



**ORDER NUMBER
F-22-20**

IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

British Columbia Utilities Commission
Indigenous Utilities Regulation Inquiry
Participant Assistance/Cost Award Application

BEFORE:

D. M. Morton, Panel Chair
C. M. Brewer, Commissioner
A. K. Fung, QC, Commissioner
B. Lockhart, Commissioner

On July 8, 2020

ORDER

WHEREAS:

- A. On March 11, 2019, by Order in Council (OIC) No. 108, made pursuant to section 5(1) of the *Utilities Commission Act* (UCA), the Lieutenant Governor in Council directed the British Columbia Utilities Commission (BCUC) to advise the Lieutenant Governor in Council respecting the regulation of Indigenous utilities in accordance with the terms of reference set out in section 3 of OIC No. 108 (Inquiry);
- B. By Orders G-62-19, G-11-19, G-110-19, G-190-19, G-214-19, G-240-19, G-269-19, G-282-19 and G-26-20, the BCUC established regulatory timetables for the Inquiry. The regulatory process involved Community Input Sessions, written evidence, information requests on evidence, written and oral final submissions, draft report workshops, and written comments and reply comments on the draft report;
- C. On April 30, 2020, the BCUC issued its Final Report on the Inquiry;
- D. The following participants filed Participant Assistance/Cost Award (PACA) applications with the BCUC with respect to their participation in the proceeding:

Date (2020)	Participant	Application
April 16	Kitselas Geothermal Inc. (KGI)	\$13,485.18

April 21	Donald Flintoff (Flintoff)	\$28,502.72
April 29	Coastal First Nations/Great Bear Initiative (CFN/GBI)	\$33,411.00 ¹
April 29	Leq'á:mel First Nation	\$14,516.25
April 30	Nisga'a Nation	\$107,423.23 ²
May 5	Commercial Energy Consumers of BC (CEC)	\$23,888.35
May 10	West Moberly First Nations	\$3,563.10
May 11	Nuu-chah-nulth Tribal Council, Cowichan Tribes, Gitanyow First Nation, Homalcow First Nation, BC First Nations Energy Working Group (Collective First Nations)	\$97,216.00

- E. By May 29, 2020, British Columbia Hydro and Power Authority (BC Hydro), FortisBC Group of Companies (FortisBC) and Pacific Northern Gas Ltd. (PNG) provided their comments on the PACA applications, stating no objections to the applications if the BCUC is satisfied; and
- F. The BCUC has reviewed the PACA applications in accordance with the criteria and rates set out in the PACA Guidelines attached to BCUC Order G-97-17 dated June 15, 2017, and concludes that the cost awards should be approved in full for KGI, CFN/GBI, Leq'á:mel First Nation, the CEC, West Moberly First Nations and Collective First Nations; and that partial cost awards should be approved for Flintoff and the Nisga'a Nation.

NOW THEREFORE pursuant to section 118(1) of the UCA, the BCUC orders as follows:

1. For the reasons outlined in Appendix A of this order, funding is awarded to the following interveners in the listed amounts for their participation in the Inquiry:

Participant	Award
KGI	\$13,485.18
Flintoff	\$13,075.21
CFN/GBI	\$33,411.00
Leq'á:mel First Nation	\$14,516.25
Nisga'a Nation	\$101,477.47
CEC	\$23,888.35
West Moberly First Nations	\$3,563.10
Collective First Nations	\$97,216.00

¹ Amended from the originally applied for \$33,508.62 following an email to the BCUC dated May 11, 2020.

² Amended from the originally applied for \$116,390.27 following an email to the BCUC dated June 23, 2020.

2. BC Hydro, FortisBC and PNG are directed to reimburse the above-noted participants for the awarded amounts in a timely manner.

DATED at the City of Vancouver, in the Province of British Columbia, this 8th day of July 2020.

