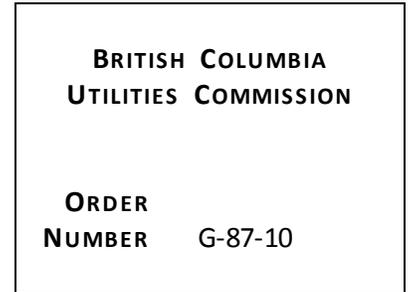




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IN THE MATTER OF  
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

An Application by British Columbia Transmission Corporation  
for Approval of a  
F2011 Transmission System Capital Plan Update

**BEFORE:** D.A. Cote, Commissioner/Panel Chair June 2, 2010  
L.A. O'Hara, Commissioner

### O R D E R

#### WHEREAS:

- A. On January 8, 2010, British Columbia Transmission Corporation (BCTC) applied to the British Columbia Utilities Commission (Commission) for an Order under section 44.2 of the *Utilities Commission Act* (the Act) accepting the expenditure schedules identified in the F2011 Capital Plan Update (the Application) as meeting the requirements of section 45(6) of the Act. These new expenditure schedules include \$27.4 million for Growth Capital, \$5 million for Sustaining Capital and \$3.1 million for BCTC Capital; and
- B. On January 14, 2010, the Commission, by Order G-9-10, established a written public hearing process and Regulatory Timetable for the review of the F2011 Capital Plan Update; and
- C. The evidentiary phase of the proceeding closed on March 29, 2010; and
- D. The written argument phase of the proceeding was completed when BCTC filed its Reply Submission on April 15, 2010; and
- E. The Commission Panel has considered the Application, evidence and submissions of Interveners and the Applicant, and the Court of Appeal decisions in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* 2009 BCCA 67 and *Kwikwetlem First Nation v. British Columbia (Utilities Commission)* 2009 BCCA 68.

**BRITISH COLUMBIA  
UTILITIES COMMISSION**

**ORDER  
NUMBER** G-87-10

2

**NOW THEREFORE** pursuant to section 44.2 of the Act, the Commission, by this order and the attached Reasons for Decision, determines as follows:

1. The following expenditure schedules as set out in the Reasons for Decision are accepted:

- (a) the Growth Capital Projects as listed in Appendix B to this Order; and
- (b) the Sustaining Capital expenditure for PCB Oil Spill Containment of \$5,000,000 (having an estimated accuracy of +/- 30%).

2. The following expenditure schedules as set out in the Reasons for Decision are rejected:

- (a) the Dawson Creek-Chetwynd Area Remedial Action Scheme; and
- (b) the BCTC Capital expenditures for the enterprise Project Portfolio Management Project.

3. The F2010 Capital Plan meets the requirements of section 45(6) of the Act.

**DATED** at the City of Vancouver, in the Province of British Columbia, this      Second              day of June 2010.

BY ORDER

*Original signed by:*

D. A. Cote  
Commissioner and Panel Chair

Attachments



**IN THE MATTER OF**

**BRITISH COLUMBIA TRANSMISSION CORPORATION  
F2011 TRANSMISSION CAPITAL PLAN UPDATE**

**REASONS FOR DECISION**

**June 2, 2010**

**BEFORE:**

D.A. Cote, Panel Chair/Commissioner  
L.A. O'Hara, Commissioner

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## 1.0 INTRODUCTION

This application by the British Columbia Transmission Corporation (BCTC) provides an update on the Crown Corporation's F2011 capital expenditures. Specifically, BCTC is requesting acceptance from the British Columbia Utilities Commission (Commission) of some \$35 million additional spending over and above those expenditures previously approved by the Commission for F2011.

### 1.1 Application

By way of background, BCTC filed its F2010 and F2011 Transmission System Capital Plan (F2010/F2011 TSCP) in November 2008. On July 13, 2009, the Commission issued its Decision and Order G-87-09 accepting a majority of the planned capital expenditures while rejecting certain capital projects and programs due to its inability to assess the need for or adequacy of First Nations consultation efforts. In November 2009, BCTC filed a re-application for approval of those rejected expenditures. By Order G-37-10 dated March 9, 2010, the Commission issued a determination on that application.

On January 8, 2010, BCTC filed the F2011 Capital Plan Update (the Application) to "inform the Commission and Interveners" about the required adjustments to its F2011 plan that are required to meet expected customer demand and ensure system reliability. In this Application, BCTC is seeking approval for both the transmission and substation distribution assets (SDA) related aspects of the projects identified in the Growth Capital Portfolio pursuant to a recent agreement between British Columbia Hydro and Power Authority (BC Hydro) and BCTC. The new approach represents a solution to concerns raised by the Commission in the July 13, 2009 Decision.

### 1.2 Orders Sought

BCTC applies pursuant to sections 44.2 and 45(6) of the *Utilities Commission Act (Act)* to the Commission for:

- (a) An Order accepting the expenditure schedules for both Transmission and System Distribution Assets provided in the Application under section 44.2(3) of the Act; and

- (b) An Order that this Transmission System Capital Plan Update meets the requirements of section 45(6) of the Act.

