consultation process reasonable and adequate. That is the inquiry that the Commission has to make if it's going to make a public interest determination. And the reason this comes up is because of the four questions in the agenda. We're not sure -- I'm not intentionally trying to argue the merits or anything. I'm trying to answer the questions.

Can you make an order on the record? Well, you can, but you have to make your public interest inquiry, and your adequacy of consultation inquiry.

Proceeding Time 11:05 a.m. T20

So those are the steps. Is it triggered? What are the rights at stake? Strength of claim? Potential impacts? Scope? And was it reasonable and adequate?

BC Hydro has an approach to consultation that we would say has some flaws in it. BC Hydro does seem to accept that the duty to consult it triggered in this case, so that's not controversial. Step one.

What rights are at stake? If the -- I'd invite the Panel to turn to the relevant part of the application, but -- if you'd like to. It's Chapter 4, it's page 410. I'm not going to take you through BC Hydro's assessment of the scope and the duty to consult in detail, but this page 410 and half of 411

are where BC Hydro sets out its approach.

And at the bottom of 410 and the top of 411, BC Hydro says,

> "Treaty 8 provides the signatory First Nations have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tracks surrendered … saving and accepting such tracks as maybe required or taken up from time-to-time for settlement, mining, lumbering, trading or other purposes."

So the first part is the right to pursue the usual vocations of hunting, trapping and fishing. The second part is what's known as the taking up clause. Which provides an ability for the Crown to take up land from time-to-time.

THE CHAIRPERSON: I just want to stop you for a minute, please, Mr. Hickling. Can you please make sure that your submissions are focused on the adequacy of the evidentiary record. Because it seems to me we're straying into arguing the merits of the application here, or correct me if I'm wrong.

MR. HICKING: I wouldn't like to say that you were wrong. This -- if the application is part of the evidentiary record, then I'm speaking to the evidentiary record. I'll -- let me go two steps further and then you can

some back to me.

THE CHAIRPERSON: Sure. And just to explain a little further what I -- where I think I would like to see if we can stay focused. If you could identify specific items that you feel, where you feel the evidentiary record is lacking, that would be helpful to the Panel. Rather than review the evidence necessarily that already is on the record.

MR. HICKLING: Yeah. I promise I'm not going to --

THE CHAIRPERSON: Okay, go ahead.

MR. HICKLING: -- take you through details, the details here. But, the question on the agenda is can we make a decision, number one. Number two, can we make a decision in the absence of the TUS/NITR.

So Hydro's characterization of the situation would naturally lead you down the path to yeah, we can make a decision. The impacts are low. They did this elaborate consultation process. But if you were to go down that path you would, in my respectful submission, be erring because that's not the correct analysis. So, forgive me, but please do interrupt if I'm boring you.

Here's my point, the next -- I'll be a little more -- put things a little more summary way.

THE CHAIRPERSON: Okay.

MR. HICLING: The next duty to consult it triggered, what

are the rights at stake? Hydro just focuses on -- and this is germane. Hydro just focuses on the text of the treaty, right, the right to hunt. But as the Commission knows, because it's been set out at length in Commission reasons, including and in particular the reasons for the project known as DCAT. In addition to the rights, to the written rights, there are the oral promises. And the oral promises form part of the treaty, and this has been confirmed over and over by the courts. The interesting thing about this is that the courts have found that the treaty guarantees continuity in traditional patterns of occupation and continuity in traditional economies.

Proceeding Time 11:10 a.m. T34

It also guarantees that there will be no forced interference with First Nations' traditional mode of life. Those are the oral promises. Those don't appear in BC Hydro's approach to consultation or the assessment of the scope of the duty.

To be brief, they also put too much emphasis on the taking up clause, because there's case law, in particular *West Moberly v. BC Hydro Chief Inspector of Mines,* which clarifies that the taking up clause has to be read in its historical context. So when it says you can -- the Crown can take up land for mining, they were talking about a handful of

prospectors with a mule and a bucket and shovel. They weren't talking about industrial sized mining operations. That is one of the ratios [sic] of the *West Moberly* case.