BY ORDER

Original signed by

D. M. Morton
Commissioner

Attachment

British Columbia Utilities Commission
Indigenous Utilities Regulation Inquiry
Participant Assistance/Cost Award Application

REASONS FOR DECISION

1.0 Introduction

On March 11, 2019, the Lieutenant Governor in Council directed the British Columbia Utilities Commission (BCUC) to conduct an inquiry respecting the Regulation of Indigenous Utilities (Inquiry). The terms of the Inquiry have been outlined in Orders in Council Nos. 108 and 559. The BCUC established the Inquiry by Order G-62-19 dated March 19, 2019.

The regulatory process for the Inquiry, established by orders of the BCUC, comprised a series of community input sessions, written evidence, one round of information requests (IRs), oral and written arguments, workshops on the BCUC's draft report, and written comments and reply comments on the draft report. The BCUC issued its Final Report on April 30, 2020.

1.1 Legislative Framework

Section 118 of the *Utilities Commission Act* (UCA) states that the BCUC may order a participant in a proceeding before the BCUC to pay all or part of the costs of another participant in the proceeding.¹

Order G-97-17 dated June 15, 2017, outlines the BCUC's Participant Assistance/Cost Award Guidelines (PACA Guidelines).² Section 3.0 of the PACA Guidelines relates to participant eligibility for a cost award and Section 4.0 relates to criteria for a cost award. Per Section 4.3 of the PACA Guidelines, in determining the amount of a participant's cost award, the BCUC considers the following:

- (a) Has the participant contributed to a better understanding by the BCUC of the issues in the proceeding?
- (b) To what degree will the participant be affected by the outcome of the proceeding?
- (c) Are the costs incurred by the participant fair and reasonable?
- (d) Has the participant joined with other groups with similar interests to reduce costs?
- (e) Has the participant made reasonable efforts to avoid conduct that would unnecessarily lengthen the duration of the proceeding, such as ensuring participation was not unduly repetitive?
- (f) The funding day calculation for funding in accordance with Sections 4.1 and 4.2, if one is provided.
- (g) Any other matters which the BCUC determines appropriate in the circumstances.

The Panel has discretion as to whether any PACA amount awarded should be for the full amount sought or should be scaled.

Section 7.0 of the PACA Guidelines outlines information regarding professional fees, including that the BCUC expects participants to use professional services in a cost-effective manner and make efforts to avoid duplication of services, and as such the BCUC may adjust cost awards where any duplication appears to have

¹ UCA, RSBC 1996, c. 473, s. 118.

² BCUC, PACA Guidelines, Order G-97-17.

occurred. In addition, consultants, specialists and expert witnesses are expected to provide services specific to their technical expertise.

Attachment A to the PACA Guidelines provides rate schedules of the maximum daily fees for professional services.

1.2 PACA Applications

The following participants filed PACA applications with the BCUC with respect to their respective involvement in the Inquiry:

Date (2020)	Participant	Application
April 16	Kitselas Geothermal Inc. (KGI)	\$13,485.18
April 21	Donald Flintoff (Flintoff)	\$28,502.72
April 29	Coastal First Nations/Great Bear Initiative (CFN/GBI)	\$33,411.00 ³
April 29	Leq'á:mel First Nation	\$14,516.25
April 30	Nisga'a Nation	\$107,423.23 ⁴
May 5	Commercial Energy Consumers of BC (CEC)	\$23,888.35
May 10	West Moberly First Nations	\$3,563.10
May 11	Nuu-chah-nulth Tribal Council, Cowichan Tribes, Gitanyow First Nation, Homalcow First Nation, BC First Nations Energy Working Group (Collective First Nations)	\$97,216.00

By May 29, 2020, British Columbia Hydro and Power Authority (BC Hydro), FortisBC Group of Companies (FortisBC) and Pacific Northern Gas Ltd. (PNG) provided their comments on the PACA applications, stating no objections to the applications if the BCUC is satisfied.