### **1.3 Statutory Framework**

With respect to section 44.2 of the Act, section 44.2(1)(b) states that a public utility may file an expenditure schedule containing “a statement of capital expenditures that the public utility has made or anticipates making during the period addressed by the schedule.”

Section 44.2(3) stipulates that the Commission must accept the capital expenditure schedule if it determines that the expenditures would be in the public interest or, in the alternative, reject the schedule.

In considering whether to accept the expenditure schedules, section 44.2(5) of the Act requires the Commission to consider “the interests of persons in British Columbia who receive or may receive service from the public utility.” It also requires that the Commission consider “the government’s energy objectives.” As the Application concerns transmission system related capital expenditures, the most relevant of the six energy objectives included in the definition in section 1 of the Act is the following:

“(d) to encourage public utilities to develop adequate energy transmission infrastructure and capacity in the time required to serve persons who receive or may receive service from the public utility.”

### **1.4 Regulatory Process**

By Order G-9-10, the Commission established a Regulatory Agenda and Timetable for the review of the Application. The matter was heard by way of a written hearing process, which included two rounds of Information Requests (IRs) and was completed on April 20, 2010 with the filing of BCTC Reply.

Four parties registered as Interveners: the British Columbia Old Age Pensioners’ Organization *et al.* (BCOAPO), Dawn Paley, BC Hydro and Plutonic Power Corporation.

## **1.5 Decision Summary**

In Order G-87-10, the Commission Panel reached determinations by project on the F2011 Capital Plan Update filed by BCTC. In what follows, the projects submitted by BCTC will be examined with respect to need, costs and potential alternatives.

On the basis of this information, the Commission Panel will determine whether each is in the public interest. Flowing out of the Application are a number of issues which will be dealt with in Section 3.0. Finally, in Section 4.0, the projects will be considered from a First Nations' issues perspective by providing the Commission Panel's assessment of the Crown's duty to consult.

## **2.0 CAPITAL PROJECTS FOR APPROVAL**

Section 2.0 provides an overview of the Growth, Sustaining and BCTC Capital Projects, which have been submitted for approval. Major projects are summarized in terms of description, costs and justification with any issues and intervener comments covered on a project by project basis.

### **2.1 Growth Projects**

The Commission has been requested to accept new growth capital expenditures totalling \$27.4 million. This consists of approximately \$20.5 million of transmission assets and a further \$6.9 million of SDA facilities which BC Hydro has requested BCTC to seek approval for on its behalf. There are a total of 11 projects which have been submitted for Commission approval (Exhibit B-1, p. 12). The Commission Panel will, in this section, determine the need for each project and whether acceptance may be in the public interest. Further, in Section 4.0 the Panel will review each of the approved projects to determine whether the duty to consult is triggered and, where it has, assess the adequacy of the level of consultation by BCTC/BC Hydro. In other words, the question is whether the level of First Nations consultation and, if necessary, accommodation has been sufficient to uphold the honour of the Crown.

Following is a description of each of the Growth Capital projects with related costs and a discussion of the justification and any related issues:

- **Dawson Creek Area Growth Projects**

BCTC reports it is currently working on the definition phase of the Dawson Creek/Chetwynd Area Transmission project, which was approved in the F2010/F2011 TSCP and is now seeking approval for an additional four implementation phase projects in the area. The primary driver for these projects is an increase in load growth resulting from gas exploration and drilling companies seeking interconnections to both the transmission and distribution electrical systems (Exhibit B-1, pp. 13-14).

The four projects include the Dawson Creek Substation Redevelopment-25 kV project (total capital cost: \$2.89 million), the Dawson Creek Substation Redevelopment-138 kV project (total capital cost: \$8.20 million), both of which were previously combined as a future project in the F2010/F2011 TSCP, the Dawson Creek Transformer Addition project (total capital cost: \$5.57 million) and the Remedial Action Scheme (RAS) in the Dawson Creek-Chetwynd Area (total capital cost: \$0.25 million) (Exhibit B-4, pp. 42-43). The Dawson Creek-Chetwynd Area RAS will be discussed and considered separately along with the Cheakamus/Ashlu Creek Generation Shedding RAS.

BCTC states the Dawson Creek 25 kV project is needed to increase load serving capability related to the Dawson Creek Transformer Addition Project and would involve replacement of circuit breakers, disconnect switches and a shunt capacitor bank at the Dawson Creek Substation allowing for an increase in firm capacity from 52 MVA to 67 MVA. Citing BC Hydro's July 2009 Load Forecast, BCTC notes that peak demand will exceed the station firm capacity by 10 MVA and this, combined with excessive load fluctuations experienced during switching of the existing 19 MVar Dawson Creek shunt protector bank which prevents full design utilization, are the primary justification for the project (Exhibit B-1, pp. 14-15).