And here's where I come to the point. In *West Moberly,* now former Chief Justice warned Crown representatives against entering into consultation processes without a full and clear understanding of the treaty rights at issue. And he wrote at paragraph 151:

> "A consultation that proceeds on a misunderstanding of the treaty or a mischaracterization of the rights that the treaty protects is a consultation based on an error of law and cannot therefore be reasonable."

Hence my referring to the application. By relying solely on the text and putting inappropriate emphasis on the taking up clause, BC Hydro has failed to develop a full and clear understanding of the rights at issue. It calls into question the reasonableness of the consultation.

THE CHAIRPERSON: Again though, could you please tie that to the evidentiary record? Do you feel that there's evidence missing from the record? And if so, perhaps you could suggest what it is. And if not, I think we

understand what you're saying and I think we should move on.

MR. HICKLING: All right, thanks. Is there evidence missing from the record? Yes, there's evidence missing from the record.

THE CHAIRPERSON: Okay.

MR. HICKLING: And that evidence is available in the form of a timely executed traditional use study and FNITR.

THE CHAIRPERSON: Thank you.

MR. HICKLING: I'll skip through my next few points, but in relation to your inquiry, to the Commission's inquiry about the adequacy of consultation, we would submit that there are flaws in BC Hydro's approach to the determination of the potential impacts as being low. There's a number of, we would submit, well-founded reasons why their approach to that assessment is flawed. And part of this inquiry comes down to what is the scope of the duty to consult. Where I was -- I'm just going to -- bear with me. I'm just going to take you here briefly, but on 411, page 411, lines 6, 7 and 8, Hydro is explaining their approach.

In the absence of a strength of claim assessment, which they say they don't need because treaty rights are well established, the scope of a duty to consult is determined by the seriousness of the potential impacts. That's actually a misstatement

of the law. In *Haida* the court said the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right, in this case an established treaty right, and the seriousness of the potentially adverse effects. You put both in the scale. Established treaty rights weighs toward a deeper end of the spectrum -- low, medium, high, potential impact, seriousness also goes into the scale.

And the nub of this point is that BC Hydro's approach to assessing the adequacy of consultation is fought in a number of principled respects. And to the extent that the Commission is tempted to follow their train of thought, I would submit you may end up at the end of the tracks with -- derailed.

Here's another point, an evidentiary point, evidence that's missing. The project is in an area that's within one of Saulteau's core traditional use areas and it's known as the area of critical community interest or the ACCI. And this was an area that was defined by Saulteau and West Moberly about ten years ago. It's on provincial maps.

Proceeding Time 11:16 a.m. T22

BC Hydro knows the boundaries of the ACCI through other consultation processes. This is the

core -- it's the last stand, it's the heart of the territory for Saulteau and West Moberly and the project is right in the middle of it. So this is another factor that's not reflected in the record, but that weighs towards the deeper end of consultation, and more intense impacts.

You're going to like this part.

THE CHAIRPERSON: Do you have an estimate of how much more time you'll need?

MR. HICKLING: I can finish in -- if I skip, I'll finish in ten minutes.

THE CHAIRPERSON: I'm not trying to rush you. I just -- I'm trying to get an estimate, because I'm thinking it's probably time we should take a break.

MR. HICKLING: Yeah.

THE CHAIRPERSON: And come back at 11:30, and you can finish up.

MR. HICKLING: Thank you.

THE CHAIRPERSON: Thank you.

THE CHAIRPERSON: Please be seated, thank you.

Mr. Hickling, are you ready to continue?

MR. HICKLING: Sure.

THE CHAIRPERSON: And again, if I could ask you to please try and focus on procedural issues, and not substantive issues, thank you.

MR. HICKLING: Yeah. Thank you.

