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**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-37-10**

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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
Transmission System Capital Plan F2010 and F2011
Re-application for Acceptance of Capital Expenditures**

BEFORE: L.A. O'Hara, Panel Chair and Commissioner
D.A. Cote, Commissioner March 9, 2010

O R D E R

WHEREAS:

- A. On June 26, 2008, the British Columbia Utilities Commission (the Commission) issued Order G-107-08 responding to the British Columbia Transmission Corporation (BCTC) F2009 to F2018 Transmission System Capital Plan; and
- B. On November 21, 2008 and pursuant to sections 44.2 and 45(6) of the *Utilities Commission Act* (the Act), BCTC filed its F2010 and F2011 Transmission System Capital Plan (F2010 Capital Plan); and
- C. By Order G-87-09 dated July 13, 2009, the Commission, in part, accepted some of the Growth Capital and Sustaining Capital expenditures in the F2010 Capital Plan and rejected certain other Growth Capital and Sustaining Capital expenditures because of evidentiary issues relating to Crown consultation with First Nations, granting BCTC the right to re-apply for approval of the rejected expenditures; and
- D. On November 20, 2009, BCTC filed a Re-application for Approval of Capital Expenditures (the Re-application), requesting the Commission accept certain of the Growth Capital and Sustaining Capital expenditures rejected by Order G-87-09; and
- E. The Commission Panel has reviewed the Re-application.

NOW THEREFORE pursuant to section 44.2 of the Act and the reasons in the attached Reasons for Decision, the Commission orders as follows:

1. The following Growth Capital expenditure is accepted:

Atchelitz Area Reinforcement Project Definition Phase Funding.

2. The following Growth Capital expenditure is rejected:

Atchelitz Area Reinforcement Project Implementation Phase Funding.

3. The following Sustaining Capital expenditures in the Overhead Lines Life Extension Program are accepted:

- (a) Spacer Damper Replacement Program
- (b) 500 kV Polymer Replacement Program
- (c) Insulator Replacement
- (d) Transmission Disconnect Switch – 69 kV and 138 kV
- (e) Transmission Recurring Capital
- (f) Overhead Lines Minor Capital
- (g) Aircraft Marker Crossings
- (h) OCAS Marker Crossings
- (i) Above Ground Structural Corrosion Protection
- (j) Underground Structural Corrosion Protection
- (k) Circuit Refurbishments 60L56/57 Project

4. The following Sustaining Capital expenditures in the Overhead Lines Life Extension Program are rejected:

- (a) Transmission Steel Structural Replacement Program
- (b) Transmission Wood Structure Framing Replacements
- (c) Circuit Refurbishment 60L43/44
- (d) Circuit Refurbishment 60L292

5. The following Sustaining Capital expenditures in the Overhead Lines Life Improvement Program are accepted:

Transmission Arcing Horn Program

6. The following Sustaining Capital expenditures in the Overhead Lines Risk Mitigation Program are accepted:

- (a) Transmission Wood Structure Bonding Program
- (b) 2m Line Post Insulator Replacement
- (c) Automatic Splice Replacement Program
- (d) STER Tower and Equipment Replacement Program
- (e) Tower Climbing Barrier and Signage Program
- (f) Overhead Ground Wire Refurbishment Program
- (g) 60L281 Copper Conductor Replacement

- (h) 60L284 Copper Conductor Replacement
- (i) 1L014 Structure 1-02 Slope Stabilization
- (j) 60L042 Structure, 8-04, 9-04, Erosion Protection
- (k) 2L002 Structures 67-02 Erosion Protection
- (l) 60L223 Structure 32-07, 32-8 Avalanche Protection
- (m) 5L042 Various Structures Concrete Footing Upgrades

7. The following Sustaining Capital expenditures in the Overhead Lines Risk Mitigation Program are rejected:

- (a) 2L077 Ice Hazard Risk Reduction
- (b) 2L078 Ice Hazard Risk Reduction
- (c) 2L001/2L005 Overhead Rating Restoration
- (d) 3L002 Overhead Rating Restoration
- (e) 5L041 Overhead Rating Restoration
- (f) 5L042 Overhead Rating Restoration
- (g) 5L044 Overhead Rating Restoration
- (h) 2L101 Overhead Rating Restoration
- (i) 1L146 Structure 0-01 Ground Stabilization
- (j) 5L094 Structure 55-01 Relocation
- (k) 60L093 Structures 27-03, 27-06, 29-13 Debris Flow Protection
- (l) 60L095 Structures 1-02, 6-14, 19-01 Debris Flow Protection
- (m) 2L003-49 Second Narrows Crossing Project

8. The following Sustaining Capital expenditures in the Overhead Lines Right-of-Way Sustainment Program are accepted:

- (a) Enterprise Geological Information System (EGIS) Enhancement
- (b) LIDAR Survey Transmission System and PLSS-CADD Modelling
- (c) Highway Relocations