In conjunction with the 25 kV project, BCTC states the Dawson Creek Transformer Addition will further expand firm capacity of the substation from 67 to 134 MVA. This will be accomplished by adding a 75 MVA/25 kV transformer to serve distribution growth in the area. Again citing the BC Hydro Load Forecast, BCTC notes the F2012 forecasted load for the Dawson Creek Substation is 77 MVA resulting in a further

shortfall in spite of improvements related to implementation of the 25 kV project. To meet the load growth requirements, BCTC notes that additional transmission capacity will be required. BCTC reports that alternatives involving load transfers and non-wire solutions were examined but rejected (Exhibit B-1, pp. 18-19).

BCTC submits the 138 kV project is required as a means of providing support for the transmission system and is a necessity if the proposed timelines for the transmission load interconnections are to be met (Exhibit B-1, p. 14). The project as described involves the addition of 50 MVar of switchable shunt capacitors to the 138 kV bus thereby enabling the interconnection of additional industrial load customers at the Dawson Creek Substation. BCTC reports that three additional large industrial loads have been nominated for interconnection to the Dawson Creek transmission system by mid 2012 and states that without this addition two of these cannot be served (Exhibit B-1, p. 21). BCTC further states that the only feasible alternative to the proposed project would be to build a new transmission line at over double the cost of the current proposal (BCTC Argument, p. 5).

In Argument, BCOAPO acknowledges that the need for the projects has been satisfactorily demonstrated and there is no evidence to suggest other viable alternatives (BCOAPO Argument, p. 2).

- **Remedial Action Scheme Projects**

In the filing, BCTC is requesting approval for two RAS projects: the Dawson Creek-Chetwynd RAS (total cost \$250,000) and the Cheakamus/Ashlu Creek Generation Shedding RAS (revised total cost \$590,000). The Dawson Creek-Chetwynd RAS is a special protection and load shedding scheme where load shedding would be initiated when under high stress conditions and a system contingency event occurs. BCTC states the RAS project is driven by the high load growth being experienced and forecast in the area and is required to provide area security and prevent uncontrolled loss of load and area voltage collapse under system specific single contingency events. No further cost effective or technically feasible alternatives were identified (Exhibit B-1, pp. 25-26). The Cheakamus/Ashlu Creek Generation Shedding RAS project is designed to provide integration between Cheakamus and Ashlu Independent Power Producer cluster and the existing Bridge River generation plant shedding and will be made available for contingencies where

generator shedding is required. BCTC submits that without this RAS project costly restrictions on generation output would be required which would also constrain area system flexibility (Exhibit B-1, pp. 36-37).

Due to the high costs of both of these RAS projects (total \$840,000) and in the case of Dawson Creek, its relationship to a suite of well defined projects, BCTC is of the view that neither should be attributed to the \$1 million approved in the previous capital plan for unidentified RAS projects which are unexpectedly required and is requesting separate approval (Exhibit B-1, pp. 25, 36). BCOAPO questions whether the Dawson Creek-Chetwynd RAS is “incremental spending” and can be described as well defined only because the need has been identified and definition work has commenced. It notes that at the time of the F2010/F2011 TSCP the project was unidentified (BCOAPO Argument, p. 2). BCTC in Reply observes that if the RAS projects are attributed to the \$1 million budget it will have no further amount for unidentified RAS projects (BCTC Reply, p. 2).

- **Cypress Creek - Transformer Addition**

At a cost of \$6.16 million BCTC proposes to add a second 168 MVA, 230/69 kV transformer at the Cypress Creek Substation on the North Shore to deal with existing system capacity and voltage constraints. BCTC submits this will increase firm transformation capacity and improve the reliability and security of supply of the North Shore 69 kV system. BCTC reports the firm capacity of the Cypress Station will be exceeded by the winter of 2009/2010 and the addition of a second transformer will result in sufficient supply capacity to the North Shore to satisfy needs beyond a 30-year planning horizon. BCTC states that it investigated a number of other alternatives the costs of which all far exceeded the cost of the proposed project (Exhibit B-1, pp. 28-30; BCTC Argument, pp. 6-7).

BCOAPO submits that BCTC has demonstrated the need for the project and is satisfied the chosen option is most cost effective (BCOAPO Argument, p. 2).

- **Other Growth Projects**

The remaining five projects, which total \$3.6 million, include the following:

- 60L19 Reconductor Project
- Auto VAR Control System Redundancy Project
- Merritt Area Transmission Project-Definition Phase
- Nanaimo Area Substation-Definition Phase
- 1L14 Capacity Increase Project

In the F2010/F2011 TSCP Decision the 60L19 Reconductor project was determined to be in the public interest but was rejected by the Panel because of the potential for some impact on aboriginal rights and the lack of evidence to assess the adequacy of consultation. In the current application, BCTC has provided additional information, which will be examined in Section 4.0.

The Auto VAR Control System Redundancy Project is required as a secondary redundant system to regulate the voltage at Ingledow, Meridian, and Cranbrook Substations. The need for this is driven by the Commission's adoption of the North American Energy Reliability Corporations Mandatory Reliability Standards, which require Auto Var control systems to have redundancy (Exhibit B-1, pp. 38 -39).

