



**ORDER NUMBER  
G-334-21**

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

and

FortisBC Energy Inc.  
Application for a Certificate of Public Convenience and Necessity  
for the Okanagan Capacity Upgrade Project

**BEFORE:**

R. I. Mason, Panel Chair  
D. A. Cote, Commissioner  
A. K. Fung, QC, Commissioner

on November 17, 2021

**ORDER**

**WHEREAS:**

- A. On November 16, 2020, FortisBC Energy Inc. (FEI) submitted an application to the British Columbia Utilities Commission (BCUC) for, among other things, a Certificate of Public Convenience and Necessity pursuant to sections 45 and 46 of the *Utilities Commission Act* (UCA) for the Okanagan Capacity Upgrade Project (Application);
- B. By Order G-275-21 dated September 17, 2021, the BCUC established an amended regulatory timetable, which includes an oral hearing regarding the oral evidence of Penticton Indian Band (PIB) on November 23, 2021 (Oral Hearing), and submissions regarding the confidentiality of PIB's oral evidence;
- C. On September 27, 2021, PIB filed written evidence. PIB requests confidential treatment of certain appendices of its written evidence, namely Appendix A, C and D (Written Confidential Information). PIB notes that FEI has agreed to maintain the confidential reports as confidential, and disclosure to FEI of the Written Confidential Information has already been provided;
- D. On November 1, 2021, PIB filed a submission on confidentiality of its oral evidence. PIB submits it intends to deliver its oral evidence to the BCUC confidentially (Oral Confidential Evidence), with the exception of FEI. On November 8, 2021, FEI and interveners filed submissions on the confidentiality of PIB's oral evidence. On November 15, 2021, PIB filed its reply submission on confidentiality of its oral evidence; and
- E. The BCUC has reviewed the submissions of the parties and makes the following determinations.

**NOW THEREFORE** with reasons for decision to follow, the BCUC orders as follows:

1. The Written Confidential Information will be held confidential by the BCUC.
2. FEI is granted access to the Written Confidential Information.
3. The Oral Hearing will be held *in camera*.
4. FEI is granted access to the Oral Hearing and to the unredacted confidential transcript from the Oral Hearing.

**DATED** at the City of Vancouver, in the Province of British Columbia, this 17<sup>th</sup> day of November 2021.

BY ORDER

*Original signed by:*

R. I. Mason  
Commissioner

**FortisBC Energy Inc.**

**Application for a Certificate of Public Convenience and Necessity  
for the Okanagan Capacity Upgrade Project**

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**Reasons for Decision**

December 1, 2021

Before:

R. I. Mason, Panel Chair  
D. A. Cote, Commissioner  
A. K. Fung, QC, Commissioner

## 1.0 Introduction

On November 16, 2020, FortisBC Energy Inc. (FEI) submitted an application to the British Columbia Utilities Commission (BCUC) for, among other things, a Certificate of Public Convenience and Necessity pursuant to sections 45 and 46 of the *Utilities Commission Act* (UCA) for the Okanagan Capacity Upgrade Project (Application).

By Order G-262-21 dated September 7, 2021, the BCUC established an amended regulatory timetable, which includes an oral hearing regarding the oral evidence of Penticton Indian Band (PIB) on November 23, 2021 (Oral Hearing), and submissions regarding the confidentiality of PIB's oral evidence (Oral Confidential Evidence). The BCUC noted that it would be procedurally unfair to allow PIB to submit evidence that other interveners had no opportunity to test, and found there was no merit to PIB's position that in the case of interveners that are not adverse in interests, they should not be entitled to ask questions of PIB.