9. The following Sustaining Capital expenditures in the Overhead Lines Right-of-Way Sustainment Program are rejected:

- (a) Deficient Rights of Way Study and Acquisition Program
- (b) Miscellaneous Rights Acquisition Program
- (c) Right-of- Way Access Program
- (d) Helipad Program

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10. Where Growth Capital or Sustaining Capital expenditures have been rejected by this Order, BCTC may re-apply for approval for those expenditures once the evidence of First Nations consultation referred to in the Reasons for Decision becomes available.
11. Pursuant to section 43 of the Act, BCTC will provide the Commission, in table format, the capital expenditure amounts as per appendices B, C, D, and E of its Application within 30 days of the issue of this Order.

DATED at the City of Vancouver, in the Province of British Columbia, this 9th day of March 2010.

BY ORDER

Original signed by:

L.A. O'Hara
Panel Chair and Commissioner

Attachment



IN THE MATTER OF

AN APPLICATION BY

BRITISH COLUMBIA TRANSMISSION CORPORATION

**APPROVAL OF A TRANSMISSION SYSTEM CAPITAL PLAN F2010 AND F2011
RE-APPLICATION FOR ACCEPTANCE OF CAPITAL EXPENDITURES**

REASONS FOR DECISION

BEFORE:

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

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1.0 INTRODUCTION

1.1 The Re-application

On July 13, 2009, the British Columbia Utilities Commission (the Commission) issued Order G-87-09 and accompanying decision (the Decision) on the British Columbia Transmission Corporation (BCTC) F2010 and F2011 Transmission System Capital Plan Application. In the Decision, the Commission rejected certain capital projects and programs due to the absence of any evidence which would enable the Commission to assess the adequacy of Crown consultation with First Nations on these projects and programs. Apart from a concern about the Identification of the Definition Phase funding level for two projects, the Commission expressed no other concerns about the rejected projects or programs.

In the result, pursuant to paragraphs 2(d) and (e) of Order G-87-09, the Commission rejected the following capital expenditures and granted BCTC the right to re-apply for approval:

- (d) Growth Capital expenditures – 60L19 Reconductor, Atchelitz Area Reinforcement, Mission Area Reinforcement and Load Interconnection Customer A as set out in the Decision and listed in Appendix A to the Decision; and
- (e) Sustaining Capital expenditures - overhead [lines] life extension, overhead lines performance improvement, overhead lines risk mitigation, and right-of-way sustainment programs as set out in the Decision and listed in Appendix B to the Decision.

Paragraph 5 of Order G-87-09 directed BCTC to comply with all determinations and directives as set out in the Reasons for Decision. The relevant directives relating to paragraphs 2(d) and (e) are Directives 40, 42, 45 and 48. They provide as follows:

- 40. With respect to the 60L19 Re-conductor and Atchelitz Area Reinforcement projects, the Commission directs BCTC to identify [the] Definition Phase funding level; and provide evidence of consultation of potentially affected First Nations in the area of these projects, including an assessment of the potential effects of the project on assumed aboriginal rights or interests. The Commission Panel directs BCTC then resubmit its application for Definition and Implementation phase funding for these projects. The Commission will then assess the adequacy of the Crown's consultation efforts.
- 42. The Commission Panel directs BCTC provide evidence of consultation with the First Nations asserting aboriginal rights in the area of this project, including an assessment of the potential effects of the project on assumed aboriginal rights or interests. The Commission Panel rejects the Sustaining Capital expenditure for the Mission Area Reinforcement project and directs BCTC to resubmit its application for Implementation phase funding for this project. The Commission will then assess the adequacy of the Crown's consultation efforts.
- 45. The Commission Panel directs BCTC provide evidence of consultation with potentially affected First Nations and then resubmit its application for Implementation phase funding for the Load Interconnection Customer A Project. The Commission will then assess the adequacy of the Crown's consultation efforts. For these reasons, the Commission Panel rejects the Growth Capital expenditure - Load Interconnection Customer A project.

48. The Commission Panel directs BCTC to provide evidence of consultation with potentially affected First Nations and then resubmit its application for implementation funding for the four line programs. The Commission will then assess the adequacy of the Crown's consultation efforts. For these reasons, the Commission Panel rejects the following Sustaining Capital expenditures - overhead [lines] life extension, overhead lines performance improvements, overhead line risk mitigation and right of way sustainment.

On November 21, 2008 BCTC filed its F2010 and F2011 Transmission Capital Plan Re-application (the Re-application) under section 44.2 of the *Utilities Commission Act* (the UCA). The Re-application addresses consultation requirements with First Nations relating to certain of the above projects and programs rejected in Order G-87-09, and seeks Commission acceptance of the capital expenditure schedules for these projects and programs. For convenience, these Reasons for Decision use "expenditure" rather than expenditure schedule to refer to a project or program in the Re-application.