The Merritt Area Transmission and Nanaimo Area Substation projects are both definition phase projects. Both require definition funding to complete a preliminary environmental assessment, public and First Nations consultation and engineering work for reinforcement of the transmission system in each area. The Merritt project, which represents the most cost effective and technically feasible alternative, is currently estimated to cost \$17 million when completed, and will provide adequate capacity to meet increasing demand load forecasts (Exhibit B-1, pp. 40-42). The Nanaimo Substation is currently estimated to cost \$21.4 million and will address restraints, which currently restrict BCTC and BC Hydro's ability to supply load growth in the area and limit existing substations flexibility to support each other. BCTC states that a number of alternatives were considered with this project being most cost effective and feasible (Exhibit B-1, pp. 44-48).

The 1L14 Capacity project, which involves the replacement of disconnect switches at the George Tripp Substation, would increase the winter rating from 800 A to 925 A. The project will remove the overload on 1L14 during single contingency conditions and extend the utilization of the circuit for approximately 10 years (Exhibit B-1, pp. 50-51).

BCOAPO raised no concerns with respect to any of these projects being in the public interest.

## **2.2 Oil Spill Containment Project**

BCTC requested the Commission accept an additional \$5 million over the current spending estimate of \$1.5 million in the F2010/F2011 TSCP for additional Oil Spill Containment Program (OSCP) spending at three high-risk substations. BCTC notes that the requested amount is in response to recently enacted changes in Federal PCB Regulations, which require the company to expand the OSCP for substations to consider the risk of slow leaking equipment that contain polychlorinated biphenyls (PCBs). BCTC states it is revising its oil spill containment prioritization and risk index calculation to include high PCB priority equipment because of the new regulations. G.M. Shrum, Stewart, and Mainwaring Substations have been identified as high priority locations for oil spill containment in F2011. The Stewart Substation, because of its remote location, would benefit by the resultant reduced need for monitoring visits while the other two substations, both of which had a reportable incident arising from spills in F2010, will have the work completed in conjunction with work which is already scheduled (Exhibit B-1, pp. 54 -57).

BCTC states that maintaining current funding levels or doing nothing are not viable options to address the company's obligations under the new PCB Regulations where failure to comply can result in punitive action against BCTC, BC Hydro and their officers and directors. BCTC states that compliance is required and notes that future capital plans will address the ongoing need for higher OSCP funding (Exhibit B-1, p. 58).

BCOAPO submits the increase in spending has been justified and is not unreasonable (BCOAPO Argument, p. 4).

## **2.3 Enterprise Project Management System**

BCTC is requesting \$3.13 million in F2011 to purchase and implement a new enterprise Project Portfolio Management (ePPM) tool to aid in the management of its growing capital portfolio. The Project is proposed as an exception project, which meets the criteria for such projects set out in the F2010/F2011 TSCP. BCTC points out that its current project management tool set was implemented five years ago when there were fewer and smaller projects, which could be managed by non-integrated stand-alone applications. The

capital program size growth is such that BCTC finds it very difficult to manage the number of projects without an integrated solution allowing for both an individual project and portfolio view enabling efficient and effective portfolio management (Exhibit B-1, pp. 59 -61). In BCTC's words, "The ePPM Project would replace the existing disparate and obsolete project management applications with a consolidated and integrated business system that will streamline project management and allow BCTC to effectively and efficiently manage the BCTC Capital Plan...". BCTC notes that on the basis of its analysis, a full replacement of the existing tool set is the most cost effective and efficient alternative as it is the only option that delivers the functionality and capability for meeting existing and future business requirements (Exhibit B-1, p. 63).

In justifying the Project, BCTC notes that the Commission has previously raised concerns with regard to its methods of capital project management and points out the importance of this step in the strategy to plan and implement capital projects. In the filing BCTC points out the difficulties which result from the existing diverse collection of project management tools and how the proposed system will be integrated with the existing financial system and provide project managers with an enterprise view of all projects and the ability to manage on a variety of levels (Exhibit B-1, pp. 64-68). BCTC states that implementing the ePPM Project would conservatively yield a capital benefit of \$1.55 annually based on a ten-year capital plan of \$5 billion (Exhibit B-1, p. 68). As stated in answer to BCUC 1.33.5, BCTC expects these savings to be in the form of improved project delivery, reduced cost overruns, and a reduction in delivery time for projects.

BCOAPO does not take issue with the cost effectiveness or the benefits of the Project but raises concern over whether the entire cost should be considered as 'exceptional'. It notes that in response to BCUC 1.37.1 roughly \$1.5 million was expended on existing project management tools and submits it would follow that reducing \$ 400,000 captured by the approved Base Capital spending would be a reasonable assumption (BCOAPO Argument, p. 5). In Reply, BCTC states that BCOAPO's assessment of the evidence is incorrect and the costs referred to in the response to BCUC 1.37.1 refer to sustainment costs for the project management tools, which it agrees, are a Base Capital amount. BCTC proposes that the capital cost to implement the Project is non-routine and was not part of the four-year cycle of capital costs used to set the Base Capital amount approved by the Commission (BCTC Reply, p. 2).

