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BRITISH COLUMBIA UTILITIES COMMISSION

ORDER NUMBER G-2-10

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

and

British Columbia Transmission Corporation
Reconsideration of the
Interior to Lower Mainland Transmission Project

BEFORE: A.J. Pullman, Commissioner
A.A. Rhodes, Commissioner
P.E. Vivian, Commissioner

January 5, 2010

O R D E R

WHEREAS:

A. On November 5, 2007 the British Columbia Transmission Corporation ("BCTC") applied pursuant to sections 45 and 46 of the *Utilities Commission Act* (the "Act") for a Certificate of Public Convenience and Necessity ("CPCN") for the Interior to Lower Mainland ("ILM") Transmission Project (the "ILM Project"); and

B. On August 5, 2008 the British Columbia Utilities Commission ("Commission") issued its Decision accompanied by Order C-4-08 that granted BCTC the CPCN for the ILM Project subject to conditions; and

C. The Court of Appeal for British Columbia released its decision in *Kwikwetlem First Nation v. British Columbia (Utilities Commission),* 2009 BCCA 68 on February 18, 2009. Madam Justice Huddart, on behalf of the Court, stated at paragraph 15:

> "I would remit the scoping decision to the Commission for reconsideration in accordance with this Court's opinion, once certified, and direct that the effect of the CPCN be suspended for the purpose of determining whether the Crown's duty to consult and accommodate the Appellants had been met up to that decision point"; and

D. On April 7, 2009 the Commission issued a letter that scheduled a Procedural Conference on April 15, 2009; and

F. After the Procedural Conference the Commission, by Order G-38-09, issued a Regulatory Timetable that included BCTC and British Columbia Hydro and Power Authority ("BC Hydro") tendering evidence and submissions on that evidence; and

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G. The Commission, by Order G-83-09, determined that it will consider Supplemental Evidence existing up to August 5, 2008. The Revised Regulatory Timetable included deadlines for Commission and Intervenor information requests, BCTC responses, and Budget Estimates for Participant Assistance. The Order also set a Second Procedural Conference; and

H. On August 25, 2009 the Commission issued Order F-21-09 that approved Interim Cost Awards to five participants in the proceeding; and

I. On August 28, 2009 the Commission held the Second Procedural Conference; and

J. On August 31, 2009 the Commission issued Order G-98-09 that established a further Revised Regulatory Timetable that included a Third Procedural Conference, Oral Public Hearing dates (unless determined otherwise at the Third Procedural Conference), and a tentative date for a Registration Deadline for a Participant Assistance Budget Estimate based on the anticipated regulatory process for a Second Interim Award; and

K. On November 30, 2009 the Commission held the Third Procedural Conference; and

L. On December 3, 2009 the Commission issued Order G-144-09 which established a further Revised Regulatory Timetable that included dates for the filing of Revised Participant Assistance Budget Estimates for a Second Interim Cost Award, Rebuttal Evidence by BCTC and BC Hydro, Intervenor Submissions on the Rebuttal Evidence, BCTC and BC Hydro Reply to the Submissions of Intervenors on the Rebuttal Evidence, the identification of Witness Panels, the filing of Direct Evidence and the commencement of the Oral Public Hearing on Monday, January 11, 2010; and

M. BCTC filed its Rebuttal Evidence and its submission on the admissibility of the Rebuttal Evidence on December 7, 2009 (Exhibit B-20). BC Hydro also filed its submission on the admissibility of the Rebuttal Evidence on December 7, 2009 (Exhibit C3-21); and

N. Intervenor submissions on the admissibility of the Rebuttal Evidence were received from the Stó:lō Hydro Ad Hoc Committee ("SHAC") (Exhibit C9-8); British Columbia Old Age Pensioners Organization et al. ("BCOAPO") (Exhibit C2-7); Kwikwetlem First Nation ("Kwikwetlem") (Exhibit C4-13); Coldwater, Cook's Ferry, Ashcroft, and Siska Indian Bands (collectively, "Nlaka'pamux Bands") (Exhibit C6-8); Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance and the Upper Nicola Indian Band (collectively, "NNTC") (Exhibit C5-17); and the Stó:lō Tribal Council ("STC") (Exhibit C8-13); and