In the Re-application, BCTC does not seek approval at this time for the 60L19 – Reconductor Project, the Mission Area Reinforcement Project or the Load Interconnection Customer A Project. Accordingly, only that part of Directive 40 which relates to the Atchelitz Area Reinforcement Project and Directive 48 are relevant for the purposes of the Re-application.

1.2 Regulatory Process

In determining the regulatory process for its review of the Re-application, the Commission Panel has considered the following factors:

- (1) its original reason for rejection of the projects and programs for which approval is now sought;
- (2) their number and size;
- (3) the additional description that BCTC provided for them;
- (4) whether the issue of the need for, and adequacy of, consultation with First Nations would be enhanced by requests for further information; and
- (5) the wording of section 44.2 of the UCA.

and concluded that it requires no further process to arrive at its decision for the following reasons.

First, the Re-application is restricted in scope to projects and programs that formed part of the application that is the subject matter of the Decision. It deals solely with the need for, and adequacy of, consultation with First Nations.

Second, while the number of projects and programs may be large generally speaking, their individual size is small.

Third, the additional description of the projects and programs has provided the Commission with a more helpful basis to determine whether further evidence of consultation is still required.

Fourth, the Commission Panel assumes that the Re-application includes all of BCTC's evidence on consultation, or the need for consultation with First Nations in response to Directives 40 and 48 and therefore is of the view that there would be no benefit to requests for further information on the issue of adequacy of consultation.

Finally, section 44.2 of the UCA does not require the Commission to hold a hearing. Unless the Commission otherwise determines additional process is required, its duty is to review any expenditure schedule filed under section 44.2, accept the schedule if it considers the schedule to be in the public interest, reject the schedule or accept or reject the schedule in part (section 44.2(1),(3) and(4)).¹

1.3 Summary of the Re-application Decision

Order G-87-09 rejected the projects and programs which are the subject of the Re-application because the Commission Panel concluded that there was no evidence that would allow it to determine the adequacy of consultation with First Nations for the programs and projects. In determining adequacy, the Commission Panel first considers if the duty to consult is triggered for each program or project. Where the duty is not triggered, no consultation is needed. For programs or projects where the duty is triggered, the Panel then considers the adequacy of the Crown's consultation. In the Re-application, the Commission has accepted some of the programs because they do not trigger a duty to consult and others because the consultation has been adequate. All accepted programs have also been deemed to be in the public interest, under the criteria of section 44.2(5). The Commission has rejected the balance of projects and programs principally on two bases: that the Commission views the duty to consult as being triggered while BCTC does not; or that there is still not sufficient evidence upon which it can assess the adequacy of consultation to date.

2.0 RESPONSIBILITY FOR FIRST NATIONS CONSULTATION

2.1 Background

In Section 1.3(ii) of the Decision, the Commission Panel referenced the February 18, 2009 British Columbia Court of Appeal decisions of *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 (*Carrier Sekani*) and *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 (*Kwikwetlem*). Those decisions confirm that the Commission has an obligation to assess the adequacy of Crown consultation within the Commission's regulatory scheme. Further, as a quasi-judicial tribunal, the Commission itself does not have a duty to consult with First Nations (*Carrier Sekani*, para. 56). .

In Section 7.1 of the Decision, the Commission discussed the relevant principles relating to the duty to consult and accommodate First Nations. The discussion refers to *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (*Haida*) and *Taku River Tlingit First Nation v. (British Columbia) (Project Assessment Director)*, 2004 SCC 74 (*Taku*).

In the Decision, the Commission Panel described the Commission's obligation in this area as follows:

¹ Section 44.2 forms Appendix 1 to these Reasons for Decision.

With regard to this Application, the Commission must determine whether BCTC or BC Hydro, as agents of the Crown, have a duty to consult First Nations in respect of the expenditures for which approval is being sought in the Application, and if so, whether the Crown agent has fulfilled its duty (Decision, p. 103).

In *Haida* the Court made the following comment on the scope of the duty to consult and accommodate:

[39] The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is 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.

The Commission Panel adopts the views it expressed in the Decision on the issue of its obligation to assess the adequacy of Crown consultation and the relevant principles relating to the duty of the Crown to consult and accommodate First Nations for the purposes of the Re-application. As further clarification, in the Commission Panel's view, where there is no adverse impact on First Nations' right(s) and title, there is no duty to consult. Similarly, where the impact is low, the scope of the duty to consult is likely low.