## 2.4 Commission Determination on Public Interest

The Interveners raised no opposition to the 11 Growth Projects with respect to the need, the decision making process or whether the public interest was being served. The Commission Panel is of a similar view and in addition finds that the scope, in service dates and, in most cases, the costs of the Capital Projects are reasonable.

The Commission Panel accepts BCTC's explanation of load growth as being the primary driver for the Dawson Creek Substation projects as the area continues to grow and the demand for service along with it. The Panel also notes that alternatives for the projects were reviewed in a satisfactory manner and each of the proposed projects was demonstrated to be the most cost effective and feasible.

The Commission Panel does not take issue with the need for the two proposed RAS projects. However, the Commission Panel is mindful that \$1 million was approved in the F2011 portion of the F2010/F2011 TSCP for unidentified RAS projects and that to approve both as an exception to this would be contradictory to the purpose for which the amount was originally approved. **Respecting that there is a need to leave a balance in the account to afford further unforeseen RAS projects in F2011, the Panel finds that the \$590,000 Cheakamus/Ahslu Creek is best identified as an exception and accordingly accepted. The \$250,000 Dawson Creek-Chetwynd Area RAS is rejected as an exception and is to be funded from the existing \$1 million in the previously approved capital plan.**

On the remaining growth capital projects the Commission Panel has little additional comment except with respect to the 1L14 Capacity Increase Project. While there is no concern with the established need for the project, the Commission Panel points out that of the \$340,000 requested only 10 percent of that amount is the material switch cost (BCUC 1.18.1) which leaves an exceeding large amount to manage and implement the project.

The additional \$5 million requested by BCTC to undertake a greater number of oil spill containment programs is very much a consequence of changes to Federal PCB Regulations and effectively no longer a matter of choice. As noted by BCTC, failure to address the situation can result in punitive action being taken against the company, BC Hydro and their officers and directors. The Commission Panel finds that the steps

BCTC has taken to identify high-priority substations for expenditure of the funds is reasonable and appropriate. **Furthermore, BCTC is directed in its next Transmission System Capital Plan to provide a comprehensive plan detailing the timing and cost estimates to fully mitigate future oil spill containment problems.**

**In accordance with the above, the Commission Panel accepts the Growth and Sustainment Capital expenditure schedule as set out in Appendix B of this Reasons for Decision subject to the satisfaction of the adequacy of BCTC's duty to consult potentially affected First Nations.**

The ePPM tool is an important element in providing a better foundation upon which to plan and implement capital projects. Having an integrated solution with robust capabilities, in the view of the Panel, will be an important step in maintaining control of future projects. Further, the Commission Panel finds the addition of earned value analysis and reporting capability with the proposed solution will assist in identifying at an early stage any project definition problems as well as any cost or schedule issues, which may arise.

The Commission Panel does not wish to unnecessarily stall the implementation of the ePPM, but points out the consolidation of BCTC and BC Hydro as contemplated in Bill 17 may raise issues of concern for this Project. In response to IR 1.33.3 BCTC reports that it "understands that BC Hydro plans to implement Oracle Primavera for project and resource scheduling of projects starting in F2011" and furthermore that "BCTC will integrate its ePPM tool to whichever project management tool BC Hydro uses as required as part of the proposed project." While these statements were made prior to the first reading of Bill 17 and do provide some comfort, they were not made in the context of the present situation which at this point is unclear due to the unique circumstances of the uncertainty brought on by Bill 17. **Accordingly, the Commission Panel cannot accept the ePPM Project as the potential for duplication would not be in the public interest and asks that it be resubmitted once clarity has been reached with regard to consolidation and the implications for systems management between the entities are better understood.**

### **3.0 OTHER MATTERS**

#### **3.1 The Sustainment Capital Model and First Nation Considerations**

The F2010/F2011 TSCP Decision determined that BCTC “is to continue to use the Sustainment Investment Model (SIM) to suggest the expenditure level for the base Sustaining Capital portfolio for asset management, and directed BCTC to provide separate and additional justification for exceptional projects within the Sustaining Capital portfolio driven by risk mitigation objectives, performance enhancement objectives, or Third Party Requests” (BCTC TSCP F2010/F2011 Decision, p. 67). The apparent rationale of the Commission Panel on this was to separate basic asset maintenance capital from other types of sustainment capital by placing greater reliance in the future on the SIM to predict future requirements thereby reducing the need to justify each project individually. Given that all parties have gained experience with respect to potential impact of First Nation issues on sustainment capital projects, the Commission Panel reminds BCTC that further submissions designed to move the process of adopting SIM forward must outline how First Nations potential adverse impacts will be addressed.

#### **3.2 BC Government Energy Objectives and the BC Energy Plan (2007)**

BCTC states the Growth Projects and the BCTC Capital ePPM Project identified in the F2011 Capital Plan Update are, in a general sense aimed at meeting system load growth reliably and are consistent with the government’s energy objective (d) as outlined previously in Section 1.3. The Sustaining Capital Oil Spill Containment program is, in BCTC’s view, consistent with the environmental theme of the government energy objectives since they are related to complying with legislated environmental requirements (BCTC Argument, p. 2).