Right. Thank you. So, I just want to -- just two minutes on the FLINRO process. Because it's been suggested that the Commission might be able to rely on the FLINRO process, and there are sound reasons why the FLINRO consultation can't be transposed here. I'll say the main one was, the FLINRO permits were all obtained prior to the formal decision to switch from the marine option to the road option. Right? So when the marine option was a viable option, the First Nations weren't -- Saulteau wasn't that worried about it, because they were going to barge it down the reservoir. So, this is one of several reasons why they may not have vigorously engaged in the permitting process.

The other thing I would say about that is, there actually isn't any evidence, as far as I can see in the record, about the FLINRO process other than the assertions from BC Hydro that FLINRO conducted an adequate process and the existence of the permits from which one might infer that there was a process. But I don't think the record shows that the FLINRO process was adequate.

The other thing I would say about that is, you know, some of the impacts are from activities that are not permitted, like the heavy use of the roads. Hydro doesn't need a permit to drive the 10,000

truckloads of rock on the roads, but it's still one of the main impacts on the First Nation. So the FLINRO process doesn't cover the waterfront.

So, I'm going to jump to the last few questions.

THE CHAIRPERSON: Thank you.

MR. HICKLING: What further processes are needed and the schedule that we've proposed. So, the -- our submissions on the further process is that -- that are needed are in the table of our schedule. Another round of IRs, submission of the studies, another round of IRs, written argument, reply, and final. That's in terms of process.

We would submit -- we'd submit that the schedule in our January 20th letter should be adapted to better fit some of the expectations in the room, and provide comfort to some of the people who are anxious.

Proceeding Time 11:36 a.m. T24

So if the Commission was so minded -- I mean the difficulty with this schedule is we need at least two or two and a half months to get the traditional use study done, right? Because we have to -- consultants have told us we need two months, minimum, and then we need a time for review and community verification and so on. So we've really

condensed that down. I don't think we can get those documents filed before April 15th.

In terms of the rest of our schedule, the milestones are spread out in two- and three-week periods, from process to process. So if we -- we would -- it would be acceptable to us if the periods between those milestones were reduced, to the point where people need to pull up their socks and focus during those weeks, but we can still do a good job in hitting those milestones.

The other -- you know, I had another clever solution which I'm not sure would fly, and the Commission counsel would be in a better position to advise on this. But there is a provision in the *Act* for dealing with urgent situations. And I'm not sure if I'm reading it right, but it's Section 85 and it says that in a case of urgency the Commission can make an order involving an outlay. I don't know if an outlay and an expenditure are the same thing, but I think in my layman's mind, they are. You could make an urgent order, and then on the application of an interested person, you could have a hearing afterwards. So, there may be a way to use Section 85 to make an order and give Hydro what it needs, but still have the proper hearing process and hearing schedule after, to be -- Commission as soon as

possible -- as soon as practical here, and reconsider the matter and make any further order that it considers advisable. So that is a --

THE CHAIRPERSON: Sorry, can you -- can you just explain exactly -- who should make an order, and when? Or make an application, and when, under Section 85?

MR. HICKLING: So, 85(1) --

THE CHAIRPERSON: Yes.

MR. HICKLING: -- says, "Except in a case of urgency."

THE CHAIRPERSON: Yes.

MR. HICKLING: "Of which the Commission is the sole judge."

THE CHAIRPERSON: Yes.

MR. HICKLING: "The Commission must not, without a hearing, make an order involving an outlay, loss, or deprivation to a public utility."

85(2) says, "If an order is made in case of urgency without a hearing, on the application of a person interested, the Commission must, as soon as practicable, hear and reconsider the matter and make any further order it considers advisable."

THE CHAIRPERSON: So what are you suggesting, then?

MR. HICKLING: I am suggesting that the decision on how to proceed is the Commission's decision. It would be acceptable to us if we shortened up the time frame, keeping in mind that April 15th is our nearest date

that we can get to. But if the Commission was so minded, and if Commission counsel so advised, it might be possible to use 85(2) to make an urgent order and then have the hearing after the urgent order.

