

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER F-12-11**

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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
Application for Participant Assistance/Cost Award Funding – Final Cost Awards**

BEFORE: A.J. Pullman, Panel Chair and Commissioner
A.A. Rhodes, Commissioner March 10, 2011
P.E. Vivian, Commissioner

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* (Act) for a Certificate of Public Convenience and Necessity (CPCN) for the Interior to Lower Mainland (ILM) Transmission Project (ILM Project);
- 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;
- 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, directed 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”;
- D. By Order G-83-09 dated June 30, 2009, the Commission directed Interveners intending to apply for participant assistance to submit a budget estimate by July 9, 2009 consistent with the Commission’s Participant Assistance/Cost Award (PACA) Guidelines and Order G-72-07;
- E. On August 25, 2009, following review of the PACA Applications received, the Commission issued Order F-21-09 approving interim funding awards pursuant to section 118(1) of the Act to five

- F. Interveners: Kwikwetlem First Nation (Kwikwetlem), Stó:lō Tribal Council (STC), Coldwater, Cook's Ferry, Siska and Ashcroft Bands (Coldwater *et al.*) which were referred to as Nlaka'pamux Bands, Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance, and Upper Nicola Indian Band (NNTC/ONA/Upper Nicola) which were referred to as NNTC *et al.*, and Hwlitsum First Nation (Hwlitsum). On September 24, 2009, the Commission issued Order F-27-09 increasing the Hwlitsum's interim award;
- G. By Order G-144-09 dated December 3, 2009, the Commission ordered, in part, that Revised PACA Budget Estimates for a Second Interim Cost Award were due on December 7, 2009;
- H. On January 10, 2010, the Commission issued Order F-1-10 approving the Second Interim Cost Award to the six Interveners that requested interim funding: Kwikwetlem, Stó:lō Hydro Ad Hoc Committee (SHAC), STC, Coldwater *et al.*, NNTC/ONA/Upper Nicola, and Hwlitsum;
- I. The Oral Public Hearing commenced on January 11, 2010 and concluded on January 29, 2010;
- J. By letter dated May 21, 2010, the Commission advised Interveners that it had set June 21, 2010 as the filing date for the final application for a cost award;
- K. The Commission received seven applications for final cost awards. Participants requesting funding were the British Columbia Old Age Pensioners' Organization *et al.* (BCOAPO), Kwikwetlem, SHAC, STC, Coldwater *et al.*, NNTC/ONA/Upper Nicola, and Hwlitsum;
- L. On July 3, 2010, pursuant to section 22 of the *Clean Energy Act*, all of BCTC's rights, property, and assets, including the CPCN, accrued to BC Hydro, with the exception of contracts governed by or permits issued under the law of a jurisdiction other than British Columbia. Accordingly, BCTC's role in the ILM Reconsideration Proceeding was assumed by BC Hydro;
- M. By letter dated August 31, 2010, BC Hydro provided its comment letter on the requests for final cost awards;
- N. First Nation Interveners were provided an opportunity to respond to the BC Hydro comment letter by September 20, 2010. Responses were received from SHAC, STC, NNTC/ONA/Upper Nicola, and Hwlitsum;
- O. By Letter L-90-10 dated November 5, 2010, the Commission invited Interveners to submit further written submissions on their Final Arguments with regard to the Supreme Court of Canada decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43. Subsequently, the Commission advised Interveners that they could amend their cost award application for this work;
- P. The Commission received amendments to the cost award applications of Coldwater *et al.*, NNTC/ONA/Upper Nicola, STC, and Hwlitsum;

- Q. By letter dated January 25, 2011, BC Hydro provided its comments on the requests for final cost awards. BC Hydro had no comment on the requests of Coldwater *et al.*, NNTC/ONA/Upper Nicola, and STC but did comment on the request of the Hwlitsum;
- R. On February 3, 2011, the Commission issued Order G-15-11 and its Decision on the Reconsideration of the ILM Transmission Project;
- S. The Hwlitsum were provided an opportunity to respond to BC Hydro's January 25, 2011 comment letter. The Hwlitsum provided a response on February 28, 2011;
- T. The Commission has reviewed the Final PACA Applications with regard to the criteria set out in the PACA Guidelines and has concluded that certain Final Cost Awards should be approved for Interveners in the Proceeding in accordance with the Reasons for Decision that are set out in Appendix A to this Order.

NOW THEREFORE the Commission orders as follows:

1. Pursuant to section 118(1) of the *Utilities Commission Act*, the Commission Panel approves the following Final Cost Awards. The First and Second Interim Awards were approved by Orders F-21-09, F-27-09 and F-1-10. The Third Cost Award is calculated by subtracting the First and Second Interim Awards from the Approved Final Cost Award:

	Approved Final Cost Award	First Interim Cost Award	Second Interim Cost Award	Third Cost Award
		Orders F-21-09 & F-27-09	Order F-1-10	
BCOAPO	\$76,085.62	\$0.00	\$0.00	\$76,085.62
Kwikwetlem	155,392.09	27,182.00	42,093.03	86,117.06
SHAC	49,440.40	0.00	49,440.40	--
STC	93,410.46	13,975.50	37,801.37	41,633.59
Coldwater et al.	122,205.17	20,232.50	36,599.00	65,373.67
NNTC/ONA/Upper Nicola	190,472.45	35,000.00	92,959.32	62,513.13
Hwlitsum	114,121.72	25,287.34	24,712.66	64,121.72
Total	\$801,127.91	\$121,677.34	\$283,605.78	\$395,844.79

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2. BC Hydro is directed to pay each of the Interveners the amount of the Participant's Third Cost Award in a timely manner.

DATED at the City of Vancouver, in the Province of British Columbia, this 10th day of March 2011.

BY ORDER

Original signed by:

A.J. Pullman
Panel Chair and Commissioner

Attachment



IN THE MATTER OF

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

Application for Participant Assistance/Cost Award Funding
– Final Cost Awards

REASONS FOR DECISION

March 10, 2011

BEFORE:

A.J. Pullman, Panel Chair and Commissioner
A.A. Rhodes, Commissioner
P.E. Vivian, Commissioner

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1.0 INTRODUCTION

These Reasons for Decision record the Commission's findings and determinations with regard to seven applications by Interveners for Participant Assistance/Cost Award funding for their participation in the Interior to Lower Mainland (ILM) Project Reconsideration Proceeding.

For the reasons described below, the Commission Panel approves certain final cost awards to the seven Interveners.

2.0 BACKGROUND

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

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

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.

The Reconsideration Proceeding began March 23, 2009 and the first Procedural Conference was held April 15, 2009.

On August 25, 2009, by Order F-21-09, the Commission issued the first interim funding awards to five Interveners: Kwikwetlem First Nation (Kwikwetlem), Stó:lō Tribal Council (STC), Coldwater, Cook's Ferry, Siska and Ashcroft Bands (Coldwater *et al.*) which were referred to previously as Nlaka'pamux Bands, Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance, and Upper Nicola Indian Band (NNTC/ONA/Upper Nicola) which were referred to previously as NNTC *et al.*, and Hwlitsum First Nation (Hwlitsum). Subsequently, the Commission issued Order F-27-09 amending the Hwlitsum's interim award.

The Commission received six requests for second interim cost awards from: Kwikwetlem, Stó:lō Hydro Ad Hoc Committee (SHAC), STC, Coldwater *et al.*, NNTC/ONA/Upper Nicola, and Hwlitsum. On January 10, 2010, by Order F-1-10, the Commission approved the second interim funding awards for the six Interveners.

The Oral Public Hearing commenced on January 11, 2010 and concluded on January 29, 2010.