The Re-application refers to the Asset Management and Maintenance Agreement dated November 12, 2003 between British Columbia Hydro and Power Authority (BC Hydro) and BCTC (Agreement). Pursuant to Article 5.1 of the Agreement, BC Hydro is primarily responsible for the relationship between BC Hydro and First Nations with respect to the Transmission System, including communications and consultations with First Nations regarding the Transmission System. Despite the primary responsibility of BC Hydro for First Nations consultation under the Agreement, BCTC "is closely involved in [consultation] activities with respect to its projects" (Re-application, p. 5).

The Commission Panel is of the view that notwithstanding the division of obligations under the Agreement, BCTC as a Crown corporation and the representative or agent of the Crown for the purposes of the Re-application is required to demonstrate whether a duty to consult with First Nations exists in respect of the expenditures for which approval is being sought. If the evidence discloses that a duty to consult exists, then BCTC, in order to maintain the honour of the Crown with respect to the expenditures and any related potential adverse impact(s) affecting asserted title and rights of First Nations, must provide the Commission with sufficient evidence to allow the Commission to decide whether the consultation efforts to the point of the Commission Panel's decision have been adequate (*Kwikwetlem*, para 70).

As has been noted in Section 1.2 above, the Re-application is made under section 44.2 of the UCA. Sections 44.2(3) and (4) provide that the Commission must accept all or part of the schedule of expenditures if the Commission considers that the expenditures would be in the public interest. Thus the Commission will assess the adequacy of consultation with First Nations and the contribution to the public interest when deciding whether to accept expenditures.

Commission Determination

The Commission is required to assess the adequacy of consultation with affected First Nations in order to determine whether expenditure in the Re-application is in the public interest. BCTC, when it requests Commission acceptance of an expenditure under section 44.2 of the UCA must provide sufficient evidence to enable the Commission to decide whether consultation is required, and if it is required, to assess the adequacy of the consultation with potentially affected First Nations regarding the impact of the expenditure. The consultation itself may have been done by BCTC, or by BC Hydro or some other entity.

For each expenditure the Commission Panel is of the view that BCTC should first identify whether the duty to consult is triggered. If BCTC believes the duty is not triggered, reasons supporting this conclusion should be provided to the Commission. If the duty is triggered, the Commission Panel believes that the following information about an expenditure would generally assist it in assessing the adequacy of consultation:

- Identification of the First Nations who are potentially affected by the expenditure.
- For each potentially affected First Nation:
 - Identification of any treaty rights or established Aboriginal rights and title or an assessment of the strength of claim to asserted Aboriginal rights and title.
 - A discussion of the potential adverse impact(s) of the expenditure on the right(s) or title.
 - An assessment of the scope of the duty to consult, along the *Haida* spectrum, based on the previous two points.
 - A summary of consultation to date.
 - An overall conclusion as to the reasonableness of the consultation process and whether the consultation duty has been adequately fulfilled to the date of the filing.

3.0 APPROVAL OR REJECTION UNDER SECTION 44.2 OF THE ACT

At pages 107-108 of the Decision, the Commission Panel made the following comments on its powers under section 44.2 of the UCA:

The Commission Panel notes section 44.2 of the *Utilities Commission Act* requires the Commission to accept or reject all or part of a schedule. The Act does not provide for conditional approval. Therefore the Commission Panel must assess the adequacy of consultation with First Nations based on the evidence filed prior to the close of the evidentiary portion of the proceeding.

The result is that if the Commission Panel rejects an expenditure schedule either wholly or in part, an applicant such as BCTC will need to re-file the expenditure for acceptance once it is able to provide the Commission with evidence that addresses the reason for rejection. This means filing evidence upon which the Commission Panel can assess the adequacy of the applicant's consultation efforts.

4.0 CAPITAL EXPENDITURES

4.1 Growth Projects

4.1.1 Atchelitz Area Reinforcement Project

The Decision directed BCTC to identify the Definition Phase funding level; and to provide evidence of consultation of potentially affected First Nations in the area of this project, including an assessment of the potential effects of the project on assumed aboriginal rights or interests (Decision, p. 109; Directive 40).

Paragraph 2 of the Re-application identifies the Definition Phase funding level as \$100,000 for this project. The Commission Panel is of the view that definition phase activities will likely have no impact on First Nations rights but also notes that definition phase activities should generally include First Nations engagement.

Appendix B of the Re-application outlines plans for BCTC to provide notice to potentially affected First Nations and to follow up on any questions or concerns raised. The Commission Panel assumes these activities are included in the Definition Phase funding and therefore accepts the expenditure for the Atchelitz Area Reinforcement Definition Phase funding.