The Commission Panel accepts BCTC’s submissions on the subject and, in any case, finds that the projects being proposed in no way are an impediment to the achievement of BC Government energy objectives.

## 4.0 ASSESSMENT OF ADEQUACY OF FIRST NATIONS CONSULTATION

### 4.1 Background

As noted previously in Section 2.1, the Commission Panel has an obligation, with respect to this expenditure schedule, to assess whether the level of First Nations consultation and, if necessary, accommodation has been sufficient to satisfy the honour of the Crown. The primary case providing a framework for assessing the consultation duty is *Haida Nation v. British Columbia (Minister of Forests, 2004 SCC 73 (Haida))*. Included in this framework are a number of sub-issues, which are detailed as follows:

- **Existence of a duty to consult**

The *Haida* decision provides direction that the duty to consult arises upon the Crown having “knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplat[ing] conduct that might adversely affect them” (para. 64). *Haida*’s direction has generally been interpreted to mean that the consultation process must be undertaken at the preliminary or strategic planning stages of the Crown’s decision-making process.

- **Scope of the duty**

The *Haida* decision further provides direction as to the requirements for the scope of consultation as follows:

“the scope of the consultation required will be proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed” (para. 68).

Where the duty to consult exists, the *Haida* decision instructs that the strength of claim and related potential impacts are then placed on a scale or spectrum providing guidance as to their relative importance and required action. For example, where the claim to Aboriginal title or right is weak or the potential for infringement minor, the duty of the Crown would be correspondingly low and may be aimed at merely

providing notice and in doing so providing relevant information and discussing any matters which may come forward (*Haida* para. 43). However, where the claim lies at the higher end of the scale, and a prima facie case for a claim has been established and/or the potential for infringement is of high significance and the risk of non-compensable damage is high to Aboriginal peoples, the Crown may be required to take steps to minimize the impact of the infringement or avoid the irreparable harm. This may involve a number of actions including the following: the finding of interim solutions, providing an opportunity for an affected First Nation to make submissions, formal participation of the affected First Nation in the decision making process and providing written reasons demonstrating that the Aboriginal concerns were considered (*Haida* para. 44). This leads to the third sub-issue.

- **Whether the Crown has fulfilled its duty**

Where a duty to consult has been triggered, the Crown is required, as set out in the Commission's First Nations Filing Guidelines, to provide an overall conclusion as to the reasonableness of the consultation process and to whether the duty to consult has been discharged. It is on the basis of this and the related evidence put before it that the Commission Panel must decide whether the duty to consult, where triggered, has been met and is discharged.

Further, the Commission has been explicit within the First Nation Filing Guidelines for Crown Utilities in those cases where a Crown utility takes the position that a particular application does not trigger the duty to consult or the application does not warrant the filing of information, the Crown utility is expected to provide reasons supporting its conclusion to the Commission (Order G-51-10, Appendix A, p. 4).

#### **4.2 Duty to Consult-The Current Filing**

BCTC states that BC Hydro holds the primary responsibility for Aboriginal relations with regard to both existing transmission system assets and operations and new capital projects as outlined in the Master Agreement between the two companies. In the filing, BCTC asserts that it works closely with BC Hydro's Aboriginal Relations and Negotiations department in the process and notes that the current application includes an assessment of First Nations consultation on a project-by-project basis (Exhibit B-1, pp. 10-11).

BCTC has separated most of the projects within the F2011 Capital Plan Update into one of two categories: Definition Phase Projects and projects which occur within the confines of existing substations or facilities. Two additional projects, the Dawson Creek Substation Redevelopment-138kV Project and the 60L19 Reconductor Project are handled separately as they fit neither category. The Commission Panel for the purposes of simplicity will review the projects in a similar fashion.

- **Definition Phase Projects**

Definition Phase funding is being sought for both the Nanaimo Area Substation Project and the Merritt Area Transmission Project. BCTC states that it is BC Hydro's view that First Nations consultation will be required for both projects and that the forecast capital costs include a provision for First Nations Consultation activities for both. In addition, BCTC notes that BC Hydro cannot proceed with consultation on either project until further information is known. In Argument BCTC concludes that "At this time, BC Hydro has therefore taken all reasonable steps to meet its duty to consult given the stage of the projects." Finally, BCTC notes the Commission will have the opportunity to assess the consultation efforts of BC Hydro when expenditures for the Implementation Phase of these projects are filed (BCTC Argument, p. 21).