By letter dated May 21, 2010, the Commission advised Interveners that June 21, 2010 had been set as the filing date for the final application for a cost award. The Commission received applications for final cost awards from seven Interveners: the British Columbia Old Age Pensioners' Organization *et al.* (BCOAPO), Kwikwetlem, SHAC, STC, Coldwater *et al.*, NNTC/ONA/Upper Nicola, and Hwlitsum. BC Hydro provided its comment letter on the requests for final cost awards on August 31, 2010. First Nation Interveners were provided an opportunity to respond to the BC Hydro comment letter by September 20, 2010. Responses were received from SHAC, STC, NNTC/ONA/Upper Nicola, and Hwlitsum.

On November 5, 2010 by Letter L-90-10 (Exhibit A-40), the Commission invited Interveners to make further written submissions on the Supreme Court of Canada decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 (*Carrier Sekani*). Subsequently, the Commission advised Interveners that they could amend their cost award applications for those submissions. The Commission received amendments to cost award applications from STC, Coldwater *et al.*, NNTC/ONA/Upper Nicola and Hwlitsum.

BC Hydro was provided with copies of the amended applications and filed its comments on January 25, 2011.

On February 3, 2011, the Commission issued Order G-15-11 and its Decision on the Reconsideration of the Interior to Lower Mainland Transmission Project (ILM Decision).

3.0 PARTICIPANT ASSISTANCE/COST AWARD FUNDING AND CRITERIA

Subsection 118(1) of the Act states: “[t]he commission may order a participant in a proceeding before the commission to pay all or part of the costs of another participant in the proceeding.” The Commission provides costs awards to Interveners to allow them to bring information to the Commission Panel that is relevant, useful, and of value to the Commission Panel in making an informed decision. The Commission’s PACA Guidelines attached as Appendix A to Order G-72-07 provide the participant eligibility criteria and application requirements for cost awards.

4.0 PRIOR INTERIM AWARDS AND BUDGET ESTIMATES

The Commission issued two rounds of interim awards to First Nation Interveners; the first round to five Interveners by Orders F-21-09 and F-27-09 and the second round to six Interveners by Order F-1-10.

The table below shows a summary of the interim cost awards made in Orders F-21-09, F-27-09 and F-1-10 and the Interveners’ budget estimates for their total estimated costs to participate in the Proceeding. BCOAPO did not request interim awards.

Participant	F-21-09 & F-27-09 First Interim Cost Awards	F-1-10 Second Interim Cost Awards	Cumulative Interim Cost Awards	Total Budget Estimate					
				Total	Legal Fees	Disbursement	Consultant	Case Manager	Other
BCOAPO	\$0.00	\$0.00	\$0.00	\$116,274.00	\$108,864.00	\$165.00	\$7,245.00	\$0.00	\$0.00
Kwikwetlem	\$27,182.00	\$42,093.03	69,275.03	138,550.05	136,300.00	2,250.05	0.00	0.00	0.00
SHAC	\$0.00	\$49,440.40	49,440.40	98,880.80	79,044.00	1,366.80	3,470.00	0.00	15,000.00
STC	\$13,975.50	\$37,801.37	51,776.87	106,563.73	82,267.73	0.00	18,750.00	0.00	5,546.00
Coldwater et al.	\$20,232.50	\$36,599.00	56,831.50	113,663.00	109,070.00	4,593.00	0.00	0.00	0.00
NNTC/ONA/Upper Nicola	\$35,000.00	\$92,959.32	127,959.32	255,918.63	137,100.00	4,462.26	59,906.65	47,807.18	6,642.54
Hwlitsum	\$25,287.34	\$24,712.66	50,000.00	201,696.52	118,895.80	0.00	82,800.72	0.00	0.00
Total	\$121,677.34	\$283,605.78	\$405,283.12	\$1,031,546.73	\$771,541.53	\$12,837.11	\$172,172.37	\$47,807.18	\$27,188.54

The table below shows further details of the budget estimates from each participant for funding for legal counsel, consultants, and case managers.

Participant	Budget Estimate			
	Total Days	Legal	Consultant	Case Manager
BCOAPO	59.50	54.00	5.50	0.00
Kwikwetlem	77.50	77.50	0.00	0.00
SHAC	72.30	54.30	18.00	0.00
STC	82.25	44.75	37.50	0.00
Nlaka'pamux Bands	69.25	69.25	0.00	0.00
NNTC et al.	259.50	102.00	67.50	90.00
Hwlitsum	144.09	72.34	71.75	0.00

In making the interim cost awards, the Commission followed the PACA Guidelines' maximum daily fees based on experience for lawyers and consultants. Many of the Interveners received interim cost awards that were 50% of their total budget estimates for the Proceeding, subject to minor adjustments.

In Order F-21-09 for the first interim award, the Commission noted that the STC had submitted a budget and an invoice for legal fees above the maximum \$1,800/day guideline for a senior lawyer with 10+ years of experience. The Commission stated: "[t]he Commission does not normally award rates above the PACA Guidelines and declines to do so at this time." In the subsequent budget estimate for legal fees, the STC amended the invoice and budget to conform to the \$1,800/day maximum, which the Commission accepted.

In making the second interim award in Order F-1-10, the Commission Panel excluded certain costs included in the Interveners' budget estimates. As well, the Commission expressed concern with NNTC/ONA/Upper Nicola's budget estimate for legal services, case managers, and consultants. The Commission also expressed concern that the Hwlitsum may be utilizing resources that may not receive full cost award funding. The Commission allowed an interim award for the Hwlitsum at a level comparable to the STC and SHAC interim awards.

In Appendix A to Order F-1-10, the Commission provided its expectations to Interveners on final cost awards by stating:

[i]n this proceeding the level of consultation required by the Crown on the Haida spectrum and the adequacy of the Crown's consultation should serve as a guide for a First Nation's level of participation to address the substantial issue criterion. A high level on the Haida spectrum would suggest a greater level of participation by a First Nation to aid the Commission Panel in arriving at its decision on whether the Crown has adequately discharged its duty. Conversely, a low level on the Haida spectrum suggests a lower level of participation by a First Nation

The final awards by the Commission will be based on the total submission of costs that conform to the PACA Guidelines. In the final application each participant is to include a full accounting of all costs with invoices that include actual hours, rate charged, and itemized purpose for each segment of time. The justification for the rate must be provided along with the resume or CV or years of call (if not already provided). It is not sufficient to show costs were incurred. To receive a cost award

the participant must demonstrate how the use of each resource contributed to the Commission's greater understanding of the relevant issues in the proceeding. In the event that the final award amount is less than the total approved Interim Award amount, the participant is required to reimburse the difference back to the utility.

The specific context for each participant will be different. Those participants with significant issues would suggest a greater need for a higher cost award than those participants with less significant issues. Final cost awards to participants may not be the same as the Budget Estimates or the interim funding allowed. [Emphasis in original].

5.0 PROCEEDING DAYS AND FUNDING DAYS

When the Commission issued Order F-1-10, a total of 52.5 proceeding days were expected. The Commission noted that many Interveners had legal counsel estimates with more than the 52.5 days, and that Intervener Evidence, Rebuttal Evidence, and the complexity of issues may warrant further funding days for some Interveners.

This Proceeding resulted in three procedural conferences, an Oral Public Hearing (between January 11, 2010 and January 29, 2010, both full and partial days), and no Oral Argument phase, for a total of 13.5 proceeding days. Were the Commission to follow its practice of allowing two preparation days for each Proceeding hearing day, the total funding days would be 40.5 days (13.5 + 27.0 days).

This Proceeding is the first substantive hearing that the Commission has held dealing with the Crown's duty to consult First Nations. The volume and complexity of First Nation issues suggests a need for flexibility in the maximum allowed funding days. As such, the Commission Panel considers that for First Nation Interveners, the funding days allowed should be based on a reasonable time for lawyers, consultants and case managers to address the issues of each Intervener. The funding for this Proceeding would allow Interveners to make submissions, present evidence, prepare and attend the Oral Public Hearing, and make final Argument. However, the time and effort expended by Interveners must be reasonable, relevant and useful to the Commission in making its decision. The Commission Panel appreciates that some Bands and/or Tribal Councils intervened in this Proceeding collectively, with single legal representation, which saved on time and costs. Also the Commission Panel appreciates that the First Nation Interveners filed a Common Book of Authorities and coordinated their Arguments which resulted in further savings of time and costs.