Appendix B of the Re-application does not provide evidence of actual consultation with potentially affected First Nations in the area of the project. While BCTC expects that the project will be undertaken entirely on existing BC Hydro property, the work is in close proximity to reserves, the amount of excavation work is expected to be extensive and an archaeological overview assessment will be undertaken as the work site is within an area of archaeological significance. No direct consultation appears to have occurred to date, and the Commission Panel concludes that the scope of the duty to consult cannot be determined without the archaeological overview assessment and knowledge of the views of potentially affected First Nations regarding the impact of the project.

While the potentially affected First Nations may have received a general notice of this project as a result of the notice BCTC provided for the original Application (Decision, p. 105), BCTC acknowledges that further notice is required. Accordingly, for this project **the Commission Panel concludes that the evidence remains insufficient for it to determine the scope of the duty to consult and to assess whether consultation to date is adequate. The expenditure for the Atchelitz Area Reinforcement Implementation Phase is rejected.**

4.2 Sustaining Capital Projects and Programs

As noted in Section 1.1 above, the Commission Panel rejected the following Sustaining Capital expenditures in the Decision: (1) overhead lines life extension; (2) overhead lines performance improvements; (3) overhead lines risk mitigation; and (4) right of way sustainment. BCTC was directed to provide evidence of consultation with potentially affected First Nations when it resubmitted its application for implementation funding for these projects (Decision, p. 113; Directive 48).

Appendices C, D and E of the Re-application provide a further description of the projects and programs for which expenditures are sought and addresses the issue of First Nations consultation for them.

4.2.1 Overhead Lines Life Extension Program

BCTC outlines the Overhead Lines Life Extension Program in Appendix C of the Re-application. This program consists of the Circuit Refurbishment 60L56/57 Project for which BCTC provided notification, plus projects or programs for which BCTC submits no consultation is required.

Circuit Refurbishment 60L56/57 Project

The Circuit Refurbishment 60L56/57 Project involved like-for-like replacement within existing right-of-way in an environmentally sensitive site. Potentially affected First Nations were notified of the project, provided information on the nature of the work, and a First Nations monitor arranged for the start of the work. A bog specialist and an archeological consultant were on site during the work. BCTC states that no substantive issues have been raised regarding the project (Re-application, pp. 28-29).

On the basis of the evidence now provided by BCTC for this project, the Commission Panel concludes that the scope of duty to consult is at the low end of the *Haida* spectrum and has been satisfied by the consultation to date, and therefore finds that consultation to date is adequate. The expenditure for the Circuit Refurbishment 60L56/57 Project is accepted.

Overhead Lines Life Extension Projects or Programs that do not Require Consultation

For these projects or programs, BCTC submits that no consultation is required. BCTC states that all of these projects involve like-for-like replacement on existing lines within existing right-of-ways and that no impacts on First Nations rights or title are expected. In BC Hydro's assessment there is no duty to consult with respect to these projects.

The Commission Panel considers like-for-like replacements of the nature of the items described below to be part of regular maintenance on an existing right-of-way or to address Transport Canada regulatory requirements involving public safety concerns with no increase in footprint that could lead to a disturbance of soils or additional structures. The Commission Panel has identified the overhead lines life extension projects and programs that fall within this category. Expenditures for projects or programs falling within this category will not, in the Commission Panel's view, cause any adverse impact on asserted title or rights. In such circumstances the Commission Panel accepts the conclusion that no consultation is required.

The Commission Panel concludes that there is no duty to consult for the following projects or programs within the Overhead Lines Life Extension Program and the expenditures for them are accepted:

- **Spacer Damper Replacement Program**
- **500 kV Polymer Replacement Program**
- **Insulator Replacement**
- **Transmission Disconnect Switch – 69 kV and 138 kV**
- **Transmission Recurring Capital**
- **Overhead Lines Minor Capital**
- **Aircraft Marker Crossings**

- **OCAS Marker Crossings**
- **Above Ground Structural Corrosion Protection**
- **Underground Structural Corrosion Protection**

Overhead Lines Life Extension Projects or Programs that Require Consultation

The remaining projects or programs of the Overhead Lines Life Extension Program may involve replacement of complete structures, replacement of non-standard construction, installation of bollards and barriers, and the installation of new structures. While these projects and programs all involve like-for-like replacements within existing rights-of-way, the replacement of complete structures and installation of new structures has a potential to adversely impact First Nation's asserted rights and title.

Therefore, for these projects and programs, the Commission Panel requires evidence which shows that potentially affected First Nations have been notified of the potential impacts, afforded the opportunity to comment upon those impacts and identify any other concerns the First Nation may have. If an adverse impact is then identified, BCTC will also need to provide evidence that allows the Commission to assess the adequacy of the consultation efforts to the point of the Commission Panel's decision.