O. SHAC consents to the admission of the Rebuttal Evidence. BCOAPO confines its submission to the general principles that the Commission should apply to the admissibility of the Rebuttal Evidence. Kwikwetlem does not object to the admission of the Rebuttal Evidence, with the exception of Attachment A-21. The Nlaka'pamux Bands do not object to the admission of the Rebuttal Evidence providing that the December 18, 2009 letter from Mary Sandy is admitted as sur-rebuttal evidence. NNTC and STC both object to the admission of the Rebuttal Evidence; and

P. On December 31, 2009 BCTC and BC Hydro filed their Reply Submissions on the admissibility of the Rebuttal Evidence; and

Q. The Commission has considered the submissions on the admissibility of the Rebuttal Evidence.

NOW THEREFORE the Commission orders, with Reasons to follow, that:

1. The Rebuttal Evidence will be admitted.

2. The December 18, 2009 letter from Mary Sandy will be admitted as sur-rebuttal evidence.

3. Other Intervenors who wish to file sur-rebuttal evidence must do so by Monday, January 11, 2010 at 9:00 a.m. Sur-rebuttal evidence is to be limited to issues raised in the Rebuttal Evidence.

4. The cross-examination of the BCTC/BC Hydro witness panel on issues that are the subject of sur-rebuttal evidence will not commence before Wednesday, January 13, 2010 at 9:00 a.m.

DATED at the City of Vancouver, in the Province of British Columbia, this 5th day of January 2010.

BY ORDER

Original signed by:

A.J. Pullman
Commissioner

Attachment

British Columbia Transmission Corporation
Reconsideration of the
Interior to Lower Mainland Transmission Project

Admissibility of Rebuttal Evidence

REASONS FOR DECISION

On January 5, 2010, the Commission issued Order G-2-10 with Reasons to follow. These are the Reasons.

1.0 INTRODUCTION

One of the issues addressed at the Third Procedural Conference, which took place on November 30, 2009, was whether BCTC or BC Hydro should be able to file rebuttal evidence in response to the evidence filed by certain Intervenors (the "Rebuttal Evidence").

By Order G-144-09 dated December 3, 2009, the Commission Panel directed BCTC and BC Hydro to file Rebuttal Evidence, if any, together with a submission on its admissibility by December 7, 2009. Intervenors were directed to provide submissions on the admissibility of the Rebuttal Evidence by December 21, 2009. BCTC and BC Hydro were directed to file reply by December 31, 2009.

BCTC filed its Rebuttal Evidence and its submission on the admissibility of the Rebuttal Evidence on December 7, 2009 (Exhibit B-20) and BC Hydro filed its submission on the same date (Exhibit C3-21).

Intervenor submissions on the admissibility of the Rebuttal Evidence were received from the Stó:lō Hydro Ad Hoc Committee ("SHAC") (Exhibit C9-8); British Columbia Old Age Pensioners Organization et al. ("BCOAPO") (Exhibit C2-7); Kwikwetlem First Nation ("Kwikwetlem") (Exhibit C4-13); Coldwater, Cook's Ferry, Ashcroft, and Siska Indian Bands (collectively, "Nlaka'pamux Bands") (Exhibit C6-8); Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance and the Upper Nicola Indian Band (collectively, "NNTC") (Exhibit C5-17); and the Stó:lō Tribal Council ("STC") (Exhibit C8-13).

On December 31, 2009 BCTC and BC Hydro filed their reply submissions on the admissibility of the Rebuttal Evidence.

The Commission Panel has reviewed and considered all the submissions filed by the parties. A failure to refer to a specific submission made by a party in these Reasons for Decision should not be construed as a failure by the Commission Panel to have considered that specific submission.

2.0 BCTC AND BC HYDRO SUBMISSIONS

BCTC submits that it seeks to file Rebuttal Evidence in response to certain assertions in the evidence of Kwikwetlem, Nlaka'pamux Bands, NNTC, STC and SHAC and that it does not seek to rebut the evidence of the Hwlitsum First Nation or the Nicola Tribal Association.

BCTC submits section 40(1) of the *Administrative Tribunals Act*, S.B.C. 2004 (the "*ATA*") permits the Commission to receive and accept any information that is "relevant, necessary and appropriate, whether or not the information would be admissible in a court of law." BCTC submits that section 40(1) is the relevant test to apply when considering the admissibility of the Rebuttal Evidence.