6.0 REQUESTS FOR FINAL AWARDS

The Commission received seven requests for final awards summarized in the table below.

Participant	Request for Cost Award							
	Total	Legal	Consultant	Case Manager	Disbursement	Foregone Earnings	Other	Exhibit A-40
BCOAPO	\$76,085.62	\$75,600.00	\$485.62	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Kwikwetlem	155,392.09	147,775.80	4,124.90	0.00	3,491.39	0.00	0.00	0.00
SHAC	48,392.25	42,678.00	0.00	5,051.85	662.40	0.00	0.00	0.00
STC	93,560.46	64,651.20	18,850.00	3,000.00	3,167.23	1,050.00	650.00	2,192.03
Coldwater et al.	137,427.87	128,139.50	0.00	0.00	5,800.33	0.00	0.00	3,488.04
NNTC/ONA/Upper Nicola	221,867.68	148,615.25	24,131.88	24,561.75	21,444.55	0.00	1,277.25	1,837.00
Hwlitsum	245,910.39	155,861.95	74,197.20	0.00	7,511.72	0.00	0.00	8,339.52
Total	\$978,636.36	\$763,321.70	\$121,789.60	\$32,613.60	\$42,077.62	\$1,050.00	\$1,927.25	\$15,856.59

The following table shows further details of the request for cost awards from each participant detailing funding days for legal counsel, consultants, and case managers. One day is equal to 8 hours.

Participant	Request for Cost Award (Days)						
	Total Days	Legal	Consultant	Case Manager	Exhibit A-40		
					Legal	Consultant	Total
BCOAPO	37.87	37.50	0.37	0.00	0.00	0.00	0.00
Kwikwetlem	102.54	97.54	5.00	0.00	0.00	0.00	0.00
SHAC	40.64	28.64	0.00	12.00	0.00	0.00	0.00
STC	79.64	34.38	37.70	6.00	1.06	0.50	1.56
Coldwater et al.	88.43	85.55	0.00	0.00	2.88	0.00	2.88
NNTC/ONA/Upper Nicola	229.27	89.96	77.00	61.25	1.06	0.00	1.06
Hwlitsum	165.89	92.78	68.25	0.00	4.86	0.00	4.86
Total	744.27	466.33	188.32	79.25	9.86	0.50	10.36

7.0 COMMENT LETTER FROM BC HYDRO

The PACA Guidelines indicate that the Commission will provide the applicant with copies of the cost award applications for comment. BC Hydro was provided copies of all the applications and responded with its comments on August 31, 2010. BC Hydro reviewed the initial time estimates for the Proceeding at the time of the second interim award (17.5 days) and the eventual hearing days required (13.5 days). BC Hydro believes the final award assessment should take this variance into consideration along with the volume of evidence, and the significance and complexity of issues.

While BC Hydro generally acknowledged the complexity and significance of the Reconsideration, its view was that the funding requests were “substantial and extraordinary” and it encouraged the Commission to consider the usefulness of contributions made by each group in helping the Commission reach its decision on the specific issues within the scope of the Proceeding.

BC Hydro noted that the claims generally adhered to the PACA Guidelines with respect to billing rates and disbursements, but indicated instances where rates, especially for senior counsel, exceeded the Guidelines and stated its support for the enforcement of the Guideline rates as appropriate and reasonable. BC Hydro

also noted that in some instances per diem rates were exceeded and should be adjusted. In addition, BC Hydro noted that honoraria to attend meetings are not supported by the Guidelines.

BC Hydro also commented specifically on the NNTC/ONA/Upper Nicola and Hwlitsum applications. These comments will be addressed in the sections for each of the First Nations.

BC Hydro was provided copies of the amended applications following the issuance of Exhibit A-40. BC Hydro filed its comments on January 25, 2011. BC Hydro only made specific comment on the Hwlitsum request which is discussed in the Hwlitsum section.

8.0 COMMENTS FROM PARTICIPANTS ON THE BC HYDRO COMMENT LETTER

By letter dated September 2, 2010, the Commission offered an opportunity for each of the First Nation Interveners to provide comments to the Commission in response to BC Hydro's letter of comment dated August 31, 2010. The Commission received responses from NNTC/ONA/Upper Nicola, STC, SHAC, and Hwlitsum.

The responses included general comments and comments specific to some First Nation's application. The specific comments, where relevant, will be addressed in the sections for each of the First Nations. The general First Nation comments are discussed in this section.

SHAC stated that any legal fees that slightly exceed the Guidelines are more than justified by the magnitude and complexity of the task and the usefulness of the product in informing the Commission's determination. SHAC cautioned the Commission to consider the implications of limiting funding awards to First Nations since First Nations are entirely reliant on funding to support their intervention.

STC took exception to BC Hydro's comments that the PACA requests are "substantial and extraordinary" and submitted that addressing the adequacy of Crown consultation is fundamentally different from traditional interventions. STC's view is the existing PACA Guidelines do not facilitate meaningful participation by First Nations in Commission Proceedings and create an unlevel playing field with entities such as BC Hydro. STC noted that BC Hydro's approach to consultation necessitated an extraordinary level of engagement by First Nations to respond to a large record of evidence. STC submitted that the First Nations Interveners coordinated the significant legal issues with the result that STC was able to realize efficiencies and cost savings.

NNTC/ONA/Upper Nicola referred to *Kwikwetlem* where the Court found the CPCN decision obliged the Commission to assess the adequacy of the consultation and accommodation efforts of BC Hydro. NNTC/ONA/Upper Nicola submit that its meaningful participation was crucial for the Commission to determine when the Crown's duty to consult arose, the scope of the duty, and whether it was fulfilled.

The Hwlitsum submitted that allowing BC Hydro to comment on the final costs of First Nations prior to the issuance of a decision by the Commission could be seen as giving rise to an apparent conflict of interest, as comments could be perceived as influenced by legal arguments. The Hwlitsum also noted the PACA Guidelines were developed before the Commission was required to review First Nations consultation in its proceedings.

9.0 FINAL COST AWARDS

The Commission Panel has reviewed the seven applications by Interveners and considered the comments received in order to determine the awarding of costs.

The Commission Panel rejects the Hwlitsum's concern that giving BC Hydro the opportunity to comment on the PACA applications could give rise to an apparent conflict of interest because the Commission also gave the First Nation Interveners an opportunity to respond to BC Hydro's letter of comment, which, in the Commission Panel's view, ensured a fair process.

The Commission Panel considers that the existing PACA Guidelines allow flexibility in awarding costs to Interveners that are fair and reasonable. While the Commission Panel acknowledges that this Proceeding addressed substantial and complex legal issues and was the first of its kind for the Commission (as in the words of the BC Court of Appeal "Aboriginal law is not in the steady diet of the Commission" (*Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67, para. 42), the Commission Panel nonetheless remains cognizant that funding awards cannot be without limit and must take into consideration the interests of ratepayers.

In making these cost awards, the Commission Panel sought to balance the interests of ratepayers with the negative implications of reducing funding requests, given the limited nature of funds available to First Nations generally, and the possibility that First Nations may be reluctant to intervene in the future without some assurance of funding.

9.1 British Columbia Old Age Pensioners' Organization *et al.*

The BCOAPO is an Intervener whose clients are not-for-profit, community-based organizations, representing the interest of residential electricity consumers and, in particular, those of modest financial means. BCOAPO submits that its clients, as representatives of the interests of residential electricity ratepayers in British Columbia, have a direct and material stake in the outcome of the Proceeding.

BCOAPO requests a final cost award amount of \$76,085.62 composed of \$75,600.00 for legal fees and \$485.62 for consultants. Legal time totalled 37.5 days. Consultant time totalled 0.37 days. The daily rates for legal and consultant services are within the daily rates set out in the PACA Guidelines. BCOAPO did not receive interim participant funding in this Proceeding.