While the Commission Panel considers that the scope of the duty to consult is likely at the low end of the *Haida* spectrum for these projects and programs, in the absence of evidence of the nature described in the previous paragraph, it cannot make a determination on the adequacy of consultation. Therefore, the expenditures for the following projects and programs are rejected:

- **Transmission Steel Structural Replacement Program**
- **Transmission Wood Structure Framing Replacements**
- **Circuit Refurbishment 60L43/44**
- **Circuit Refurbishment 60L292**

4.2.2 Sustaining Capital: Overhead Lines Life Performance Improvement Program

BCTC outlines the Overhead Lines Life Performance Program in Appendix D of the Re-application. This program consists of one project to install transmission arcing horns to prevent damage to equipment due to lightning strikes.

BCTC asserts that all components of the program involve minor equipment modification on existing towers within existing right-of-ways. There are no expected impacts to First Nations rights or title. No Crown authorizations are required. In the assessment of BC Hydro, there is no duty to consult with respect to this project.

The Commission Panel considers minor equipment modifications within existing right-of-ways with no increase in footprint will not cause an adverse impact on First Nations' asserted rights or title. In such circumstances the Commission Panel accepts the conclusion that no consultation is required.

On the basis of the evidence now provided by BCTC for this project, the Commission Panel concludes that there is no duty to consult for this program. The expenditure for the Transmission Arcing Horn Program is accepted.

4.2.3 Sustaining Capital: Overhead Lines Risk Mitigation Program

BCTC outlines the Overhead Lines Risk Mitigation Program in Appendix E of the Re-application. The program consists of projects and programs for which BCTC states no consultation is required and one project, 2L003-49 Second Narrows Crossing, which requires notification.

2L003-49 Second Narrows Crossing Project

The Second Narrows Crossing Project is a seismic upgrade project to mitigate the seismic risk of an 80 year old tower adjacent to the Squamish Nation reserve and may require site access through the reserve. It involves work outside the right-of-way, and may require additional right-of-way around the base of the tower. Permits will be required from the Department of Fisheries and Oceans. BCTC states that the impacts on First Nations rights and title are expected to be low, that BC Hydro assesses the duty to consult to be at the low end of the *Haida* spectrum and that notification will be provided. Potentially affected First Nations have not yet been notified.

The Commission Panel concludes that it is unable to assess the scope of the duty to consult for this project until potentially affected First Nations have been notified and given an opportunity to express their views regarding potential impacts of the expenditure on asserted title and rights. While the scope of the duty to consult may be at the low end of the *Haida* spectrum for this project, in the absence of evidence of written notice to potentially affected First Nations, the Commission Panel cannot make a determination on the adequacy of consultation.

Therefore, the expenditure for this project is rejected.

Overhead Lines Risk Mitigation Projects and Programs that do not Require Consultation

The Overhead Lines Risk Mitigation projects and programs for which BCTC asserts no consultation is required, involve:

- equipment modifications or replacements conducted within existing rights-of-way;
- like-for-like replacements within existing right-of-ways;
- equipment modifications or replacements conducted within existing rights-of-way on private land, Ministry of Transportation road allowance and Tzeachten First Nation Indian Reserve land;
- the purchase of spare equipment;
- replacement of overhead ground wires within the rights-of-way;

- installation of taller structures, installation of intermediate structures, blasting and re-contouring of the ground within existing rights-of-way some of which requires notification to the Department of Fisheries and Oceans and Ministry of Environment;
- minor landscaping on private property;
- moving a structure on private land to a new location on private land;
- information sharing with First Nations for the possible acquisition of additional rights-of-way and the need for permitting requirements from Crown authorities; and
- replacement of tower types that would or may require a larger footprint.

Certain of these projects and programs are like-for-like replacements or equipment modifications within existing rights-of-way with no or an immaterial increase in footprint that could lead to a disturbance of soils or additional structures. Others are on private land, rather than Crown land. For such projects and programs, the Commission Panel's view is that the expenditure will not cause an adverse impact on First Nations asserted rights or title and the Commission Panel accepts BC Hydro's assessment that no consultation is required.

On the basis of the evidence now provided by BCTC, the Commission Panel concludes that there is no duty to consult for the following projects or programs within the Overhead Lines Risk Mitigation Program and therefore these expenditures accepted:

- **Transmission Wood Structure Bonding Program**
- **2m Line Post Insulator Replacement**
- **Automatic Splice Replacement Program**
- **STER Tower and Equipment Replacement Program**
- **Tower Climbing Barrier and Signage Program**
- **Overhead Ground Wire Refurbishment Program**
- **60L281 Copper Conductor Replacement**
- **60L284 Copper Conductor Replacement**
- **1L014 Structure 1-02 Slope Stabilization**
- **60L042 Structure, 8-04, 9-04, Erosion Protection**
- **2L002 Structures 67-02 Erosion Protection**
- **60L223 Structure 32-07, 32-8 Avalanche Protection**
- **5L042 Various Structures Concrete Footing Upgrades**

Overhead Lines Risk Mitigation Projects and Programs that Require Consultation

The remaining projects and programs within the Overhead Lines Risk Mitigation Program may involve increasing the footprints of structures, installing taller structures, re-contouring the ground surface and constructing berms and in one instance, working on First Nations Reserve land. The Commission Panel is of the view that there is a higher probability that these projects and programs may adversely impact First Nations' rights and title.