THE CHAIRPERSON: The urgent order being for Hydro to repair the dam? I'm not quite sure what your thinking is here.

MR. HICKLING: For acceptance of the expenditure schedule.

THE CHAIRPERSON: Okay. Mr. Miller, do you have any comments on that?

MR. MILLER: Mr. Chair, Section 85 deals with orders without notice. It wouldn't be applicable in this situation, because notice has already been given.

THE CHAIRPERSON: Thank you.

MR. HICKLING: I don't -- I don't see that in the terms of the provision, but I defer to Commission counsel.

COMMISSIONER HAROWITZ: Could I --

THE CHAIRPERSON: Go ahead.

MR. MILLER: Well, I don't have anything further to say, unless you have a question.

THE CHAIRPERSON: Okay. Sorry, I thought you did. Yes.

COMMISSIONER HAROWITZ: Let me see if I can just strip away whether it's 85(2) or 104.9(3). I'm making it up for the point. Leaving aside the mechanism in the *Act* that may or may not enable this, am I correct in

hearing that what you're saying is, Saulteau First Nation would be amenable to some kind of an outcome that involved the Panel reaching a decision on accepting the expenditure schedule as filed, conceivably. I mean, if that were otherwise our decision that we reached, subject to there being some other hearing mechanism or process that addressed the TUS and/or ITR in due course, not withstanding that they didn't form part of that original order.

Proceeding Time 11:41 a.m. T25

Leaving aside what mechanism or enabling piece of the *Act* was used, am I hearing that you would be amendable to that kind of -- in general terms, is that what you are putting forward?

MR. HICKLING: Provided that -- yes, provided that the subsequent hearing process was similar to -- not overly constrained on the TUS and FNITR, because there may be other --

COMMISSIONER HAROWITZ: Okay. Yeah.

MR. HICKLING: -- First Nations related -- but basically yes.

COMMISSIONER HAROWITZ: Okay, so in principle?

MR. HICKLING: In principle.

COMMISSIONER HAROWITZ: Thank you.

MR: HICKLING: And I just want to put everyone's mind at rest in the room here that the, you know, this isn't a

last minute challenge to frustrate the project. Everybody wants the project to happen because everybody wants the dam to be safe. It's a question of the process for getting there, and the process being fair and honourable and so on. So, --

THE CHAIRPERSON: Thank you.

MR. HICKLING: Thank you. If -- now, I have some revised dates if the Commission would be interested to hear in the milestones?

THE CHAIRPERSON: Please. Yes.

MR. HICKLING: So, consistent with our table, if the traditional use study, singular, and the ITR were filed April 15th -- and in our January 20th letter we indicated that we could do that if we got the funding in place on February 1st. So, if we file on the 15th, a week later, eight days later for the IRs, that's April 23rd. A week later for the responses, that's April 30th. Ten days later for Hydro's final submission, that's May 10th. Intervener final written submission 10 days, that's May 20th. BC Hydro written reply five days, that's May 25th. And then the BCUC decision, I am not sure how fast you can turn it around, but two or three weeks, and that gets you to June 10th or June 15th, which is pretty close to what people want.

THE CHAIRPERSON: Okay.

MR. HICKLING: And those are my submissions unless you

have any questions.

THE CHAIRPERSON: I don't think we do. Thank you, Mr. Hickling.

Mr. Davis? Do you have any further submissions?

REPLY BY MR. DAVIS:

MR. DAVIS: No, I said everything. Like, it's a safety issue, and let's get going on it. The FNITR and the TUS, we're working on them, and somebody has to look at them down the road, but safety first, right?

THE CHAIRPERSON: Okay.

MR. DAVIS: That is my -- that's bottom line.

THE CHAIRPERSON: Okay.

MR. DAVIS: Thank you.

THE CHAIRPERSON: Thank you, Mr. Davis.