BCOAPO participated in the procedural conferences, Oral Public Hearing, cross-examination, and Arguments. BC Hydro did not make a specific comment on BCOAPO's participation.

Commission Determination

The Commission Panel finds BCOAPO's participation was informative in the cross-examination and Argument phases. Also, the Commission Panel finds that it is appropriate that BCOAPO should be funded for its presence at the Proceeding, reviewing the relevant filed evidence, and making Arguments to support the interests of the consumer groups it represents because the effectiveness of the Crown's consultation process would directly impact the rates to be paid by the customers BCOAPO represents. The Commission Panel finds that the days requested by BCOAPO fall within its rule-of-thumb of two preparation days for each hearing day and finds this to be appropriate for a non-First Nation Intervener. **The Commission Panel approves a final cost award to the BCOAPO in the amount of \$76,085.62, as requested.**

9.2 Kwikwetlem First Nation

The Kwikwetlem First Nation was a registered Intervener in the ILM Proceeding. The Kwikwetlem appealed the Commission's decision to not consider First Nations consultation in the original ILM CPCN Proceeding to the BC Court of Appeal. This appeal resulted in the Commission's Reconsideration Proceeding. The ILM Project crosses Kwikwetlem's traditional territory and has the potential to infringe on the Kwikwetlem's Aboriginal rights. After the close of Argument, the Kwikwetlem advised the Commission that it had been consulted and accommodated in respect of the ILM Project and withdrew from the Proceeding.

Kwikwetlem's final cost award application amounts to \$155,392.09 and is composed of \$150,767.19 for legal fees and \$4,124.90 for consultants. Legal time totalled 97.54 days. Consultant time totalled 5 days. The daily rates for most of the legal and consultant services are within the maximum daily fee in the PACA Guidelines, with the exception of the \$2,100 daily rate for Mr. McDade, Q.C., legal counsel.

Kwikwetlem submits that its law firm's hourly rates result in lower daily rates for legal counsel between 0 – 5 and 5 – 10 years of call and a higher daily rate for legal counsel of 10+ years of call than the Commission's PACA Guidelines set out. Also, Kwikwetlem submits that its law firm's rates are well within the standard of the profession and are notably lower than rates charged by other firms. Kwikwetlem submits these rates should be accepted by the Commission as they reflect the actual costs borne by Kwikwetlem for its participation in the Proceeding and are fair and reasonable in the context of these lengthy, complex and novel proceedings.

Commission Determination

Kwikwetlem took a lead role in the Proceeding. The Commission Panel finds that the participation of Kwikwetlem's legal counsel was particularly informative in the Oral Public Hearing. Mr. McDade spent considerable time cross-examining the applicants' witness panel which significantly contributed to the Commission Panel's understanding of the issues and was sufficiently thorough to cover many of the major issues, reducing other Interveners' cross-examinations. The Commission Panel finds the efforts of Kwikwetlem's counsel exceptionally valuable in this Proceeding and, because of this, determines that the efforts merit the \$2,100 daily fee requested which is above the fee set out in the PACA Guidelines.

The Commission Panel also notes and appreciates that the daily rates requested by Kwikwetlem's lawyers, other than Mr. McDade, are lower than the PACA Guidelines maximum.

The Commission Panel approves a final cost award of \$155,392.09 to the Kwikwetlem for its participation in the Proceeding, as requested.

9.3 Stó:lō Hydro Ad Hoc Committee

The Stó:lō Hydro Ad Hoc Committee (SHAC) is an umbrella group representing a number of Bands from the Stó:lō Aboriginal Nation for the purpose of the ILM Reconsideration Proceeding, namely Aitchelitz First Nation, Leq'á:mel First Nation, Skawahlook First Nation, Skowkale First Nation, Tzeachten First Nation, and Yakwekwioose First Nation.

By Order F-1-10, SHAC was awarded an interim cost award of \$49,440.40.

SHAC requests a final cost award of \$48,392.25 composed of \$43,103.50 for legal fees and \$5,288.75 for a case manager. Legal time totalled 28.64 days and case manager time totalled 12 days. The requested billing rates for legal services are within the daily maximum rate for counsel with the relevant years of call.

SHAC participated in the Proceeding but did not participate in the cross-examination during the Oral Public Hearing. Accordingly, its legal costs were lower than anticipated. After the close of Argument, SHAC notified the Commission that its member First Nations had been consulted and accommodated in respect of the ILM Project and withdrew from the Proceeding.

Commission Determination

The Commission Panel finds that the costs incurred for legal services and case management are consistent with the PACA Guidelines. The Commission Panel in Order F-1-10 approved a cumulative interim cost award of \$49,440.40 to SHAC which is \$1,048.15 higher than SHAC's final cost award request.

The Commission Panel acknowledges the comments of SHAC regarding First Nations' limited funding and considers the difference between the interim cost award and the final cost award request to be immaterial. **Accordingly, the Commission Panel will approve a final cost award of \$49,440.40 to SHAC for its participation in the Proceeding.**

9.4 Stó:lō Tribal Council

The Stó:lō Tribal Council represented the following seven First Nations in this Proceeding: Cheam Indian Band, Kwaw-kwaw-a-pilt First Nation, Scowlitz First Nation, Shxw'ow'hamel First Nation, Soowahlie First Nation, Sumas First Nation, and Seabird Island First Nation.

STC's requested final cost award amounted to \$91,368.43, composed of \$66,089.51 for legal fees, \$18,872.00 for consultants, \$3,000 for a case manager, \$1,222.92 for disbursements, and \$1,050 for foregone earnings. Legal time totalled 34.38 days. Days for consultants were 37.70. The claim for foregone earnings totalled 6 days. The request for legal services was \$225 per hour or \$1,800 per day which is a daily maximum rate for a counsel with 10+ years of call. The STC request includes a Steering Committee Honoraria of \$500 for 5 people and \$150.00 for food costs associated with the Steering Committee.

The STC's application for an incremental cost award to address Exhibit A-40 is for \$2,192.03 consisting of \$1,912.50 for legal fees (8.5 hours x \$225/hr), legal disbursements of \$29.53, and research/coordinating expenses of \$250.00 (4.0 hours x \$62.50/hr, provided by Gentian Environmental Research).

The STC request a final cost award in the amount of \$93,560.46.

Commission Determination

The Commission Panel notes that the legal and consultant rates requested by STC conform to the PACA Guidelines. The Commission Panel finds that the legal time, consultant time, and case manager time are reasonable and should be approved since a number of the STC First Nations are owed a medium or high duty to consult, as determined in the ILM Decision, which, in the Commission Panel's view, warrants a greater participation in the Proceeding. The Commission Panel approves the claim for foregone earnings for two witness panel members as reasonable.

STC's application includes honoraria and food costs for its Steering Committee composed of Elders. The PACA Guidelines do not have a provision for these types of costs. The Commission Panel notes that the STC did include honoraria in its budget estimate though the Commission Panel declined to include those costs in the calculation of the STC's second interim cost award.

In making the final cost award, the Commission Panel considered the claim for the Steering Committee. The Commission Panel considers that the views of the Elders from the various Bands that make up the Tribal Council are important, can provide valuable input for a matter before the Commission, and could reduce the cost of a case manager. In the Commission Panel's view, a \$100 per diem, as requested by STC, is reasonable. The Commission Panel considers that, while smaller projects and individual First Nations may not warrant the establishment of a Steering Committee, the ILM Project is a large and significant project that crosses STC traditional territory and may impact the seven First Nations represented by STC.

The Commission Panel finds that honoraria for Elders should be awarded to the STC because the ILM Project is a significant wide-reaching project with potential impacts to the First Nations represented by the STC. The Commission Panel awards \$500 in honoraria to the STC but does not allow an award for food costs. The Commission Panel does not consider that food costs for the Steering Committee should merit an award of costs because the Commission's per diem allowance for food costs is intended for participants who appear at a Commission Proceeding.