BCTC submits that the Rebuttal Evidence is relevant. BCTC relies upon the description of relevance set out in *R. v. Korol*, 2009 BCCA 118 at paragraph 34:

> Evidence is relevant if it is probative of either a fact in issue or a fact which itself is probative of a fact in issue.

BCTC submits that each portion of the Rebuttal Evidence responds to specific issues raised or statements made within the evidence of the respective First Nation Intervenor's or their responses to Information Requests pertaining to the adequacy of their consultation and accommodation efforts.

BCTC also submits that the Rebuttal Evidence meets the test of necessity. BCTC cites the Commission's Reasons for Decision to Order G-83-09, where it found that necessity was determined by the Commission's ability to determine whether the Crown's duty to consult and accommodate was met up to the point in time of the Commission's decision. BCTC submits that without the admission of the Rebuttal Evidence, the Commission will be deprived of evidence which responds to the specific issues now raised in the evidence of the respective First Nation Intervenors. In the absence of such evidence, BCTC submits that the evidentiary record will be incomplete regarding the concerns and issues that the First Nation Intervenors rely upon to argue that consultation was inadequate. In turn, the lack of a full evidentiary record will impede the Commission's ability to determine whether the Crown's duty to consult and accommodate was fulfilled at the time of the Commission's CPCN decision.

BCTC submits that the Rebuttal Evidence also meets the final requirement of appropriateness as set out in section 40(1) of the *ATA*. BCTC cites the Commission's Reasons for Decision to Order G-83-09, where it determined the issue of "appropriateness" on the basis of whether the parties would be prejudiced by the introduction of the evidence, and submits that this approach is equally applicable when considering the appropriateness of the Rebuttal Evidence. BCTC relies on the principles set out in *Access Pipeline Inc. v. Alberta (Designated Linear Assessor)*, [2009] A.W.L.D. 2717, 2009 CarswellAlta 861 ("*Access Pipeline*"). There, the Municipal Government Board (the "MGB") held that the admissibility of rebuttal evidence raises two competing issues: (1) natural justice in the hearing and decision-making process is best served when the decision maker has all of the relevant information before it; and (2) parties have the right to know the case to be met in order that they may have a fair opportunity to respond to the evidence and argument of the opposing party. In the view of the MGB, the first interest must significantly diminish the second before information probative to the issues to be decided can be excluded.

BCTC submits that in the circumstances of this proceeding, the admission of the Rebuttal Evidence maintains the principles of natural justice by allowing BCTC to respond to allegations in the respective First Nation Intervenor's evidence. BCTC submits that as a principle of natural justice, it must know the case to be met. BCTC notes that it sought guidance from the respective First Nation Intervenors as to the case to be met in its reply submission on April 6, 2009 (Exhibit B-2) and further at the Procedural Conference held on April 15, 2009. BCTC submits that on several occasions, it advised that in the absence of further clarity of the Intervenors' particular issues and concerns, BCTC would be unable to respond adequately given the voluminous amount of evidence that could be led. BCTC submits that failing any response from the Intervenors, BCTC's Supplemental Evidence was broad and did not fully respond to the issues and concerns which the respective First Nation Intervenors have since particularized. Additionally, BCTC notes that several First Nation Intervenors did not fully respond to the Information Requests issued by BCTC.

BCTC further submits that the Rebuttal Evidence will not prejudice the respective First Nation Intervenors since it can be explored through cross-examination of BCTC's evidence and the First Nation Intervenors' witnesses can review the Rebuttal Evidence far in advance of their cross-examination.

In conclusion, BCTC submits that the Rebuttal Evidence is relevant to the issues which the Commission must determine and responds directly to issues which the respective First Nation Intervenors have since raised. The Rebuttal Evidence is necessary to equip the Commission with a full evidentiary record on the issues that these Intervenors rely upon to argue that the Crown's duty to consult and accommodate was not met at the time of the Commission's decision. Finally, the Rebuttal Evidence is appropriate in that it provides BCTC an opportunity to respond to the case it has to meet.