Ms. Khan, do you have any further submissions?

REPLY BY MS. KHAN:

MS. KHAN: Well, we would like to hear from Hydro whether the proposed revisions to the filing deadlines would affect whether or not they're able to start work on the project this summer. If it is possible for the work to be started this summer, then we certainly support those revisions.

If the Commission decides that you are going to proceed with approving the project, but then

we would also like to have some kind of process in place for review of the TUS and the ITR. It was my understanding, perhaps mistakenly, that the ITR could be filed in February, and that the TUS would be filed later, but I understand that that might not be the case, that they might have to be filed at the same time. So, we are interested in just taking a look at the TUS and the ITR at some later stage, even if approval for the project is granted at an earlier stage. Thank you.

THE CHAIRPERSON: Thank you, Ms. Khan.

Mr. Weafer, do you have anything further?

Proceeding Time 11:46 a.m. T26

REPLY BY MR. WEAFER:

MR. WEAFER: Mr. Chairman, we took some comfort in the final discussion with counsel for the Saulteau Nation that they're trying to work with the schedule to accommodate moving forward with the project this summer, because I've highlight -- we're concerned about the costs of delay. We're also concerned about safety issues. So, if that can be accommodated, we do not oppose the capacity funding for the studies. And I want that to be clear to counsel for the First Nation. That's not our issue. Our issue is moving forward quickly. So if a procedural schedule can be established that suits us. Thank you very much.

THE CHAIRPERSON: Thanks, Mr. Weafer.

Ms. Jones? I imagine you have something further.

MS. JONES: Yes.

THE CHAIRPERSON: Okay.

REPLY BY MS. JONES:

MS. JONES: Several points to provide.

We'd like to start by responding to one issue raised by CEC. In particular, in their submissions they provided that BC Hydro could come back to the BCUC if there was an issue. With the exception of a situation of urgency, BC Hydro would only be coming back to the Commission after an approval is issued if there was a material increase in costs. So I just wanted to clarify that.

With respect -- turning to comments made by BCOAPO, they provided that they were not clear about what types of external agreements had already been entered into if they had been, particularly with dealing with the increase to costs that BC Hydro spoke to. I can inform the Panel that an RFP was done, an early contractor involvement process was done. Or, sorry, the RFP was for an early contractor involvement process. It's essentially to plan the construction and develop detailed plans to negotiate contractor terms and conditions, and so forth.

That RFP has closed. BC Hydro has received the proposals on it, and is in the process of reviewing it. That process is subject to a timeline, to an amount of time. I believe it's 120 days.

And if Saulteau First Nation's schedule was granted, that process would then have to stop. Well, it would run out of time. The -- no agreements on the actual construction have been entered into. Those will come after the decision to implement has been made.

With respect to the First Nation independent technical review, our submission is the same, that that is an element of the consultation process that is ongoing. It's not yet complete, and the role of this Commission, of course, is to decide whether or not consultation is complete up to this point, and up to this stage.

And I'm happy to take the Commission there, but in the December 3rd meeting minutes you'll see Mr. Davis, I believe it was, speaking to the FNITR, and wherein he says "It won't be finalized until we've received the TUS information." So there is a mechanism in the First Nation independent technical review that brings in the TUS information.

So, although there is a discussion about a draft version of the First Nation independent

technical review coming up in February, that will not be finalized until the TU information is completed. And therefore they are sort of kind of a combined package in terms of getting the final product.

Again, our submission is that those are part of the ongoing consultation process. They will both inform BC Hydro's decision on whether or not to implement the project, which is anticipated for May. And based on the timelines that have been proposed, provided the studies, the TUS and the FNITR can be completed by the April 15th timeline proposed, they will be taken into consideration and form part of BC Hydro's decision-making process.