The Commission Panel agrees that the appropriate time to assess the adequacy of First Nations consultation is when further evidence of consultation is submitted along with project details in the Implementation Phase. The Panel further notes that the Definition Phase includes funding for the consultation process and accepts Definition Phase Funding for the two projects. The Commission Panel is of the view that the consultation process should be initiated at the earliest possible stage of the project planning process. To date there is no filed evidence to suggest that potentially impacted First Nations have been notified of the projects. **Accordingly, BCTC/BC Hydro should provide notification to all potentially affected First Nations for both of these projects within 30 days if they have not already done so.**

- **Projects within Existing Substation or Facilities**

BCTC submits that for those projects which occur within the substation fence or existing facilities there is no requirement for First Nations consultation. This includes the following projects:

1. Dawson Creek Substation Redevelopment-25 kV;
2. Dawson Creek Transformer Addition;
3. Dawson Creek-Chetwynd Area RAS;
4. Cypress Substation-Transformer Addition;
5. Cheakamus/Ashlu Creek Generation Shedding RAS Project;
6. Auto VAR Control System Redundancy Project;
7. 1L14 Capacity Increase Project;
8. Oil Spill Containment Program-Additional Funding; and
9. ePPM Project

BCTC submits that the key determining factor with these projects is they all take place within the confines of the existing substations or facilities and points out that since these fenced lands have been used by the utility for some time and preclude the exercise of any Aboriginal or treaty rights on the land, the activities related to the projects will not result in any new impacts on asserted Aboriginal rights, title or treaty rights (BCTC Argument, p. 22).

With respect to the three Dawson Creek projects in this category, BCTC is of the view that although the projects occur within the area of Treaty 8, the land on which the projects are to take place have been taken up many years ago. Citing *Mikisew Cree First Nation v. Canada (Minister of Heritage)*, BCTC states that “rights under Treaty 8 are expressly subject to the Crown’s right to take up land” and while the right to take up land is subject to the duty to consult, the lands, in this case, were taken up many years ago (BCTC Argument, p. 23).

**In keeping with previous decisions, the Commission Panel accepts BCTC’s Argument that in cases where the work is conducted on existing substations or facilities and does not result in any new impacts on First Nations asserted rights or title, the duty to consult is not triggered.**

- **Dawson Creek Substation Redevelopment-138 kV**

BCTC states that the Dawson Creek Substation redevelopment-138 kV project is similar to other projects in the aforementioned category with the exception of one key point. Where this project differs is it involves not only the existing substation area but also involves an expansion onto what is now private land. BCTC cites *Brokenhead Ojibway First Nation v. Canada (Attorney General)* to support its position that the expansion onto private land does not trigger First Nation consultation requirements. In this decision, the Court directs that the development of land for public purposes does not alone trigger a duty to consult but rather, to engage the Crown's duty to consult, there must be some unresolved non-negligible impact arising due to the development. BCTC argues that in this project there are no non-negligible impacts arising from the development that engage the Crown's duty to consult. In support of this, BCTC relies on the following factors: the private property to be acquired has been zoned and designated industrial, the development on the property is of a nature that treaty rights could not have been exercised on this land for many years, the Crown has taken up the lands from Treaty 8 many years previously and no Crown authorizations are required for purchase (BCTC Argument, pp. 24-25).

The Commission Panel does not view the expansion onto what is now private land as being determinative in this matter. What is determinative is whether, as a result of the expansion, there is an impact on Treaty 8 First Nations which is significant. The fact that the land has been a privately owned site, which has been developed and precluded the exercise of Aboriginal or Treaty rights for many years as reported in the response to BCUC 1.47.1.3, provides support for the view that the expansion creates no new impacts on First Nation Treaty rights. **As a result, the Commission Panel accepts BCTC's assertion that in this instance there is no duty to consult.**

- **60L19 Reconductor Project**

The 60L19 Reconductor Project was originally filed among the projects for approval in the F2010/F2011 TSCP. In that decision the Commission Panel cited the potential for some limited impact on aboriginal rights or interests but noted there was no evidence to assess the adequacy of BCTC's or BC Hydro's efforts to consult First Nations with respect to the project. The Commission Panel then directed BCTC to resubmit its application with evidence related to consultation with potentially affected First Nations, which would

include an assessment of the project effects on asserted aboriginal rights or interests (F2010/F2011 TSCP Decision, p. 109).

The project is designed to re-conductor 60L19 for 2.6 km between the Stave Falls and Haney Substations. The upgrade work includes the acquisition, from private owners, of 0.42 hectares of new right of way property and involves an expansion of the right of way, the stringing of a new conductor, ground re-contouring, and the clearing of right of way (Exhibit B-1, p. 35). BCTC reports that BC Hydro's assessment is there is no requirement for First Nations consultation for this project. BCTC states the factors in support of this assessment are as follows:

- (a) This project does not occur in a treaty area, so no First Nations treaty rights are affected.
- (b) No Crown authorization is required for the purchase of the right-of-way on this private land. This acquisition does not change the underlying fee simple interest of the private property.
- (c) The stringing of a new conductor is done on poles and in the air, which does not involve any disturbance of soils on the right-of-way, and therefore does not infringe upon aboriginal rights or title.
- (d) Through geological mapping it has now been determined that the 60L19 Reconductor Project will not involve any ground re-contouring.
- (e) The project will involve the placement of four anchors to brace two poles and the replacement of six poles on the existing right-of-way. These activities involve negligible disturbance of soils on the right of way. The steel helical anchors that will be used for this project are spiral shaped screws; the anchors are not dug into the soil but rather screw into it with very minimal soil disturbance. Consequently, these activities involve such a negligible disturbance of soil that aboriginal rights or title cannot be infringed.
- (f) The right-of-way runs on private land alongside a road on either side of which private residences are located.