BC Hydro submits that prior to filing the Supplemental Evidence, both BCTC and BC Hydro requested the respective First Nation Intervenors to identify and further particularize their concerns relating to consultation on the ILM Project. Upon filing of the Intervenor evidence, BC Hydro submits that new concerns arose while others were given greater specificity.

BC Hydro submits that the Commission's power to allow Rebuttal evidence is confirmed by a review of Commission guidelines and practice, statutory provisions and case law. The Rebuttal Evidence is relevant in that it is responsive in nature and limited to discrete pieces of information. BC Hydro submits that the Rebuttal Evidence is necessary to allow all parties an opportunity to present evidence on the specific concerns relating to consultation, enabling the Commission to consider the issue it has been directed to address by the B.C. Court of Appeal. Further, the Rebuttal Evidence is appropriate in that it provides evidence on specific issues which have now been particularized through the Intervenors' written evidence. Moreover, no prejudice to the Intervenors would result by allowing the admission of the Rebuttal Evidence as they would have the opportunity to test the evidence through the oral hearing and a reasonable amount of time to consider the Rebuttal Evidence.

3.0 INTERVENOR SUBMISSIONS

3.1 Stó:lō Hydro Ad Hoc Committee

SHAC consents to the admission of the Rebuttal Evidence.

3.2 British Columbia Old Age Pensioners' Organization

BCOAPO submits that while the Commission has the discretion to allow a party to file rebuttal evidence when appropriate, the material BCTC seeks to file must be truly in the nature of proper rebuttal and limited to "new material that is responsive to evidence from other parties which the utilities could not reasonably have foreseen and addressed in previous filings". The BCOAPO submit that the Commission should receive such evidence "in the interests of a fully-informed determination of the Reconsideration proceeding which is well-grounded in an appreciation of the relevant facts." BCOAPO also submits that the Commission should ensure that Intervenors have an adequate opportunity to respond to the rebuttal evidence in the course of the proceeding, perhaps most efficiently in the form of direct testimony and/or documentary materials in the oral hearing.

3.3 Kwikwetlem First Nation

Kwikwetlem takes no objection to the admission of the Rebuttal Evidence concerning Kwikwetlem, other than the document submitted as Attachment A-21 of the Rebuttal Evidence. Kwikwetlem submits that Attachment A-21 is not admissible as rebuttal evidence on the grounds that it relates to a meeting that was not raised by either Kwikwetlem or BCTC in initial evidence submissions and admission of Attachment A-21 would in effect, allow BCTC to split its case.

3.4 Nlaka'pamux Bands

The Nlaka'pamux Bands do not object to the admission of the Rebuttal Evidence providing that the December 18, 2009 letter from Mary Sandy is admitted as sur-rebuttal evidence, as agreed to by BCTC.

3.5 Nlaka'pamux Nation Tribal Council

The NNTC oppose the filing of the Rebuttal Evidence B in respect of the NNTC and Rebuttal Evidence C in respect of Upper Nicola and ONA. NNTC's primary basis for objection is that Attachments B-1 to B-11 and C-1 to C-8, along with the written Rebuttal Evidence commenting on the same, should have been produced as part of BCTC's Supplementary Evidence. NNTC refers to the decision of *R. v. Krause,* [1986] 2 S.C.R. 466 ("*Krause*") for the principle that rebuttal evidence is exceptional and should be limited to responding to new issues raised by the responding party that the first party could not have reasonable anticipated. NNTC submits that BCTC has in effect, split its case through holding back substantial evidence and as a result, is depriving NNTC of a fair chance to respond and test that evidence. NNTC points out that the documents forming the Rebuttal Evidence were within the possession of BCTC when it prepared the Supplementary Evidence and are similar in nature to documents put forward by BCTC as part of its Supplementary Evidence in relation to other First Nations. NNTC submits that the documents within the Rebuttal Evidence were clearly within the scope of consultation evidence that

BCTC was directed to file. Further, certain portions of the Rebuttal Evidence repeat and rely upon evidence which NNTC submits is already within the record.

NNTC submits that the Rebuttal Evidence concerning NNTC does not respond to new issues which BCTC could not have reasonably anticipated would arise. To this effect, NNTC's concerns were clearly and repeatedly made known to BCTC throughout the consultation process. BCTC could have reasonably anticipated that NNTC would raise the very same concerns in its written evidence. NNTC submits that BCTC did not require any further "statement of concern" from NNTC in order to reasonably anticipate NNTC's concerns or issues relating to consultation.