Okay, turning to the submissions of Saulteau First Nations, first I think I'd like to respond to a couple of factual submissions that Mr. -- that counsel for Saulteau put forth. In particular he said BC Hydro -- or suggested BC Hydro was relying on its own delay to prejudice Saulteau First Nations. BC Hydro -- what happened, if it was a miscommunication, is unfortunate. But it was clear -- it's clear from the record, it's clear from the e-mails exchanged, particularly the e-mails on scope, that BC Hydro in September is rushing to have -- is really pushing the parties to get this TUS done. It's saying, listen, we'd like to help inform the BCUC process. That

means, however, that we have to get going on this now. We came to an agreement on scope. We gave the green light. We said, I think the work can begin. That was on October 9th.

And when you look at that, and then you look at what happened after the CFA, it's clear that BC Hydro the whole time was trying to do its best to get this work completed, in the timeline proposed and agreed to by both parties, which is as set out in the TUS proposal.

Proceeding Time 11:52 a.m. T27

THE CHAIRPERSON: Ms. Jones, perhaps you're going to get to this, but the contract -- the capacity agreement has now gone through legal review, has it?

MS. JONES: Yes, it has. So, I mean on that note, Mr. Hickling is clear to say the ball was in BC Hydro's court in terms of finalizing, because it was just a draft that was sent over. But if we go back to the e-mail that was sent from BC Hydro attaching that draft, absolutely it says, "I haven't had my legal department review it yet." But it's clear that Rod is sending it out saying, "I'm hoping that we can discuss this and come to a mutual understanding on its content." And it's also clear from the communications after that that all of the indications back from Saulteau First Nation, was that it was straight forward, that they

were undertaking their own legal review of it, and it's clear that they then did so, because Mr. Hickling, in his letter of January 20th, provides a bunch of substantive comments for the first time back to BC Hydro.

THE CHAIRPERSON: I'm not trying to focus on the past, I'm just trying to clarify that the contract has now been though legal review?

MS. JONES: When you say the contract, do you mean the capacity funding agreement?

THE CHAIRPERSON: So it's been through legal review?

MS. JONES: Yes. It was our intent this morning to provide it to Mr. Hickling. Didn't have time. BC Hydro will be providing it today.

THE CHAIRPERSON: Okay.

MS. JONES: It's a revised version of that. It addresses the error that was -- reference to MLIB. It also addresses the newly expressed concerns from Mr. Hickling in his January 20th letter, and that will be sent out today. Again, it doesn't change anything as to what was the cost and the green light on the scope that was given on October 9th. But it is --

THE CHAIRPERSON: But it was an essential piece of the puzzle in order to get the TUS agreement underway though?

MS. JONES: Yes, although if we look to the First Nation

independent technical review, that process has in fact started in the absence of BC Hydro and the First Nations actually signing the agreements for funding for that. Once the agreement as to cost was come to by the parties, and the scope, that study started right away.

BC Hydro, I guess, it was BC Hydro's position that at the end of October when it said we've agreed on scope and you're good to start the work, that the issue of finalizing the capacity funding agreement was sort of to tie it up. But we certainly -- the documents certainly show that at no point was BC Hydro changing what had already been agreed to, which was it can commence.

THE CHAIRPERSON: So is it your submission that the First Nations should have gone ahead based on your approval of the costs and dealt with the capacity agreement later? Is that --

MS. JONES: BC Hydro is not laying blame. BC Hydro is just saying if there was a mix-up, it wasn't BC Hydro's intent ever to delay the process by not finalizing the CFA. In fact, by all of the back and forth that was had on the scope, BC Hydro thought that as soon as the scope was agreed to the work would in fact start. And when you look at those previous e-mails, and perhaps I can take the Commission to those,

Mr. Hill is clear that he'd like to get a report back by January. So he's pushing to try to get this thing done, and --

THE CHAIRPERSON: I think we heard from Mr. Hickling that they weren't in a position to be able to start the study until the capacity agreement was in place. That's what I seem to recall anyway.