Therefore, for these projects and programs, the Commission Panel requires evidence which shows that potentially affected First Nations have been notified of the potential impacts, afforded the opportunity to comment upon those impacts and identify any other concerns the First Nation may have. If an adverse impact is then identified, BCTC will also need to provide evidence that allows the Commission to assess the adequacy of the consultation efforts to the point of the Commission Panel's decision.

While the Commission Panel concludes that the scope of the duty to consult is likely at the low end of the spectrum for these projects and programs as all but one are within existing rights-of-way, in the absence of evidence of the nature described in the previous paragraph, it cannot make a determination on the adequacy of consultation. Therefore, the expenditures for the following projects and programs are rejected:

- 2L077 Ice Hazard Risk Reduction
- 2L078 Ice Hazard Risk Reduction
- 2L001/2L005 Overhead Rating Restoration
- 3L002 Overhead Rating Restoration
- 5L041 Overhead Rating Restoration
- 5L042 Overhead Rating Restoration
- 5L044 Overhead Rating Restoration
- 2L101 Overhead Rating Restoration
- 1L146 Structure 0-01 Ground Stabilization
- 5L094 Structure 55-01 Relocation
- 60L093 Structures 27-03,27-06,29-13 Debris Flow Protection
- 60L095 Structures 1-02, 6-14, 19-01 Debris Flow Protection

4.2.4 Sustaining Capital: Overhead Lines Right-of-Way Sustainment Program

BCTC outlines the Overhead Lines Risk Mitigation Program in Appendix F of the Re-application that consists of several individual projects and programs.

(1) Deficient Rights-of-Way Study and Acquisition Program and (2) Miscellaneous Rights Acquisitions

The Deficient Rights-of-Way Study and Acquisition Program will identify property rights deficiencies associated with existing transmission infrastructure, and attempt to acquire additional rights where needed. The Miscellaneous Rights Acquisition program includes the acquisition of land rights that are not perpetual and are subject to periodic renewal and/or negotiation (for example, land lease agreements and expired rights-of-way). The program also includes the acquisition of miscellaneous new rights such as access agreements and licenses of occupation required for road access to transmission facilities. Private, municipal, Provincial, Federal and First Nations lands are involved in both programs.

BCTC submits that rights acquisition on First Nations reserves is a direct negotiation with the impacted First Nation and no rights are acquired until an agreement is reached with the First Nation. BCTC submits that for rights acquisition on private land, BC Hydro does not consult with First Nations because the land is owned by a third party. For rights acquisitions on Crown lands, BCTC submits that the Crown agency granting the rights, usually the Integrated Land Management Bureau, consults with First Nations. BCTC does not expect any acquisition of Crown Land under this program until the Crown agency granting the rights has completed consultation with First Nations.

The Commission Panel believes that the acquisition of rights may adversely impact asserted First Nations rights or title and trigger a duty to consult. In the case of acquisition of rights on First Nation reserve land, actual acquisition will follow an agreement arising from direct negotiations with the impacted First Nation and thus the duty to consult will be fulfilled. In the case of acquisition of rights on private land, the Commission Panel assumes that the third party owner's ability to dispose of the rights being acquired by BCTC is not subject to prior approval by a Crown agency. If no such prior approval is necessary, the Commission Panel accepts that no consultation is required for the acquisition. If prior approval from a Crown agency for the disposition is required, the Commission Panel is of the view that there may be a duty to consult.

Related to the acquisition of rights on Crown land and BCTC's submission that another Crown agency will complete consultation with First Nations. In *Kwikwetlem*, the BC Court of Appeal recognized that statutes may:

...mandate discrete processes whereby two decision-makers make two different decisions at two different stages of one important provincially-controlled project. Neither is subsidiary or duplicative of the other...Each decision-maker makes a decision in the public interest, taking into account factors relevant to the question on which they are required to form an opinion. (para. 55)

The Court of Appeal further stated in *Kwikwetlem*:

Information developed for the purpose of the CPCN [Certificate of Public Convenience and Necessity] application and the opinion expressed by the Commission are likely to be relevant to the EAC [environmental assessment certificate] application, just as information gathered at the pre-application stage of the EAC process may be relevant to the CPCN hearing. That interplay does not mean the effect of their decision on Aboriginal interests is the same. Nor does it make a ministerial review of the Crown's duty to consult with regard to the definition of the project a necessarily satisfactory alternative to an assessment of that duty at an earlier stage by the Commission charged with opining as to whether a public utility system enhancement is necessary in the public interest. (para. 56)

The Commission Panel interprets these paragraphs to mean that while the Commission must not delegate the assessment of the adequacy of consultation to another decision-maker, the Commission can assess evidence of consultation provided to another decision-maker provided that the evidence is also submitted in an application to the Commission. In the case of the rights acquisition programs, the Commission cannot accept that the adequacy of consultation is met by another decision-maker's assessment but can assess the evidence presented to that decision-maker as part of a submission for assessment by the Commission.