(BCTC Argument, pp. 25-26)

While acknowledging there will be minimal impacts, BCTC states that such impacts do not require Crown consultation and cited the *Mikisew Cree* decision where the Supreme Court of Canada stated "This does not mean that whenever a government proposes to do anything in Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact. The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty" (*Mikisew Cree First Nation v. Canada (Minister of Heritage)*, para 55). BCTC

cites the previously referred to *Brokenhead Ojibway First Nation* decision to support the view that impacts must arise from a development to engage the duty to consult. BCTC notes that in spite of the fact that both of these decisions apply to cases involving treaty rights, the principles still apply in the case of the 60L19 Reconductor (which is not on treaty land) as the duty to consult remains, in essence, the same.

The F2010/F2011 TSCP, as previously stated, directed BCTC in addition to providing evidence related to First Nation consultation on this Project, to include an assessment of the project impacts on assumed aboriginal rights or interests. In Argument, the BCOAPO commented on the lack of any additional consultative work on the part of BCTC (BCOAPO Argument, p. 5). In Reply, BCTC again submits that BC Hydro's assessment on the duty to consult remains the same as it was for the F2010/F2011 TSCP, but the evidence now on record is sufficient for the Commission to conclude that "indeed no duty to consult is triggered." BCTC further notes that BCOAPO's Argument does not address BCTC/BC Hydro's evidence for why no duty to consult is triggered (BCTC Reply, p. 2).

**The Commission Panel accepts the BCTC position that there is now sufficient evidence on the record to reach a conclusion on this matter. Based on the evidence of this proceeding, the Commission Panel considers the replacement of existing structures, as described, to be part of the regular maintenance program and the work as explained by BCTC, and will have insignificant, if any impact on the surrounding environment. Furthermore, the fact that the right-of-way to be acquired is located on private land which runs alongside a road with houses on both sides supports the view that the exercise of Aboriginal rights has been precluded for many years and there are no new First Nation impacts. Accordingly, the Commission Panel accepts BCTC's argument that there is no duty to consult.**

ACCEPTED FORECAST GROWTH CAPITAL EXPENDITURES

| Row # | Project Description  | Percentage |       | Estimate Accuracy |      | BC Hydro     | BCTC         | Project      |
|-------|--|------------|-------|-------------------|------|--------------|--------------|--------------|
|       |  | SDA        | Trans | -                 | +    | SDA          | Trans        | Total        |
|       |  |            |       | (%)               | (%)  | (\$ Million) | (\$ Million) | (\$ Million) |
| 1     | Transmission Costs Accepted per Appendix A of July 13, 2009 Capital Plan Decision, net of Rejected Projects on the basis of insufficient First Nations consultation evidence |            |       |                   |      | 0            | 51.62        | 51.62        |
|       | New Growth Projects for Acceptance:  |            |       |                   |      |              |              |              |
| 2     | Dawson Creek Substation Redevelopment - 25 kV  | 97%        | 3%    | 10%               | 20%  | 2.82         | 0.07         | 2.89         |
| 3     | Dawson Creek Transformer Addition  | 73%        | 27%   | 10%               | 20%  | 4.07         | 1.5          | 5.57         |
| 4     | Dawson Creek Substation Redevelopment -138 kV  | 0%         | 100%  | 10%               | 20%  | 0            | 8.2          | 8.2          |
| 5     | Dawson Creek - Chetwynd Area RAS   |            |       |                   |      |              |              |              |
| 6     | Cypress Substation Transformer Addition  | 0%         | 100%  | 10%               | 20%  | 0            | 6.16         | 6.16         |
| 7     | 60L19 Reconductor Project  | 0%         | 100%  | 10%               | 15%  | 0            | 0.87         | 0.87         |
| 8     | Cheakamus/Ashlu Creek Generation Shedding RAS  | 0%         | 100%  | 50%               | 100% | 0            | 0.65         | 0.65         |
| 9     | Auto VAR Control System Redundancy Project   | 0%         | 100%  | 10%               | 10%  | 0            | 0.65         | 0.65         |
| 10    | Merrit Area Transmission Project - Definition Phase  | 42%        | 58%   | 50%               | 100% | 0            | 1            | 1            |
| 11    | Nanaimo Area Substation - Definition Phase   | 70%        | 30%   | 20%               | 50%  | 0            | 0.75         | 0.75         |
| 12    | 1L14 Capacity Increase   | 0%         | 100%  | 10%               | 20%  | 0            | 0.34         | 0.34         |
| 13    | Project Sub-total New Growth Projects for Acceptance   |            |       |                   |      | 6.89         | 20.19        | 27.08        |
| 14    | Total Growth Portfolio Capital Cost for Accepted   |            |       |                   |      | 6.89         | 71.81        | 78.70        |