The Panel has reviewed the PACA applications in accordance with the criteria and rates set out in the PACA Guidelines attached to BCUC Order G-97-17, and concludes that the cost awards should be approved in full for KGI, CFN/GBI, Leq'á:mel First Nation, the CEC, West Moberly First Nations and Collective First Nations; and that partial cost awards should be approved for Flintoff and the Nisga'a Nation. These reasons explain the Panel's decision with respect to the adjustments to the funding awards for Flintoff and the Nisga'a Nation.

³ Amended from the originally applied for \$33,508.62 following an email to the BCUC dated May 11, 2020.

⁴ Amended from the originally applied for \$116,390.27 following an email to the BCUC dated June 23, 2020.

2.0 Flintoff

2.1 Summary of Costs

In the Inquiry, Flintoff provided written evidence, IRs, responses to IRs, written argument, and comments on the BCUC draft report. A summary of the costs sought in Flintoff's PACA application is provided in Table 1 below:

TABLE 1: Flintoff PACA Application Cost Summary

	Daily Rate	Days	Total	+5% GST	+7% PST	Total
Consultant Fees	\$1,850	13.75	\$25,437.50	\$1,271.88	\$1,780.63	\$28,490.01
Disbursement and Other Costs						\$12.71
Total Award						\$28,502.72

2.2 PACA Budget

On July 2, 2019, Flintoff submitted a PACA budget estimating 10.5 funding days to participate in the Inquiry at the \$1850 daily rate. BCUC staff provided a response to Flintoff's PACA budget advising the funding days were well within staff's estimate, but highlighted that Section 7.11 of the PACA Guidelines states:

Generally the Commission will limit awards for individual participants to foregone earnings, childcare and disbursements. However, the Commission may award individual participants professional fees if it deems those fees are warranted for the individual to participate effectively.

Per Attachment A of the PACA Guidelines, the maximum award for foregone earnings is \$250 per proceeding day per person.

Panel Determination

The Panel notes that Flintoff's participation in this Inquiry was as an individual and does not consider that the maximum daily rate for a consultant of \$1850 per day is warranted. However, in our view, Flintoff's submissions did provide some better understanding of the issues in the Inquiry, and on that basis we are willing to make an award above the maximum award for foregone earnings. The Panel considers the number of funding days sought by Flintoff to be reasonable.

Accordingly, the Panel determines that adjusting Flintoff's daily rate to \$950 per day is fair and reasonable, and therefore awards Flintoff \$13,075.21.⁵

⁵ \$950 * 13.75 days + \$12.71 (other expenses).

3.0 Nisga'a Nation

3.1 Summary of Costs

The Nisga'a Nation participated in all aspects of the Inquiry. A summary of the costs sought in the Nisga'a Nation PACA application is provided in Table 2 below:

TABLE 2: Nisga'a Nation PACA Application Cost Summary

	Daily Rate	Days	Total	+5% GST	+7% PST	Total
Counsel Fees						
David Bursey, Bennett Jones LLP	\$2,800	7.3	\$20,440	\$1,022	\$1,430.80	\$22,892.80
Charlotte Teal, Bennett Jones LLP	\$1,900	4.7	\$8,930	\$446.50	\$625.10	\$10,001.60
Chani Campbell, Aldridge + Rosling LLP	\$2,600	9	\$23,400	\$1,170	\$1,638	\$26,208
Brianne Paulin, Aldridge + Rosling LLP	\$1,641	17.8	\$29,214.96	\$1,460.75	\$2,045.05	\$32,720.76
Chris Cochrane, Aldridge + Rosling LLP	\$2,800	1.79	\$5,003.60	\$250.18	\$350.25	\$5,604.03
Micah Clark, Aldridge + Rosling LLP	\$2,550	3.5	\$8,925.00	\$446.25	\$624.75	\$9,996
Total Counsel Fees						\$107,423.23
Disbursement and Other Costs						
Printing/ photocopying						\$449.40
Meals						\$196.35
Airfare						\$2,957.58
Hotel						\$488.14
Taxi						\$170
Total Disbursement and Other Costs						\$4,261.47
Total Award						\$111,684.70⁶

⁶ The total PACA funding sought was reduced from the Nisga'a Nation's original request after correspondence between BCUC staff and the Nisga'a Nation.