The Commission Panel has separately reviewed the costs incurred to address the matter in Exhibit A-40. The request includes legal fees of \$1,800/day for 8.5 hours and research/coordinating fees of \$500/day for 4 hours which are within the PACA Guidelines. The Commission Panel believes the 12.5 hours spent to review the STC Argument and provide a submission on the effect of *Carrier Sekani* to the STC Argument is reasonable. **Accordingly, the Commission Panel approves the requested amount of \$2,192.03 for the matter set out in Exhibit A-40.**

STC	
Final Cost Award Request	\$93,560.46
Commission Adjustment: Food costs for Steering Committee	-\$150.00
Approved Final Cost Award	<u><u>\$93,410.46</u></u>

The Commission Panel approves a final cost award of \$93,410.46 to the STC for its participation in the Proceeding.

9.5 Coldwater *et al.*

Coldwater, Cook's Ferry, Siska and Ashcroft Indian Bands (Coldwater *et al.*) intervened in the Proceeding. Coldwater *et al.* are four of the 15 bands that comprise the Nlaka'pamux Nation. The Nlaka'pamux Nation is an Aboriginal people whose traditional territory includes the Lower Thompson River, the Fraser Canyon, the Nicola Valley, the Coldwater River Valley and the Coquihalla area.

On July 29, 2010, Coldwater *et al.* had requested a final cost award amount of \$133,939.83 composed of \$130,173.61 for legal fees and \$3,766.22 for consultants. Legal time totalled 85.55 days. The requested daily

rates for two lawyers (Messrs. McDade and Kirchner) are above the \$1,800 daily maximum rate as set out in the PACA Guidelines.

On December 16, 2010, Coldwater *et al.* made a further request of \$3,488.04 (legal fees of \$2,312.50 and legal disbursements of \$25.54) for the costs to address Exhibit A-40. The legal fees of \$2,312.50 are composed of 2.5 hours for Mr. Kirchner (10 years of call) at \$285/hr and 20.5 hours for Ms. Skeels (2 years of call) at \$140/hr.

Coldwater *et al.* requests a total of \$137,427.87 for its participation in the Proceeding, including the matter in Exhibit A-40.

Commission Determination

The Commission Panel finds that the 85.55 days of legal time, excluding legal work to address Exhibit A-40, is reasonable given the level of consultation required for the four Bands, and the contribution of the Intervener. The Commission Panel in the ILM Decision found that the Crown had a medium duty to consult the Coldwater and Cook's Ferry Indian Bands. The Commission Panel finds the Arguments put forth by the Intervener were informative on the issues and helpful for the Commission to make its Decision.

The Commission Panel finds that adherence to the maximum daily fees for legal counsel, as set out in the PACA Guidelines, should be followed for Coldwater *et al.* The Commission Panel made an exception for Mr. McDade's daily rate for representation of Kwikwetlem because it was the lead Intervener in the Proceeding. The extenuating circumstances that led to that cost award being above the Guidelines do not apply in these circumstances. **Accordingly, with regard to the final cost award request (excluding Exhibit A-40) the Commission Panel adjusts Coldwater *et al.*'s requested amount downward by \$13,722.71 as set out in the table below for the difference in the daily rates.**

Coldwater et al.								
Lawyer	Years of Call	Requested Daily Rate	Approved Daily Rate	Days	Requested Fees	Approved Fees	Taxes	Commission Adjustment
McDade	10+	\$3,000	\$1,800	0.8125	\$2,437.50	\$1,462.50	\$0.00	-\$975.00
McDade	10+	\$2,800	\$1,800	0.7625	\$2,135.00	\$1,372.50	\$0.00	-\$762.50
Kirchner	10+	\$2,280	\$1,800	7.3625	\$16,786.50	\$13,252.50	\$0.00	-\$3,534.00
Kirchner	10+	\$2,120	\$1,800	25.91	\$54,929.20	\$46,638.00	\$0.00	-\$8,291.20
Other Senior Counsel	10+	\$1,877.58	\$1,800	2.0625	\$3,872.51	\$3,712.50	\$0.00	-\$160.01
Total Commission Adjustment before Exhibit A-40								-\$13,722.71
Final Cost Award Request excluding Exhibit A-40		\$133,939.83						
Commission Adjustment		-\$13,722.71						
Approved Final Cost Award excluding Exhibit A-40		<u><u>\$120,217.13</u></u>						

The Commission Panel has separately reviewed the costs incurred to address Exhibit A-40. The cost award request included a daily rate of \$1,800 for 2 hours and \$2,280 for 0.5 hours for Mr. Kirchner, which is above the PACA Guidelines rate for the 0.5 hours, and a daily rate of \$1,120 for 15.5 hours for Ms. Skeels which is below the PACA Guidelines rate, for their respective years of call.

The Commission Panel has reviewed the time required by all the Interveners to address Exhibit A-40. NNTC/ONA/Upper Nicola and the STC each required 8.5 hours of legal time. STC also utilized a coordinator for 4 hours. In total STC required 12.5 hours. The Hwlitsum requested 38.9 hours. The Hwlitsum submit that a change in legal counsel required extra time to prepare the submission to address the matter in Exhibit A-40. The Commission Panel addresses the Hwlitsum situation later in the Hwlitsum section.

Based on the time required for the Interveners noted above, the Commission Panel believes a total of no more than 12.5 hours is reasonable to address Exhibit A-40 when the legal firm representing the Intervener is the same throughout the Proceeding. **Accordingly, the Commission Panel allows Coldwater *et al.* an amount of \$1,988.04 as set out in the table below for the matter set out in Exhibit A-40.** The daily rates have been adjusted to the maximum for rates for the respective year of call consistent with the PACA Guidelines.

Coldwater et al.							
Lawyer	Years of Call	Daily Rate	Hourly Rate	Hours	Total Fees	Taxes	Total
Kirchner (Exhibit A-40)	10+	\$1,800	\$225	2.5	\$562.50	\$0.00	\$562.50
Skeels (Exhibit A-40)	0-5	\$1,120	\$140	10	\$1,400.00	\$0.00	\$1,400.00
Legal Disbursements							\$25.54
Approved Final Cost Award for Exhibit A-40							\$1,988.04
Approved Final Cost Award excluding Exhibit A-40		\$120,217.13					
Approved Final Cost Award for Exhibit A-40		\$1,988.04					
Approved Final Cost Award		<u>\$122,205.17</u>					

The Commission Panel approves a final cost award of \$122,205.17 to Coldwater *et al.* for its participation in the Proceeding.

9.6 Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance, and Upper Nicola Indian Band

The Nlaka'pamux Nation Tribal Council (NNTC) was formed to represent Nlaka'pamux collective interests. The NNTC represented the following six Nlaka'pamux Nation members for the Proceeding: Skuppah Indian Band, Spuzzum First Nation, Boothroyd Indian Band, Kanaka Bar Indian Band, Oregon Jack Creek Band, and Lytton First Nation.

The Okanagan Nation Alliance (ONA) represents the collective Aboriginal rights and title of the Okanagan Nation. Upper Nicola Indian Band is a member of the ONA, along with six other Okanagan Bands: Lower Similkameen, Okanagan, Osoyoos, Penticton, Upper Similkameen and Westbank.

The Nlaka'pamux Nation Tribal Council and the Okanagan Nation Alliance/Upper Nicola Indian Band intervened separately but were represented by the same law firm in the Proceeding and applied together for PACA funding.

On July 5, 2010, NNTC/ONA/Upper Nicola request a final cost award of \$220,030.68 composed of \$148,615.25 for legal fees, \$24,131.88 for consultants, \$24,561.75 for case managers and \$22,721.80 for disbursements and other costs. In response to a request from the Commission, on August 6, 2010, NNTC/ONA/Upper Nicola provided further information in relation to their PACA request, including details of consultant and case manager work.