While NNTC admits the Rebuttal Evidence may be relevant, they submit that that its prejudicial effect outweighs its probative value. In their view, the documents included within the Rebuttal Evidence consist of internal notes which reflect a one-sided characterization of events. In particular, NNTC takes exception to Attachment B-11 to Rebuttal Evidence B and Attachment C-9 to Rebuttal Evidence C, a copy of what is known as a "protective writ" filed on behalf of the Okanagan Nation and asserting Aboriginal title in relation to Okanagan Nation Territory. NNTC submits that the writ is irrelevant to any consultation between the Crown and the NNTC concerning the ILM Project or to the obligations owed by the Crown, on an interim basis, to honourably consult and accommodate the NNTC. Further, NNTC submits that there is no evidence to indicate that BCTC relied upon the writ throughout the course of consultation.

NNTC does however, consent to the admission of pages 1, 2 and the top paragraph of page 3 of Rebuttal Evidence C, providing NNTC is given the right to contest and test the evidence.

NNTC submits that should the Commission decide to admit the Rebuttal Evidence, it must provide NNTC with an opportunity to respond in a manner and on a timeline that does not further comprise their ability to fairly participate in this process. The NNTC submits that a fair deadline for any response to be provided would be no less than 24 hours before the witness panels for NNTC are called.

3.6 Stó:lō Tribal Council

The STC submits that the Rebuttal Evidence sought to be admitted by BCTC in respect of the STC was plainly available to be included within BCTC's Supplemental Evidence and as a result, its admission would constitute case splitting. STC notes that the bulk of the evidence consists of meeting notes which were referenced in BCTC's Supplemental Evidence, but not filed as part of that Supplemental Evidence. With respect to BCTC's explanation that the First Nation Intervenors failed to adequately articulate their concerns, STC submits that it was clear that STC was taking the position that consultation on the ILM Project was inadequate. Further, STC submits that BCTC does not address why meeting notes within the Rebuttal Evidence were not included within the Supplemental Evidence when other meeting notes were included. In the view of STC, BCTC simply cannot sustain the position that it was not reasonably anticipated that the content of the meetings would be relevant.

STC submits that, if the Rebuttal Evidence is admitted, the STC should be provided an opportunity to file sur-rebuttal evidence no later than 48 hours before the witness panel for STC is called.

4.0 BCTC AND BC HYDRO REPLY SUBMISSIONS

In its reply, BCTC submits that it does not object to the admission of the December 18, 2009 letter from Mary Sandy as sur-rebuttal evidence of the Nlaka'pamux Bands if BCTC's Rebuttal Evidence is admitted. In response to the submissions of NNTC and STC, BCTC rejects the suggestion that it is splitting its case and notes that it expressly indicated that BCTC required more specific complaints from the First Nation Intervenors prior to filing its Supplemental Evidence. With respect to NNTC's reference to the legal test regarding rebuttal evidence in criminal and civil proceedings, as reflected in the decision of *Krause*, BCTC submits that such a test is of limited application to the Commission proceedings as it is not bound by strict rules of evidence and parties do not have the benefit of pleadings which properly identify the other party's position. BCTC further notes that the Rebuttal Evidence is clearly relevant as admitted by NNTC.

BCTC submits that the NNTC's submission ignores the jurisdiction afforded to the Commission under section 40(1) of the *ATA*. BCTC also references the comments found within *Canada (Attorney General) v. Lambie*, [1995] 1 F.C. 680 as support for the position that civil proceeding rules should not be strictly applied within the administrative context. BCTC submits that its Rebuttal Evidence is directed at specific instances in the evidence of the respective First Nation Intervenors which BCTC could not reasonably anticipate or generally attempts to clarify the NNTC's evidence. BCTC notes that NNTC's description of meetings and correspondence was incomplete in many respects. Through the Rebuttal Evidence, BCTC submits that it is seeking to clarify its position regarding NNTC's strength of claim as NNTC has misinterpreted or misstated BCTC and BC Hydro's evidence on the issue.

