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LETTER NO. L-6-08

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VIA E-MAIL

March 5, 2008

BCTC – INTERIOR TO LOWER MAINLAND TRANSMISSION CPCN EXHIBIT A-8A

TO: British Columbia Transmission Corporation
Registered Intervenors/Interested Parties

Re: British Columbia Transmission Corporation ("BCTC")
Project No. 3698486 / Order No. G-137-07
Application for a Certificate of Public Convenience and Necessity ("CPCN")
for the Interior to Lower Mainland Transmission Project

First Nations Scoping Issue – Reasons for Decision

During the Procedural Conference held on December 20, 2007, a process for consideration of the scope of the proceeding regarding First Nations issues was established (T1: 86-88). The question for consideration can be stated as follows:

> Should the Commission Panel consider the adequacy of consultation and accommodation efforts on the ILM Project as part of its determinations in deciding whether to grant a CPCN for the ILM Project?

The process established for consideration of this issue included notice by BCTC to First Nations on or before January 11, 2008 of the Commission Panel's intention to address the scoping question on consultation and accommodation. First Nations were asked to express their interest, if any, in making submissions on the scoping question by January 18, 2008. Expressions of interest were received from:

1. Kwikwetlem First Nation;
2. Vision Financial Services;
3. Sto-Lo First Nation;
4. Nlaka'pamx Nation;
5. Okanagan Nation Alliance; and
6. Nlaka'pamux Nation Tribal Council

BCTC and British Columbia Hydro and Power Authority ("BC Hydro") filed their submissions with the Commission on January 21, 2008. Intervenor submissions were received from the BC Old Age Pensioners Organization *et al*. ("BCOAPO"), Terasen Utilities, Kwikwetlem First Nation ("Kwikwetlem"), Nlaka'pamux Nation Tribal Council ("NNTC"), Okanagan Nation Alliance ("ONA"), and the Upper Nicola Indian Band ("UNIB") (the last three submissions are referred to collectively as the "Joint Submissions") on or before February 4, 2008. Reply submissions were received by February 13, 2008.

By letter dated February 21, 2008 (Exhibit A-8), the Commission Panel concluded that it should not consider the adequacy of consultation and accommodation efforts on the ILM Project as part of its determinations in deciding whether to grant a CPCN for the ILM Project with reasons to issue by March 7, 2008. These are the reasons.

BC Hydro and BCTC submit that the Commission Panel should not consider the adequacy of consultation and accommodation efforts on the ILM Project as part of its determinations in deciding whether to grant a CPCN for the ILM Project.

In its Vancouver Island Transmission Reinforcement ("VITR") Decision (Commission Order No. C-4-06 dated July 7, 2006) and the Revelstoke Unit 5 Decision (Commission Order No. C-8-07 dated July 12, 2007), the Commission has previously considered, in the context of a CPCN proceeding, whether it is obligated to consider the duty to consult and, if necessary, to accommodate. In the VITR Decision, the Commission decided that it did not need to consider the adequacy of consultation and accommodation. The Revelstoke Unit 5 Decision followed the VITR Decision and provided further comments. These reasons follow the reasons provided in both the VITR Decision and the Revelstoke Unit 5 Decision and provide further comments. In doing so, the Commission Panel rejects the submissions of Kwikwetlem, NNTC, ONA, and UNIB that the VITR Decision and the Revelstoke Unit 5 Decision should not be followed.

The Commission has also considered the duty to consult in the recent Alcan Decision (Commission Order No. E-3-08 dated January 29, 2008). While the Alcan Decision is subject to a leave to appeal application, the Commission Panel notes that the Alcan Decision considered, *inter alia*, whether or not there was a "triggering" event for the duty to consult. In the instant case, that is not in issue.