NNTC/ONA/Upper Nicola's legal time request totals 719.6 hours. The majority of legal time was for the work of two lawyers, Mr. Howard (222.06 hours) and Dr. Stadfeld (396.42 hours) but the work of eight lawyers and one articling student was included in the PACA request. The requested daily rates for all eight lawyers were above the daily maximum rates set out in the PACA Guidelines. Rates for articling students are not set out in the PACA Guidelines. The NNTC/ONA/Upper Nicola request 19.89 hours at \$100.00/hour for the articling student for a total fee of \$1,989.00.

Case manager timed totals 338 hours ranging from \$33.80/hour to \$500/day. All rates requested are within the PACA Guidelines for case managers. NNTC/ONA/Upper Nicola request 15 days at \$500/day for Mr. Manuel for Upper Nicola, 4 days at \$500/day for Ms. Bridge for ONA, 13.25 days at \$350/day for Mr. Bandringa for the NNTC and 29 days at \$270.40/day for Ms. Douglas for the NNTC. NNTC/ONA/Upper Nicola submit that Mr. Bandringa and Ms. Douglas were employed both to collect evidence and act as case managers.

Consultant time totals 617 hours. NNTC/ONA/Upper Nicola submit that the consultant time was for developing the NNTC evidence on Nlaka'pamux traditional uses of their land and resources, the adverse impacts of the current transmission lines, the anticipated impacts of the new ILM Project and the extent of BC Hydro's consultation and accommodation efforts. NNTC/ONA/Upper Nicola explain that the consultants undertook research to assist in developing the NNTC's Evidence (Exhibit C5-7-1), Sur-rebuttal Evidence (Exhibit C5-20) and responses to Information Requests (Exhibits C5-9, C5-10, and C5-11).

NNTC/ONA/Upper Nicola submit that Ms. Douglas coordinated the other consultants and provided them with guidance.

The specific cost award request for case managers and consultants is:

Category	Rate (\$)	Days	Hours	Total Fees (\$)	GST 5 %	PST 7 %	Disbursements (\$)	Total (\$)
Case Manager								
Pauline Douglas-NNTC	\$33.80		232	\$7,841.60			\$1,568.32	\$9,409.92
Robert Bandringa-NNTC	43.75		106	4,637.50			190.58	4,828.08
Dan Manuel-UNB	500	15		7,500.00			823.75	8,323.75
Gwen Bridge-ONA	500	4		2,000.00				2,000.00
Total								\$24,561.75
Consultants								
Gwen Bridge - qualitative analysis	\$1,250.00	1		\$1,250.00			\$0.00	\$1,250.00
John Haugen - Cultural Heritage Resource Manager	21.43		176	3,771.68			528.04	4,299.72
Jeanie Charlie - Cultural Heritage Resource Manager	21.43		136	2,914.48			408.03	3,322.51
Emily Miliken - Research Coordinator	28.57		144	4,114.08			575.97	4,690.05
Susan Tanco - Research Coordinator	75		32	2,400.00			336	2,736.00
Tawnya Durant - GIS Technician	51		128	6,528.00			1305.6	7,833.60
Total			954					\$24,131.88

BC Hydro Comments

Regarding NNTC/ONA/Upper Nicola's case management and consultant time, BC Hydro commented that the number of case management days appears excessive and the number of consultants and the time submitted by them appear high, especially in relation to other Interveners. BC Hydro further questioned whether the documentation provided by NNTC/ONA/Upper Nicola adequately supports the use of the consulting resources claimed.

Commission Determination

The Commission Panel finds that the 719.6 hours of legal time (equivalent to 89.95 days), excluding legal work to respond to Exhibit A-40, is reasonable given the contribution of the Intervener and the level of consultation required. In the ILM Decision, the Commission Panel found that two of the Bands represented by NNTC/ONA/Upper Nicola, Spuzzum First Nation and Upper Nicola Indian Band had a high duty to consult and that the NNTC itself had a medium to high duty to consult. The Commission Panel finds that the Arguments and cross-examination from the NNTC/ONA/Upper Nicola generally contributed to the Commission Panel's understanding of the issues despite a significant focus on the effects of the Existing ILM Assets which NNTC/ONA/Upper Nicola subsequently removed their reliance on in response to Exhibit A-40.

The legal fees requested are above the maximum daily fees set out in the PACA Guidelines and, as discussed for Coldwater *et al.*, except where there are extenuating circumstances, the Guidelines should be followed. As well, the PACA Guidelines have no rate set for articling students. **The Commission Panel finds that \$75/hour is a reasonable rate for articling students. Accordingly, the Commission Panel adjusts the amount for legal fees downward by \$27,687.00.**

The Commission Panel has reviewed the cost request to address Exhibit A-40. NNTC/ONA/Upper Nicola requested 8.5 hours total which is within the 12.5 hours of time the Commission Panel found reasonable to address Exhibit A-40 but requested hourly rates which exceed the maximum rates set out in the Guidelines. **The Commission Panel has accordingly adjusted the amount for legal fees for Exhibit A-40 and allows for \$1,458.04.**

The Commission Panel has reviewed the NNTC/ONA/Upper Nicola's request for case management time and finds it reasonable for each of the groups to employ one case manager. Generally, the Commission Panel considers case management is needed to coordinate a number of First Nations but for the Upper Nicola, Mr. Manuel was employed as a case manager/consultant and representative. Although NNTC/ONA/Upper Nicola submit that the two NNTC case managers, Mr. Bandringa and Ms. Douglas both collected evidence and acted as case managers, a review of Ms. Douglas' timesheet submitted with the PACA request indicates the majority of her time was spent researching and writing the ethnographic report submitted as Appendix A to the NNTC Evidence (Exhibit C5-7-1). The Commission Panel finds that Ms. Douglas' time is more appropriately considered with that of the consultants because her efforts were towards coordinating the consultants and preparing the research report. The Commission Panel finds the requests for case management for Mr. Manuel, Ms. Bridge and Mr. Bandringa reasonable and will address the request for Ms. Douglas in the following paragraph with the request for consultant time.

NNTC/ONA/Upper Nicola have requested case manager (Ms. Douglas) and consultant time for the preparation of evidence and responses to Information Requests. NNTC/ONA/Upper Nicola submit that Ms. Douglas, Ms. Milliken, Mr. Haugen, Ms. Charlie, and Ms. Durant contributed in particular to the Appendix A to Exhibit C5-7-1. Appendix A is a 62 page report titled "Nlaka'pamux Ethnography of the South West Nlaka'pamux Territory" dated August 2009. The report was prepared to show the historic use and occupation by the Nlaka'pamux of the area through which BC Hydro plans to build the ILM Transmission

line. On review of the report, the Commission Panel finds it to be similar to the traditional use studies completed by other First Nation Interveners and funded by BC Hydro as part of the ILM consultation process. In August 2007, BC Hydro sent the NNTC a letter requesting a meeting to discuss funding a TUS but by August 5, 2008, NNTC had not undertaken such a study (ILM Reconsideration Proceeding, Exhibit B-3-1, p. 61).

The Commission Panel considers that the ethnographic report for which the consultants and Ms. Douglas spent a considerable amount of time preparing would be more suitably funded through BC Hydro's capacity funding than through PACA funding. However, the Commission did ask Information Requests that could require ethnographic research. **Therefore, the Commission Panel will allow 200 hours for Ms. Douglas' work and a combined 550 hours for the work of the consultants. Accordingly, the Commission Panel adjusts the requested amount for consultant fees downward by \$2,247.67 and the amount for case management downward by \$1,081.60.** All adjustments are shown in the tables below. As the Commission Panel cannot ascertain exactly which exhibits each consultant worked on, it will adjust the consultant fees downward by the corresponding percentage reduction in hours allowed (550 hours approved/616 hours requested).