MR. JONES: And it --

THE CHAIRPERSON: But I'm not sure if it matters at this point. As I say, that's in the past. I'd like to make sure that you're -- both parties --

MR. JONES: Steps have been taken.

THE CHAIRPERSON: -- both parties are ready to move forward.

MR. JONES: That's correct. Steps will be taken, BC Hydro is proactive on that, yes.

THE CHAIRPERSON: All right. Okay, thank you.

MR. JONES: Now, Mr. Hickling did speak to two -- or he did -- when he was asked to identify omissions on the record, he did identify or did speak to two, what I believe to understand, were two omissions that he identified.

The first was that BC Hydro's record contains no evidence of the oral treaty rights. BC Hydro's response to that is this consultation process has gone on for years and BC Hydro, as is evidenced in

the application, has heard a bunch of feedback from Saulteau First Nation about the potential impacts, and that is all recorded in the application.

Mr. Hickling appeared to suggest that BC Hydro could not have that in the absence of a TUS, so the Traditional Use Study, and that's not -- there is no requirement for a traditional use study at law, there's no requirement for it -- for one to be completed in order for the potential impacts to be addressed. And on that point I would draw the Commission's attention to the case of *West Moberly First Nations v. British Columbia, Minister of Energy and Mines*. The citation is 2014 BCSC 924.

Now, this case involved a decision by the Ministry of Energy and Mines to authorize some bulk sampling for a proposed coal site near the West Moberly First Nations Reserve. And the West Moberly First Nations, as part of the process, requested that the Ministry of Mines stop and not issue the permits pending the outcome of a TUS study that they were undertaking.

Proceeding Time 11:57 a.m. T28

In particular it was called a cultural study, but it was a TUS study in essence. The permits were issued, and West Moberly First Nations sought judicial review of that decision on the basis that

there was inadequate consultation because the TUS was not completed prior to the issuance of the permits.

And in going through the record, the B.C. Supreme Court found that -- first of all, they undertook a substantive view of the record. So, they went to the actual merits. They didn't decide this on a procedural question, they are doing judicial review, they undertake a whole review of the merits of the case, what the scope of the consultation should be, what is required by the consultation and whether or not it was adequate. And the court found that it was clear from the record in that case that the Crown had extensive information of the use of the area by the West Moberly First Nation, even in the absence of the TUS, the completed TUS.

In that case, an important point, the judge also noted that timeliness has to be an element of the administrative process, and all sides need to work to the consultation process in a meaningful manner. In his conclusion, he stated,

> "The fact that more studies, more consultation, and more accommodation would nearly always be possible, raises the risk of inadequate consultation being found, simply from the fact that further consultation could have been carried out

when it wasn't."

And he goes on to say, what the analysis has to refer to itself to asking whether some relevant block of date was omitted. In this case, that's because they were looking at the blocks where the drilling would occur. Or some particular reasonable First Nations request was ignored.

So, what the court is saying is, you know, the fact that there is ongoing consultation going out there doesn't mean that you don't -- that you can't -- and the fact that there could be other studies out there, doesn't mean that you don't find that consultation is inadequate. Instead it goes to the fact that at some point the process has to end.

And in this case, consultation is ongoing. Consultation will continue through the life of the project. BC Hydro has stated how it will consider the TUS and FNITR in its implementation decisions. That is clear from our responses to the IRs that were posed.

The second omission, or alleged omission that Mr. Hickling identified was in respect of -- he provided some evidence on the ACII. We, again, BC Hydro's position is that we've been engaged in consultation with this First Nation, with all the First Nations, for a number of years on this project.

We have heard the concerns -- we have heard concerns from First Nations about the potential impacts. The record shows what the feedback from First Nations has been. And in respect of the ACII, if we heard about it, it is in the record. That is our record, that is the consultation we have undertaken, and that's what we are asking to be judged on. And that's what the merits, in terms of the merits of the case and the final determination, the role of this Commission is to determine whether or not our consultation process, up to this stage of the process, is adequate. And up to this stage of the process, does not include the ongoing future consultation that we intend on doing. It is still going to be undertaken, it is still going to form part of the information and decision-making process for the project, but the role of the Commission is up to the date of its decision, up to this stage of the process.