In both the VITR Decision and Revelstoke Unit 5 Decision, the Commission relied on the Environmental Assessment Office ("EAO") process and as concluded in the VITR Decision:

> "The government has legislated regulatory approvals that must be obtained before VITR proceeds. Pursuant to Section 8 of the EAA, BCTC requires an EAC for VITR. Given the Section 11 Procedural Order and the Terms of Reference for VITR, the Commission Panel is satisfied that a process is in place for consultation and, if necessary, accommodation. In the circumstances of VITR, the EAO approval, if granted, will follow some time after this decision. Through this legislation, the government has ensured that the project will not proceed until consultation and, if necessary, accommodation has also concluded. The Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government" (p. 48).

In the Revelstoke Unit 5 Decision, the Commission Panel said:

> "The Provincial and Federal Governments have created legislation, the Environmental Assessment Act and the Canadian Environmental Assessment Act, which ensure that regulatory approvals must be obtained before Revelstoke Unit 5 can proceed and that the project will not proceed until consultation and, if necessary, accommodation has been completed" (p.34).

In the instant case, BCTC, pursuant to the Environmental Assessment Act, requires an Environmental Assessment Certificate ("EAC") for the ILM Project. BCTC has said that it anticipates submitting its EAC application in the fall of 2008, assuming a CPCN is issued in the summer of 2008. Given the Section 11 Procedural Order (Exhibit B-1, Volume 2, Appendix P) and the draft Terms of Reference (Exhibit B-1, Volume 2, Appendix Q), the Commission Panel is also satisfied that a process is in place for consultation and, if necessary, accommodation.

Prior to issuing an EAC, Provincial Ministers must consider whether the Crown has fulfilled legal obligations to First Nations (Guide to Environmental Assessment Process, Step 8 and Environmental Assessment Act, Section 17). Given the statutory requirement for an EAC and the process established by the Section 11 Procedural Order, the Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government. Accordingly, the Commission Panel does not intend to conduct a separate inquiry into the adequacy of consultation and accommodation in this proceeding.

The Commission Panel agrees with the submissions of BCTC that the process for consultation and, if necessary, accommodation for the ILM Project is, for the purpose of the question in issue, identical to the issue considered in the VITR and the Revelstoke Unit 5 Decisions. And particularly important for this Decision, the Commission Panel also concludes and agrees with BCTC that there have not been any legal developments since the VITR Decision and the Revelstoke Unit 5 Decision that call those decisions into question (BCTC Submissions, p. 2). Therefore, for the same reasons provided in the VITR and the Revelstoke Unit 5 Decisions, the Commission Panel concludes that evidence regarding the adequacy of consultation and accommodation need not be considered in this proceeding. As quoted at page 47 in the VITR Decision, MacLachlin C.J.C. states in *Haida* :

> "It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts" (*Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 S.C.R. 511, para. 51).

The remaining part of these reasons comments on submissions made by First Nations and on submissions made regarding the consideration of forecast accommodation costs in cost-effectiveness analysis.

The Kwikwetlem submit as follows:

> "Consultation is a <u>continuing obligation which may arise throughout a series of decisions</u>. The fact that the infringement results from previous decisions, has been the subject of previous decisions, or will require future decisions, does not preclude the requirement of consultation" (Kwikwetlem Submission, para. E3). [emphasis in the original]

> "The Kwikwetlem submit that the duty of consultation and, if necessary, accommodation, arises at all stages of the ILM Project, starting at the <u>earliest possible stage</u>. Whether or not consultation and accommodation efforts will be assessed during the EAO (which we suggest is not the case) is not relevant here, and certainly does not imply that it need not be assessed at this stage in the process as well" (Kwikwetlem Submission, para. E11). [emphasis added]

The NNTC, ONA, and UNIB submit, in part:

> "… reconciliation of Aboriginal and Crown title requires First Nation participation in decision-making about how their territory is used" (Joint Submissions, para. 14).

> "Because the honour of the Crown is at stake, the fulfilment of the duty to consult and accommodate cannot be anticipated or deferred" (Joint Submissions, para. 15).