BCTC submits that its Rebuttal Evidence also responds directly to the non-committal responses to Information Requests in which the NNTC indicated: "NNTC is not able to confirm, but do not deny receipt of this document." In response to NNTC's submission that rebuttal evidence cannot be confirmatory, BCTC submits that this is not a correct statement of the law. Instead, BCTC relies upon *Crown Forest Industries Ltd. v. Courtenay Assessor, Area No. 06*, [1985] B.C.W.L.D. 3019 (C.A.) for the position that specific confirmation of previously filed evidence in situations of uncertainty can be helpful.

With respect to the filing of Attachment B-11 to Rebuttal Evidence B and Attachment C-9 to Rebuttal Evidence C, a copy of the "protective writ", BCTC submits that the document is relevant to their position concerning whether consultation must involve existing assets or whether there are other forums for addressing the impacts of existing assets.

BCTC submits that this applies regardless of whether the writ includes the NNTC or not, and points out that it was (originally) filed by the law firm representing the NNTC, Upper Nicola Indian Band and Okanagan Nation Alliance.

BCTC submits that NNTC have not demonstrated how they would be prejudiced by the admission of the Rebuttal Evidence. To the contrary, BCTC states that NNTC will have the opportunity to test the Rebuttal Evidence through cross-examination and may have their witness panels address the issues raised within the Rebuttal Evidence. Further, it is open to NNTC to argue the weight to be attributed to such evidence. In the event that the Commission disagrees with this conclusion, BCTC submits that NNTC's proposal to file sur-rebuttal evidence will be prejudicial to BCTC as 24 hours notice is not adequate time to prepare for the cross-examination of NNTC's witness panels. Further, BCTC submits that any sur-rebuttal evidence should be limited to mirror the Rebuttal Evidence, in the form of notes or other meeting records. If sur-rebuttal evidence is to be permitted, BCTC submits that this evidence should be provided at least 48 hours prior to NNTC's cross-examination of BCTC and BC Hydro's witness panel.

BCTC addresses STC's submission and notes that the STC did not participate i) in the original CPCN proceedings, ii) at the B.C. Court of Appeal, or iii) in the original written or oral submissions on the admissibility of additional evidence. BCTC submits that the STC's statement is hardly an articulation of specific concerns that would give rise to a reasonable anticipation of the specific concerns that STC now sets out in its evidence. BCTC submits that its Rebuttal Evidence responds to those specific concerns that STC has now raised in its evidence, which BCTC had not previously been advised of and did not foresee, and that, in particular, it responds to the STC position that the STC did not believe that consultation had even begun by August 2008.

BCTC submits that the Rebuttal Evidence also responds to STC's characterization of several meetings, which BCTC states it could not have foreseen as STC did not previously provide complaints about these meetings. BCTC also submits that its Rebuttal Evidence responds to STC's responses to certain Information Requests where STC is not able to confirm, but do not deny a particular event or correspondence. BCTC submits that it could not have reasonably anticipated that STC would be unresponsive to the Information Requests seeking confirmation.

BCTC submits that STC has neither established nor asserted that it is prejudiced by the filing of the Rebuttal Evidence. However, if the Commission should allow the STC to provide sur-rebuttal, BCTC submits that it should also be filed at least 48 hours prior to STC's cross-examination of BCTC and BC Hydro's witness panel.

In reply to Kwikwetlem's submission, BCTC submits that Kwikwetlem's evidence suggests that the meeting of October 2, 2007 did not take place and indicates that the last meeting Kwikwetlem attended with BC Hydro was on July 31, 2007. As a result, BCTC submits that Attachment A-21 is admissible in response to that evidence. BCTC also points out that Kwikwetlem's evidence alleges that Mr. Chaffee was a staff person who had no authority to consult but that the meeting notes Attachment A-21 indicate that Mr. Chaffee described himself as a "Councillor" and provide specific evidence of Mr. Chaffee's role in the consultation process. BCTC submits that it had not been aware of this assertion by Kwikwetlem prior to the filing of Kwikwetlem's evidence.

In its reply submission, BC Hydro confirms that it will not object to the filing of the letter dated December 18, 2009 as sur-rebuttal evidence for the Nlaka'pamux Bands. With response to BCOAPO, BC Hydro respectfully finds that its submissions are of limited assistance.