NNTC/ONA/Upper Nicola								
Lawyer	Years of Call	Requested Hourly Rate	Approved Hourly Rate	Hours	Requested Fees	Approved Fees	Taxes	Commission Adjustment
Howard	10+	\$240	\$225	222.06	\$53,294.40	\$49,963.50	\$0.00	-\$3,330.90
Stadfeld	0-5	\$205	\$150	396.42	\$81,266.10	\$59,463.00	\$0.00	-\$21,803.10
Other Senior Counsel	10+	\$240 - \$300	\$225	16.41	\$4,653.00	\$3,692.25	\$0.00	-\$960.75
Other Junior Counsel / Articling Student	0-5	\$130-175	\$150	64.86	\$10,824.00	\$9,729.00	\$0.00	-\$1,095.00
Articling Student	0	\$100.00	\$75	19.89	\$1,989.00	\$1,491.75	\$0.00	-\$497.25
		Hourly Rate	Requested Hours	Approved Hours	Requested Fees	Approved Fees	Commission Adjustment	
Case Manager								
Douglas - NNTC		33.8	232	200	\$7,841.60	\$6,760.00	-\$1,081.60	
Consultants			Requested Hours	Approved Hours	Requested Fees	Approved Fees	Commission Adjustment	
Total Consultant Request			616	550	\$20,978.24	\$18,730.57	-\$2,247.67	
Total Commission Adjustment excluding Exhibit A-40								-\$31,016.27
Final Cost Award Request excluding Exhibit A-40		\$220,030.68						
Commission Adjustment		-\$31,016.27						
Approved Final Cost Award excluding Exhibit A-40		<u>\$189,014.41</u>						

NNTC/ONA/Upper Nicola							
Lawyer	Years of Call	Daily Rate	Hourly Rate	Hours	Total Fees	Taxes	Total
Howard (Exhibit A-40)	10+	\$1,800	\$225	2.1	\$472.50	\$0.00	\$472.50
Stadfeld (Exhibit A-40)	0-5	\$1,200	\$150	6.4	\$960.00	\$0.00	\$960.00
Legal Disbursements							\$25.54
Approved Final Cost Award for Exhibit A-40							\$1,458.04
Approved Final Cost Award excluding Exhibit A-40		\$189,014.41					
Approved Final Cost Award for Exhibit A-40		\$1,458.04					
Approved Final Cost Award		<u>\$190,472.45</u>					

The Commission Panel approves a final cost award of \$190,472.45 for NNTC/ONA/Upper Nicola for their participation in this Proceeding.

9.7 Hwlitsum First Nation

The Hwlitsum are not a Band under the *Indian Act*, but follow some of its procedures such as the election of a Chief. The Hwlitsum assert a traditional territory that encompasses a portion of the Lower Mainland and Vancouver Island, and the Gulf Islands. Of relevance to the ILM Project, the Hwlitsum assert territory in the vicinity of the Fraser River around Coquitlam Lake and Pitt Lake.

The Hwlitsum state they have a substantial interest in a substantial issue and claim they are directly interested and affected by the ILM Project. The Hwlitsum explain how they contributed to a better understanding of the issues by the Commission through Information Requests, oral and written evidence, and written Arguments which assisted the Commission in understanding section 35 Aboriginal rights and the Hwlitsum perspective of Crown consultation.

On June 25, 2010, the Hwlitsum made the final cost award application for \$237,570.87 (excluding the matter in Exhibit A-40), composed of \$159,795.88 for legal fees for their counsel Ms. Muir, \$77,387.12 for their consultant Mr. Grove, and \$2,240 for their expert witness Dr. Miller. Legal time totalled 92.78 days. Consultant time totalled 68.25 days. The request for legal services for Ms. Muir is within the daily maximum rate for counsel with the relevant years of call.

The Hwlitsum submit that their June 25, 2010 application for legal costs and expenses is fair and reasonable.

The Hwlitsum calculated total costs and expenses of \$173,242.35 from December 2009 to June 2010. The calculation included a line item for expenses for Mr. Grove of \$2,294.70. It also included another line for Mr. Grove's fees, including GST, of \$49,019.65. A review of the \$49,019.65 shows that it includes the expense of \$2,294.70 claimed as a separate line item.

The Hwlitsum had to hire new legal counsel who submitted an amended final cost award for the matter raised in Exhibit A-40. The Hwlitsum explain they were faced with the challenge of retaining new legal counsel due to the unexpected withdrawal of their previous counsel and that considerable time was

required to educate new counsel of what had come before. The Hwlitsum's incremental cost request is \$8,339.52 to address Exhibit A-40. The request includes 38.9 hours (4.9 days) of counsel time. The application requests a daily rate of \$2,400 for lawyers Mr. Murphy with 10+ years of call and \$1,520 for Ms. Vear with 0-5 years of call, both of which are above the PACA Guidelines rates for counsel.

The Hwlitsum request a total cost award \$245,910.39 for its participation in the Proceeding, including the matter in Exhibit A-40.

Interim Cost Awards to the Hwlitsum

In Order F-1-10, the Commission Panel approved a cumulative interim cost award of \$50,000.00 to the Hwlitsum, but did not accept the Hwlitsum's budget estimate of \$201,696.52. At that time, without knowing the full extent of the Hwlitsum issues, the Commission Panel believed that a \$100,000 budget estimate would be more appropriate using the estimates of STC and SHAC who represented multiple First Nations as comparison. Accordingly, the Commission Panel approved an interim cost award at 50% of the \$100,000. In its determination, the Commission Panel expressed concern that the Hwlitsum may be utilizing resources that may not receive full cost award funding. The Commission Panel indicated that the Hwlitsum would need to demonstrate that they meet the PACA Guidelines, have participated effectively and efficiently, and have provided useful information to the Commission Panel in their final application for a cost award.

In Order F-1-10 the Commission addressed the Hwlitsum's projected time of approximately 72 days legal services and 72 days for consulting services, and noted that this level of resources appeared to be higher than other First Nation Interveners who, in many cases, represented more than one First Nation.

By way of guidance the Commission Panel suggested that it:

would normally expect the level of effort to be commensurate with the time required to address the substantial interest in a substantial issue criterion for the Intervener.

In this proceeding the level of consultation required by the Crown on the Haida spectrum and the adequacy of the Crown's consultation should serve as a guide for a First Nation's level of participation to address the substantial issue criterion. A high level on the Haida spectrum would suggest a greater level of participation by a First Nation to aid the Commission Panel in arriving at its decision on whether the Crown has adequately discharged its duty. Conversely, a low level on the Haida spectrum suggests a lower level of participation by a First Nation.

In their June 25, 2010 PACA application, the Hwlitsum took issue with these remarks and disagreed with the concept of determining participant funding by reference to the *Haida* spectrum. In addition, the Hwlitsum pointed out that they did not agree with where on the *Haida* spectrum they had been placed by BC Hydro.

BC Hydro Comments

BC Hydro was provided an opportunity to comment on the Hwlitsum's June 25, 2010 final cost award application. BC Hydro notes the Hwlitsum advances a claim for 159 days of legal and support services. In BC Hydro's view, that level of claim cannot be supported and should be reduced. BC Hydro also states the

Hwlitsum adopted, in part, submissions of other Interveners and argues that its contribution to the Proceeding was limited.

In response, the Hwlitsum reject any characterization by BC Hydro that its contribution to the Reconsideration was limited. The Hwlitsum state that its information requests, testimony, and Arguments illuminated the limited First Nation consultation with BCTC and BC Hydro in the environmental assessment process up to August 5, 2008.

BC Hydro was also provided with an opportunity to comment on the First Nations incremental cost award application for the matter set out in Exhibit A-40. On January 25, 2011, BC Hydro provided its comment letter with specific comments regarding the Hwlitsum application. BC Hydro noted that the Hwlitsum application for \$8,339.52 was considerably higher than the other applicants. BC Hydro considers the effort of the Hwlitsum's new counsel duplicative in the circumstance but acknowledges the Commission may consider the impact of a change in counsel in their cost award.