On the last point, I believe -- or two more points. Mr. Hickling suggested section 80 of the *Act*. We defer to Mr. Miller on that one. What we would say is that, that the Commission's jurisdiction on assessing the adequacy of consultation ends with its determination on whether or not to approve the cost expenditure. And that after that, there is another Crown decision that has to be made. In particular, BC

Hydro will decide whether or not to implement the project. If the First Nation does not agree with that decision, if the First Nation feels that inadequate consultation has been undertaken for the project to be implemented, it does have further recourse. It is clear from *Rio Tinto*, from the Supreme Court of Canada's decision that if the Government has set up the duty to consult through administrative tribunals in a certain way, and if there is an omission in that, or it does not meet the First Nation's needs, the ultimate recourse is to the courts. That is what *Rio Tinto* says.

So, the Commission's jurisdiction on assessing the adequacy of consultation is restricted to what is in its statute. It's statute in this case, 44.2, the process ends once the Commission approves the expenditure. And therefore, this Saulteau First Nation's suggestion that perhaps the Commission could still retain an assessment of the adequacy of consultation after that determination is made, really ignores that the tribunal is bound by what's in its statute, and also ignores the Supreme Court of Canada's articulation that where there are deficiencies in the administrative law process for First Nations to argue inadequate consultation, the ultimate -- at the end of the day, the ultimate forum

for those disputes is the courts.

Proceeding Time 12:03 p.m. T29

Last part, I think we heard several -- we heard Mr. Hickling speak about the adequacy of consultation as part of the Commission's public interest determination. He talked about the process for the BCUC deciding that question, and the trigger, the scope. He talked about the usefulness of a TUS and treaty rights and aboriginal rights and the taking-up clause.

And again, our submission on the whole of this process is, Mr. Hickling, all of his request is based on substantive issues. And the Commission cannot decide those in the absence of making a finding on whether or not BC Hydro's consultation has been adequate. And to do that, this process has to see itself to the end. And so his -- the request, although pitched as a procedural issue, is in fact requesting a determination of the substantive issue of Crown consultation and whether or not it's been adequate. And that's not appropriate at this stage.

THE CHAIRPERSON: Okay.

MS. JONES: Any further questions?

THE CHAIRPERSON: No. No. You do. Okay, thank you, Ms. Jones. Just hold a second.

We'll just take -- we're just going to take

a few minutes. We'll be back by ten after.

(PROCEEDINGS ADJOURNED AT 12:05 P.M.)

(PROCEEDINGS RESUMED AT 12:07 P.M.)

THE CHAIRPERSON: Please be seated. Thank you.

Ms. Jones, actually we have two more questions for you, please. One of them is, could you please tell us what your drop-dead date is for a decision in order to get the project completed -- or started at least this year? And the second question is, could you please comment on Mr. Hickling's proposed amendments to his schedule? Thank you.

MS. JONES: I'm just going to check about the drop-dead date.

THE CHAIRPERSON: Yes.

MS. JONES: BC Hydro's drop-dead date in terms of the Commission's decision would be by May 15th.

THE CHAIRPERSON: Okay.

MS. JONES: In terms of the proposed -- or the altered proposed schedule, from Saulteau First Nation, it still puts -- the practical implication of it is still that BC Hydro would lose a year of -- until it could commence construction.

THE CHAIRPERSON: Okay, thank you. All right. The panel -- you've given the Panel a lot to think about, so we're not -- we won't be able to give you our decision now. But we will get our decision out as soon as

possible. And there will be a procedural timetable going forward attached to that decision.

So, thank you very much for everyone's participation today, we appreciate it, and we're adjourned. Thank you.

(PROCEEDINGS ADJOURNED AT 12:08 P.M.)