For the rights acquisition programs for private lands where prior approval of a Crown agency is required before disposition and for the rights acquisition programs on Crown land, the Commission Panel requires evidence which shows that potentially affected First Nations have been notified of the potential impacts, afforded the opportunity to comment upon those impacts and identify any other concerns the First Nation may have. If an adverse impact is then identified, BCTC will also need to provide evidence that allows the Commission to assess the adequacy of the consultation efforts to the point of the Commission Panel's decision.

In the absence of evidence of consultation with potentially affected First Nations, the Commission Panel cannot make a determination on the adequacy of consultation. Therefore, the expenditures for the Deficient Rights-of-Way Study and Acquisition Program and the Miscellaneous Rights Acquisitions Program, which involve the acquisition of rights on Crown lands and may involve the acquisition of rights for private lands where prior approval of a Crown agency is required, are rejected.

(3) Enterprise Geological Information System (EGIS) Enhancement (4) LIDAR Survey of Transmission System and PLS-CADD Modelling

These projects will collect information about the transmission system. It is mostly office work with some field surveying, including the use of a low-flying helicopter. In BC Hydro's assessment, there is no impact on asserted First Nations rights or title, and no duty to consult on the projects.

It would be respectful and courteous for BCTC to notify First Nations and other local residents in an area prior to making extensive use of a low-flying helicopter.

On the basis of the facts outlined in Appendix F of the Re-application, the Commission Panel finds that acceptance of the expenditures to fund these projects will not adversely impact asserted First Nations title or rights.

The Commission Panel concludes that there is no duty to consult on these projects. The expenditures for the Enterprise Geological Information System and LIDAR Survey of Transmission System and PLS-CADD Modeling are accepted.

(5) Right-of-Way Access Program Definition and (6) Helipad Program

The Right-of-Way Access Program involves like-for-like replacements or minor infrastructure improvements or modifications. The work will be conducted within the rights-of-way and on access roads. Permits may be required. BCTC states that impacts on asserted title and rights will be minimal, that any duty to consult will be at the low end of the *Haida* spectrum and that potentially impacted First Nations will be notified as site locations are identified.

The Helipad Program involves helipad repairs, installations or replacements in otherwise inaccessible areas. BCTC submits that it takes steps to avoid any heritage or archaeological sites. BCTC anticipates no impacts on asserted First Nations title or rights. In BC Hydro's assessment there is no duty to consult for this program.

The Helipad Program involves the installation of new structures which, in the Commission Panel's view, has the potential to adversely impact First Nations rights. BCTC acknowledges there may be minor impacts on First Nations rights from the Right of Way Access Program Definition and Refurbishment Program. The Commission Panel requires evidence which shows that potentially affected First Nations have been notified of the potential impacts, afforded the opportunity to comment upon those impacts and identify any other concerns the First Nation may have. If an adverse impact is then identified, BCTC will also need to provide evidence that allows the Commission to assess the adequacy of the consultation efforts to the point of the Commission Panel's decision.

The Commission Panel concludes that the scope of the duty to consult for both of these programs is likely at the low end of the *Haida* spectrum as they take place within existing rights-of-way or in relatively remote areas but in the absence of evidence of the nature described in the previous paragraph, the Commission Panel cannot make a determination on the adequacy of consultation. Therefore, the expenditures for the programs are rejected.

(7) Highway Relocations

This program involves relocation of portions of the transmission lines, including towers, to accommodate road construction. The relocations of power lines and towers are part of larger Ministry of Transportation (MOT) projects. The general practice has been that the MOT consults with First Nations as necessary for the entire project, including any tower relocations.

The Commission Panel finds that, since the BCTC component is a subsidiary part of these highway projects and the MOT consults with First Nations for the entire project, the Crown's duty to consult can be fulfilled through the MOT consultation. However, the Commission must make an independent assessment of the adequacy of consultation and in the absence of evidence of consultation with potentially affected First Nations, it cannot make a determination on the adequacy of consultation. Therefore, the expenditure for the program is rejected.

DATED at the City of Vancouver, in the Province of British Columbia, this day of March 2010.

LIISA A. O'HARA
PANEL CHAIR/COMMISSIONER

DENNIS A. COTE
COMMISSIONER