The Commission Panel believes that a distinction needs to be drawn between circumstances such as those in the *Gitxsan Houses v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4th) 126 (S.C.) and the *Haida* cases where a decision or a series of decisions are made each having their own impacts, and the circumstances in the instant case where a single project requires at least two different regulatory approvals before there are impacts on Aboriginal rights and title. A CPCN approves the scope, design, and cost estimates for a project; all of which may be of interest to First Nations. The statutory requirement for an EAC, together with the Section 11 Procedural Order, the draft Terms of Reference and the Guide to the Environmental Assessment Process, ensures that First Nations will be consulted, prior to a decision of the Ministers on whether to issue an EAC for the ILM Project. Moreover, the EAC requirement ensures that if the duty to consult has not been met and, where necessary, adequate accommodation has not been provided, then the project will not proceed, and there will be no impacts on Aboriginal rights and title. In this manner, meaningful consultation is ensured, and the honour of the Crown will be upheld. In other words, the honour of the Crown does not require consultation on every step of a regulatory scheme, provided, as in the instant case, that meaningful consultation is ensured before there are impacts on Aboriginal rights and title. Again, provided that there is meaningful consultation before there are impacts on Aboriginal rights and title, consultation is neither required on every step of a regulatory scheme nor is it required, as suggested in the above quote of the Kwikwetlem submission, at the "earliest possible stage" of a regulatory scheme.

The Commission Panel also agrees with the submissions of BCTC (BCTC Reply, p. 4) regarding the comments in the Joint Submissions that refer to the *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource*) (2005) 37 B.C.L.R. (4th)309, 2005 BCCA 128, at paras. 16-19 and the *Tzeachten First Nation v. Canada (Attorney General)* (2007), B.C.J. No. 385 (BCCA) at para. 49 (Joint Submissions, paras. 19-20).

In this regard, the Commission Panel agrees with the following submission from BCTC:

> "The essence of the KFN's submission appears to be that each individual Crown decision-maker must ensure that consultation and accommodation is complete before making any decision. If this is what the KFN are arguing, BCTC submits that this ignores, as set out in Haida, that the Crown's obligations to First Nations are dependent on the individual circumstances of each case and that the controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake" (BCTC Reply, p. 6).

Kwikwetlem refers to four cases: *Gitxsan Houses, Haida, Dene Tha' First Nation v. Alberta (Energy and Utilities Board),* 2005 ABCA 68 and *Squamish Nation v. The Minister of Sustainable Resource Management,* 2004 BCSC 1320 (Kwikwetlem Submission, para. E5), and submits that in particular the *Squamish Nation* decision of the BCSC is binding on the question of deference to the EAO (Kwikwetlem Submission, para. E10). The following two facts distinguish the *Squamish Nation* case from the instant case: 1) rights to the land were created before consultation (*Squamish Nation*, para. 25), and 2) other legally enforceable rights were alleged to have been created before consultation (*Squamish Nation*, para. 75). *Squamish Nation* also does not involve earlier decisions of a quasi-judicial decision maker such as the Commission.

In the instant case, if a CPCN is granted, by statutory requirement it will be subject to an EAC and it may be subject to other conditions. The project simply cannot proceed without an EAC. Further, the EAO process is mandated by the legislature and is separate and independent from this proceeding. Each of the cases referred to by Kwikwetlem and noted above involved decisions with impacts that were not subject to other decisions and necessarily followed from the decisions in question. Although the development of the regulatory framework in the *Dene Tha'* case has no parallel in the instant case, the decisions in question were found to adversely affect potential aboriginal rights. Further, the cases of *Haida, Squamish Nation* and *Dene Tha'* were all examples of

governmental decision-making outside of a formal regulatory process (BC Hydro Reply, para. 17). *Gitxsan Houses* is another such example.