3.2 PACA Budget

On October 4, 2019, Nisga'a Nation filed a PACA budget estimating \$173,600 in costs, comprising 51 funding days for legal counsel. BCUC Staff provided a response indicating that the PACA budget exceeded Staff's estimate of 26 funding days for full participation in the Inquiry.

3.3 Other Information

Nisga'a Nation's PACA application seeks funding for six lawyers. In accordance with Section 7.1 of the PACA Guidelines, the BCUC "expects participants to use professional services in a cost-effective manner and to make efforts to avoid duplication of services among legal counsel, consultants, specialists, expert witnesses and case managers. The Commission may adjust cost awards where any duplication appears to have occurred."

On this matter, Nisga'a Nation explains that Aldridge + Rosling LLP acts as general counsel to Nisga'a Lisims Government, and provides legal advice to Nisga'a Lisims Government on a wide range of legal issues, including the implementation of the Nisga'a Final Agreement. Nisga'a Nation also retained a regulatory expert from Bennett Jones LLP to advise Nisga'a Lisims Government in the Inquiry, as Aldridge + Rosling LLP does not have this specific expertise in regulatory law or procedures before the BCUC. Nisga'a Nation further notes that a junior lawyer undertook the majority of the preparation and drafting of the Nisga'a Nation's submissions where possible.

Nisga'a Nation submits that the importance of the Inquiry to the Nisga'a Nation required the provision of a comprehensive background of Nisga'a Lisims Government's jurisdiction, while ensuring the BCUC appropriately distinguished such rights and jurisdiction from other Indigenous groups, requiring extensive work by legal counsel. Nisga'a Nation adds that the scope expanded over the course of the Inquiry, that Nisga'a Nation participated fully, and in Nisga'a Nation's view its submissions were of assistance to the BCUC in its draft and final recommendations.

Panel Determination

The Panel acknowledges the need for the Nisga'a Nation to retain an experienced regulatory legal counsel (Bennett Jones LLP) to complement its general counsel (Aldridge + Rosling LLP). However, the Panel questions the efficiency of having four lawyers from Aldridge + Rosling LLP working on the Inquiry. This resulted in a total number of funding days that is unnecessarily excessive. Our review of the confidential legal invoices does not allay this concern.

BCUC staff provided an estimate of 26 funding days in response to the Nisga'a Nation's PACA budget. The Panel agrees with the Nisga'a Nation that following the issuance of the staff estimate, the regulatory process and scope of the Inquiry expanded. While the staff estimate is not binding, the Panel considers that it provides a useful reference point for estimating a reasonable number of funding days, and that the 44 funding days for legal counsel sought by the Nisga'a Nation is on the high side of what is reasonable.

The Panel's concerns must be balanced against a consideration of the contribution that the Nisga'a Nation made to the Inquiry. We acknowledge that the Nisga'a Nation participated fully in the Inquiry and provided a unique perspective in its submissions which were important in the preparation of the Panel's draft and final recommendations. However, we are of the view that the submissions of the Nisga'a Nation could have been prepared in a more efficient manner. The Panel notes that the highest PACA application besides that of the Nisga'a Nation is that of the Collective First Nations, which applied for \$97,216 in professional fees. In our view this is a fair and reasonable benchmark for an adjustment to the professional fees sought by Nisga'a Nation.

In consideration of the above, the Panel determines that the Nisga'a Nation be awarded \$101,477.47.⁷

⁷ \$97,216 plus \$4,261.47 for Total Disbursements and Other Costs.