BC Hydro submits that it was not reasonably foreseeable that Kwikwetlem would omit mention of the meeting referred to in Attachment A-21. BC Hydro submits that the meeting notes are admissible in that they are responsive to Kwikwetlem's suggestion that July 31, 2007 was the last meeting to occur between the parties. Further, BC Hydro submits that Attachment A-21 is relevant to the issue of Mr. Chaffee's capacity, an issue which BC Hydro could not have anticipated prior to filing its evidence.

With regard to the objections of the NNTC and the STC, BC Hydro submits that filing all evidence of consultation would have resulted in "an unwieldy and unnecessarily voluminous record that would risk the accusation that the applicant was trying to bury the truly relevant evidence in a volume of marginally relevant (or even irrelevant) material that does not speak to any contentious issues the Commission is being asked to resolve." BC Hydro compares and contrasts the Commission's process with that of court proceedings, noting that in the context of the Commission, parties neither file pleadings nor the grounds of complaints prior to the filing of evidence. BC Hydro submits that it is the identification of relevant issues for the particular proceeding that is determinative rather than every issue arising during the course of consultation.

With regard to the meeting notes that were included within the Supplemental Evidence as raised by NNTC and STC, BC Hydro submits that those notes were included on the basis that they spoke directly to an issue that had been specifically identified prior to the filing of the Supplemental Evidence. Further, BC Hydro points out that Table 1-5 of the Supplemental Evidence identifies in excess of 100 issues raised by First Nations during the consultation process. BC Hydro submits that if the Supplemental Evidence had included every document relevant to all issues, this would have produced voluminous material which would that would not have been relevant to any issue before the Commission.

BC Hydro disagrees with the proposal of NNTC and STC to either exclude the evidence entirely or allow for sur-rebuttal evidence to be filed either 24 or 48 hours prior to calling the witness panel for NNTC or STC. Rather, BC Hydro submits that if NNTC and/or STC wish to file sur-rebuttal it should be filed prior to the commencement of the hearing on January 11, 2009.

5.0 COMMISSION DETERMINATION

While the majority of Intervenors have not objected to the admission of the Rebuttal Evidence sought to be introduced by BCTC, both NNTC and STC have submitted that the Rebuttal Evidence ought not to be admitted on the grounds that it constitutes case splitting and its admission would therefore be unfair. The NNTC and STC do not address the application of section 40(1) of the *ATA* to the Rebuttal Evidence. Instead, they submit that the evidence in question was available to be adduced by BCTC at the time when it submitted its Supplemental Evidence.

In support of their position, NNTC and STC cite the Supreme Court of Canada decision in *Krause* in which the principle is stated that the Crown or plaintiff, is generally not allowed to split its case. In *Krause* it was held that the Crown or plaintiff must produce and enter as part of its own case all the clearly relevant evidence it has or that it intends to rely upon, to establish its case. In effect, this principle prevents unfair surprise, prejudice and confusion which could result if the Crown or plaintiff were allowed to split its case, that is to put forward part of its evidence – as much as it deemed necessary at the

outset – then to close the case and following the completion of the defence and add further evidence to bolster the position already advanced.

The Supreme Court of Canada did acknowledge however, that the Crown or plaintiff may adduce rebuttal evidence if the defence has raised some new matter or defence which the Crown or plaintiff had no opportunity to deal with and could not have reasonably anticipated. Rebuttal is not permitted to merely confirm or reinforce earlier evidence which could have been introduced before the defence was submitted. The Court states at paragraph 16 that rebuttal evidence is "permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other."

NNTC has submitted that the Rebuttal Evidence allows BCTC to gain a procedural advantage by dividing up the sequence in which it delivers its evidence, and thereby seek to insulate that evidence from challenge and scrutiny. However, the Commission Panel agrees with BCTC and BC Hydro that many of the issues now identified within the evidence of the respective First Nation Intervenors, such as the distinction made between pre-consultation and actual consultation, were not issues which BCTC could have reasonably anticipated. Further, the Commission Panel agrees that the rules of evidence as applied within the context of criminal and civil proceedings should not be applied strictly to Commission proceedings.