On February 28, 2011, the Hwlitsum provided a response to the January 25, 2011 BC Hydro comment letter. The Hwlitsum acknowledge that their claim for the work in response to Exhibit A-40 is higher than other Interveners but submit that this is due to the additional time required for their new counsel to become familiar with the Proceeding record so the Hwlitsum could be adequately represented. The Hwlitsum submit the principles of access to justice and the right to informed counsel supported their need to be represented by legal counsel and supported the hours of work claimed because their new counsel was obliged to inform herself of the facts, issues and law that came before to adequately address the effect of *Carrier Sekani*. As well, the Hwlitsum submit that they reduced their fees by not claiming for consultant time and that overall, the fees claimed to respond to Exhibit A-40 are reasonable in light of the work required.

Commission Determination

The Commission Panel has reviewed the Hwlitsum application, BC Hydro's comments, and the responses by the Hwlitsum. The Commission Panel has also reviewed the level of participation in the Proceeding by the Hwlitsum, notably their procedural submissions, evidence, information requests and responses thereto, testimony, and Argument.

The Commission Panel accepts that the position on the *Haida* spectrum may not in every instance be determinative as the guide for a First Nation's level of participation to address the substantial issue criterion, and will not in this instance consider the Hwlitsum's place on the *Haida* spectrum as being determinative of the level of PACA funding.

In Order F-1-10, the Commission clearly put the Hwlitsum on notice when it stated:

[t]he Commission Panel is concerned that the Hwlitsum may be utilizing resources that may not receive full cost award funding. The Hwlitsum in its final application for a cost award will need to demonstrate that it meets the PACA Guidelines, has participated effectively and efficiently, and provided useful information to the Commission Panel. At this time, it appears to the Commission Panel that the intervention by the Hwlitsum may be more comparable (and possibly less so) to that of the STC and SHAC.

The Commission Panel has considered the full amount of the Hwlitsum's total funding request of \$245,967.39 and finds that the Hwlitsum's funding request is disproportionate to many of the other Interveners for both legal counsel and consultant time.

The Commission Panel notes that Ms. Muir's claim for 742.2 hours (92.8 days) of legal time exceeds all Interveners other than Kwikwetlem. The Commission Panel has considered the time claimed by counsel for STC as an appropriate comparator in that the STC filed evidence, prepared and responded to Information Requests, tendered a witness panel, cross-examined BC Hydro, and submitted Argument. The Commission Panel notes that its own practice of allowing 2 preparation days for one proceeding day would allow 324 hours (40.5 days) and that the time claimed by counsel for STC, a good comparator for the Hwlitsum, was 273 hours. **The Commission Panel will accordingly allow Ms. Muir 40.5 days at \$ 1,600 per day.**

The Commission Panel also notes that Mr. Grove's claim of 66.25 days as a consultant exceeds, by a wide margin, the amount claimed by any other Intervener for consulting.

The Commission Panel has considered the activities of Mr. Grove and how they informed the Commission on the issues for the Hwlitsum. Overall, the Commission Panel finds the Hwlitsum contribution much more limited than other First Nation Interveners who attended the Oral Public Hearing in regard to the purpose of the Commission Panel gaining a better understanding of the issues. In the view of the Commission Panel, based on the evidence in the Proceeding, the claims made by the Hwlitsum on the potential adverse impacts on fishing and fish habitat, their substantial interest in the Proceeding, were not persuasive. On this important matter the Commission Panel knew little more at the end of Argument than at the start of the Oral Public Hearing. However, the Commission Panel believes the Hwlitsum should be awarded some costs for their participation in making their views known to the Commission.

Accordingly the Commission Panel will reduce Mr. Grove's allowable days to 30 days at his charged rate of \$1,000 per day.

The Commission Panel accepts the costs of \$2,240 for Dr. Miller, as well as the disbursement costs of \$4,321.80 for Ms. Muir and \$3,189.92 for Mr. Grove.

The Hwlitsum retained new counsel to submit further argument on the effect, if any, of *Carrier Sekani* on their final Arguments. The Hwlitsum's further Argument consisted of five pages including sections on when the duty to consult with the Hwlitsum first arose, the Commission's duty to assess consultation, past and continuing breaches and a reply to the submissions of the Province.

The Commission Panel's review of the further Argument of the Hwlitsum shows much of it is simply a re-statement of their original final Argument, citing *Carrier Sekani* as support. The Commission Panel views the task set out in Exhibit A-40 as limited, particularly to the new law introduced in *Carrier Sekani* around consultation on Existing Assets. The Commission Panel recognizes that access to justice and informed counsel are necessary, however, the Commission Panel does not see the limited task set out in Exhibit A-40 as requiring the time claimed by the Hwlitsum. **The Commission Panel finds 3.5 days to be reasonable for the Hwlitsum's new counsel, Ms. Vear, to respond to Exhibit A-40. Also, the Commission Panel disallows the rate request for Mr. Murphy and Ms. Vear which are above the PACA Guidelines.** The Commission Panel finds that the appropriate rates in the PACA Guidelines should be followed.

The calculations of approved costs for the Hwlitsum are shown below:

Hwlitsum	Daily Rate	Days	Total Fees	GST at 5% HST at 12%	Disbursements	Total
Legal Counsel (Ms. Muir: 10+ yr call)	\$1,600	40.5	\$64,800.00	\$3,240.00	\$4,321.80	\$72,361.80
Consultant (Mr. Grove: 10+ yr)	\$1,000	30	\$30,000.00	\$1,500.00	\$3,189.92	\$34,689.92
Witness (Dr. Miller)			\$2,240.00			\$2,240.00
Exhibit A-40 Legal Counsel (Mr. Murphy: 10+ yr call)	\$1,800	0.0625	\$112.50	\$13.50	\$0.00	\$126.00
Exhibit A-40 Legal Counsel (Ms. Vear: 0-5 yr call)	\$1,200	3.5	\$4,200.00	\$504.00	\$0.00	\$4,704.00
Approved Final Cost Award						\$114,121.72

The Commission Panel approves a final cost award of \$114,121.72 to the Hwlitsum for its participation in the Proceeding.

10.0 SUMMARY OF APPROVED FINAL COST AWARDS AND REQUESTED COST AWARDS

A summary of the final cost awards are shown below along with the final application requests.

	Approved Final Cost Award	Request for Final Cost Award
BCOAPO	\$76,085.62	\$76,085.62
Kwikwetlem	155,392.09	155,392.09
SHAC	49,440.40	48,392.25
STC	93,410.46	93,560.46
Coldwater et al.	122,205.17	137,427.87
NNTC/ONA/Upper Nicola	190,472.45	221,867.68
Hwlitsum	114,121.72	245,910.39
Total	\$801,127.91	\$978,636.36

11.0 SUMMARY OF APPROVED FINAL AND INTERIM COST AWARDS

The Commission previously approved interim funding in Orders F-21-09, F-27-09 and F-1-10. The third cost award is calculated by subtracting the interim cost awards from the approved final cost award. BC Hydro's payment of the third cost award to the Interveners concludes the funding payments to match the approved final cost awards. The table below shows the funding of all the cost awards.

	Approved Final Cost Award	First Interim Cost Award	Second Interim Cost Award	Third Cost Award
		Orders F-21-09 & F-27-09	Order F-1-10	
BCOAPO	\$76,085.62	\$0.00	\$0.00	\$76,085.62
Kwikwetlem	155,392.09	27,182.00	42,093.03	86,117.06
SHAC	49,440.40	0.00	49,440.40	--
STC	93,410.46	13,975.50	37,801.37	41,633.59
Coldwater et al.	122,205.17	20,232.50	36,599.00	65,373.67
NNTC/ONA/Upper Nicola	190,472.45	35,000.00	92,959.32	62,513.13
Hwlitsum	114,121.72	25,287.34	24,712.66	64,121.72
Total	\$801,127.91	\$121,677.34	\$283,605.78	\$395,844.79