As Kwikwetlem submits, the Commission will determine whether public convenience and necessity require the proposed extension of the public utility system (Kwikwetlem Submission, para. 9). The CPCN can be thought of as the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project. The first opportunity to consider the adequacy of consultation and accommodation is after the project is selected and is sufficiently defined so as to make accommodation discussions meaningful, that is, impacts need to be identified. And it is only after impacts can be identified, that consultation and accommodation can be concluded. This does not mean that BCTC and BC Hydro should begin consulting with First Nations after a CPCN has been granted and the ILM Project has been further defined; it only means that the Commission can and should rely on the EAO to now or in the future make determinations with respect to the duty to consult and, if necessary, accommodate.

The issue of the cost of accommodation and cost-effectiveness analysis was raised in the submissions of BCOAPO, the Kwikwetlem, and in the Joint Submissions. The relevance to this proceeding of the potential impacts of the cost of accommodation, including project scope or design changes to accommodate First Nations interests, does not appear to be disputed by anyone (BCTC Reply, p. 6). In fact, that evidence may helpfully explain recommendations made by BCTC regarding the scope and design of the ILM Project. First Nations are entitled to full and fair participation in this proceeding. As stated in the Revelstoke Unit 5 Decision:

> "First Nations may be active participants in Commission processes; however, it is not necessary for the Commission to consider whether or not the duty of the Crown to consult and, if necessary, accommodate has been met" (p. 40).

And in the VITR Decision, the Commission said:

> "The Commission Panel notes that the submissions of TFN [Tsawwassen First Nation] have been awarded considerable weight with respect to consideration of Option 4. Similar evidence arising from consultation might also be considered by the Commission in future proceedings" (p. 49).

BCTC and BC Hydro have said that a process has been established to consult with, and if necessary accommodate, First Nations regarding the ILM Project (Exhibit B-1, Section 8.2). However, an overarching theme of Intervenor submissions was concern regarding conclusions drawn from a cost-effectiveness analysis based on estimates of First Nations accommodation costs made prior to the final settlement of amounts, if any, for accommodation.

The Commission Panel believes that it is reasonable to expect that there will be an adequate record in this proceeding to assess cost estimates and potential risks to the project arising from the duty to consult, and where necessary, accommodate. In this regard, the Commission Panel notes the following comment from BCOAPO: "the Commission must be cognizant of any measures taken by BCTC and BC Hydro in order to fulfill the obligation of the Crown to consult and accommodate, and must determine whether that obligation has been met to an extent which eliminates any unreasonable risk to ratepayers that subsequent accommodation costs will adversely affect the cost-effectiveness of the proposed transmission reinforcement, or imprudently result in an escalation of either utility's future revenue requirement, or impose financial burdens upon ratepayers" (BCOAPO Submission, p. 1). Also as BCTC states: "There is a risk in this process, albeit BCTC does not believe a material one, that the Project will not be allowed to proceed as a result of the EA process or that there will be some

material modification to it, either as a result of First Nations issue or otherwise. In this event BCTC will have to come back to the Commission for a new or amended CPCN"(BCTC Reply, p. 5).

The Kwikwetlem and Joint Submissions allege faults with the EAO process. The Commission Panel agrees with submissions from BCTC and BC Hydro that it should not be the Commission's role to second-guess the efficacy of a legislatively-established regime to satisfy the Crown's obligations (BCTC Reply, p. 7; BC Hydro Reply, para. 6).

The Joint Submissions claim that the cost of accommodation for existing and past infringements is particularly relevant to the ILM Project (Joint Submissions, para. 26). BC Hydro submits that there are other forums for dealing with concerns about past infringements (BC Hydro Reply, para. 27). The Commission Panel defers determinations regarding the relevance of the cost of accommodation for existing and past infringements to later in the proceeding, and notes that cost-effectiveness analysis does not usually include costs that are common to all alternatives.

It follows from these reasons that the Joint Submissions request for an adjournment until the process of consultation and accommodation is completed is denied (Joint Submissions, para. 29).

Yours truly,

Original signed by:

Erica M. Hamilton

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