The Commission Panel adopts the reasoning found at paragraphs 23 – 29 of *Access Pipeline,* as submitted by BCTC, for distinguishing *Krause* from the current proceeding, particularly as the rebuttal evidence impugned in *Krause* was held to relate to a collateral issue and to be "neither material nor relevant" on the main issue. The MGB in *Access Pipeline* found at paragraph 28, that *Krause* had little application to the case before it as *Krause* pertained to new evidence raised on rebuttal *during the trial* of a criminal matter, leaving the defence with little or no ability to challenge the evidence. The MGB further found at paragraph 28 that it was not bound by the rules of evidence that applied in *Krause* pursuant to section 496 of the *Municipal Government Act,* R.S.A. 2000, c. M-26.

As noted by BCTC, the MGB held at paragraph 23 that the interest in natural justice and providing the decision-maker with all the relevant information before it must significantly diminish the interest in providing the parties with the right to know the case and a fair opportunity to respond to the evidence and argument of the opposing party before probative information to the issues to be decided can be excluded. Accordingly, the MGB admitted the rebuttal evidence at issue in that matter on the basis that the rebuttal issues were not unrelated to the issues originally raised by the Complainant and addressed issues or misunderstandings in the Respondent's submissions, which the MGB found the Complainant entitled to do. Further, the MGB held that the rebuttal issues could be addressed at the upcoming merit hearing and would additionally provide the right of sur-rebuttal.

It is clear that the Commission has the jurisdiction under section 40(1) of the *ATA* to admit rebuttal evidence that is relevant, necessary and appropriate for the purpose of the Commission determining whether the Crown's duty to consult and, if necessary, accommodate has been met up to the Commission's decision point. The Commission Panel agrees that the Rebuttal Evidence is relevant and meets the test set out in *Korol* which the Commission Panel adopted at page 2 of the Reasons for Decision to Order G-83-09. The Commission Panel finds that the Rebuttal Evidence consists of information which is probative to the issue of the adequacy of the consultation and accommodation efforts of BCTC and BC Hydro.

The Commission Panel agrees with BCTC that a case of necessity regarding the Rebuttal Evidence has been established on the basis that the Commission Panel requires the fullest evidentiary record before it to enable it to make its determinations. The Commission Panel further agrees that section 40(1) of the *ATA* applies equally to all kinds of evidence, including rebuttal evidence. The Commission Panel finds that the admission of the Rebuttal Evidence is appropriate as all Intervenors will have the opportunity to test the evidence through cross-examination and to make submissions as to the weight to be attributed to the Rebuttal Evidence. The Commission Panel also finds that any prejudice that may be suffered by the Intervenors as a result of the admission of the Rebuttal Evidence can be adequately addressed through these mechanisms and through allowing sur-rebuttal evidence.

The Commission Panel finds that the Rebuttal Evidence sought to be admitted by BCTC is relevant to the issue of whether the Crown met its consultation obligations up to the point of the Commission's decision concerning the ILM Project. Similar to the MGB in *Access Pipeline*, the Commission Panel finds in this case that natural justice requires the Commission Panel to have all of the information before it. The Commission Panel agrees that a large portion of the Rebuttal Evidence responds to issues, misunderstandings and evidentiary gaps concerning particular events that are now raised in the evidence of the respective First Nation Intervenors. The Commission Panel also agrees with BCTC that the format of the proceedings is new to the Commission and all Parties.

Both NNTC and STC request the right to submit sur-rebuttal evidence if the Rebuttal Evidence is admitted. The Commission Panel is of the view that fairness requires the First Nation Intervenors to be given an opportunity to adduce sur-rebuttal evidence such that, as stated by the Supreme Court of Canada in *Krause* at paragraph 16, "…each party will have had an equal opportunity to hear and respond to the full submissions of the other."

Accordingly, for the above reasons, the Commission Panel determines that the Rebuttal Evidence will be admitted. The Commission Panel further determines that the December 18, 2009 letter from Mary Sandy will be admitted as sur-rebuttal evidence and that other Intervenors who wish to file sur-rebuttal evidence must do so by Monday, January 11, 2010 at 9:00 a.m. Sur-rebuttal evidence is to be limited to issues raised in the Rebuttal Evidence. Finally, the cross-examination of the BCTC/BC Hydro witness panel on issues that are the subject of sur-rebuttal evidence will not commence before Wednesday, January 13, 2010 at 9:00 a.m.