On September 27, 2021, PIB filed written evidence. PIB requests confidential treatment of certain appendices of its written evidence, namely Appendix A, C and D (Written Confidential Evidence). PIB notes that FEI has agreed to maintain the confidential appendices as confidential, and disclosure to FEI of the Written Confidential Evidence has already been provided.<sup>1</sup>

In its September 27, 2021 filing, PIB stated that the Written Confidential Evidence consists of indigenous knowledge of PIB (Indigenous Knowledge) and contains highly sensitive information pertaining to PIB's cultural heritage. That evidence identifies specific locations of placenames, creation stories, archeological and historical resources and areas and use and occupancy locations and areas for harvesting, ceremony, burial, spiritual and transmission of knowledge purposes. PIB submits that disclosure of such information could lead to land use competition, vandalism, trespass and general disrespect and disregard for these highly sensitive landscape features.<sup>2</sup>

By letter dated October 1, 2021, BCUC sought comments from the parties in this proceeding on PIB's request for confidentiality of certain sections of its Written Confidential Evidence, in addition to the comments already sought on the oral evidence. Following comments by parties, by letter dated October 29, 2021, the BCUC noted that there were no objections to PIB's requests regarding confidentiality of its Written Confidential Information. The BCUC requested PIB to submit a public version of Confidential Appendix A with redactions of the specific information that PIB wishes to remain confidential.

On November 1, 2021, PIB submitted an outline of the Oral Confidential Evidence. PIB requests that the Oral Confidential Evidence be delivered in camera, including with respect to interveners but with the exception of FEI.<sup>3</sup>

On November 17, 2021, the BCUC issued Order G-334-21 with reasons to follow. These Reasons for decision accompany Order G-334-21, and provide a summary of parties' submissions regarding the confidentiality of PIB's oral evidence, and the Panel's determination regarding the confidentiality of PIB's Oral Confidential Evidence and Written Confidential Evidence.

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<sup>1</sup> Exhibit C5-9, cover letter, pp. 2 – 3.

<sup>2</sup> Exhibit C5-9, cover letter, p. 2.

<sup>3</sup> Exhibit C5-13.

## 2.0 Submissions on PIB's Oral Evidence

PIB intends to deliver its oral evidence confidentially, including with respect to the interveners, but with the exception of FEI. The majority of PIB's oral evidence will consist of the Indigenous Knowledge described in the Written Confidential Evidence for which PIB has previously requested confidential treatment. PIB submits it has the right to control the use and dissemination of its Indigenous Knowledge whether in written or in oral form as recognized by Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) affirmed by the *Declaration on the Rights of Indigenous Peoples Act* (DRIPA). PIB submits its evidence with respect to historical and cumulative effects and PIB's concerns with respect to its rights and title is inextricably related with its confidential Indigenous Knowledge. PIB adds it would compromise the quality of the evidence if witnesses were hampered in presenting their oral evidence and answering questions due to the required vigilance over concerns of disseminating confidential Indigenous Knowledge.<sup>4</sup>

PIB submits that as the Province of BC and the BCUC are required to align this proceeding with DRIPA and the UNDRIP in order to obtain the free, prior and informed consent of PIB before issuing certificates of public convenience and necessity for project, the BCUC process must respect PIB's intention to deliver its oral evidence on a confidential basis.<sup>5</sup>

FEI does not agree with the articulation of the legal basis asserted by the PIB for the request. However, FEI takes no position on the PIB's request for the presentation of its oral evidence confidentially given that FEI will be permitted to attend the hearing.<sup>6</sup>

BC Sustainable Energy Association (BCSEA) does not oppose PIB delivering its oral evidence confidentially in relation to BCSEA. To the extent that some portion of PIB's oral evidence is outside the scope of the BCUC's confidentiality decision vis-à-vis BCSEA, BCSEA requests that it be provided an opportunity to test such evidence or, in the alternative, that the BCUC assess the weight of such evidence bearing in mind that BCSEA has not had an opportunity to test it.<sup>7</sup>

The Commercial Energy Consumers of BC (CEC) does not take issue with the PIB request for confidentiality of its oral evidence given the broad concerns raised by PIB, and expansive requests for evidence to not be tested by interveners which go well beyond what is typically considered by the BCUC in CPCN applications. The CEC will take a position in final argument on what weight should be given to the evidence deemed confidential given it has not had access to the materials when a better understanding is available as to what costs are potentially arising as a result of PIB positions. The CEC submits it may be appropriate to allow reply to other parties' final submissions, as it is not known what submissions will be made by PIB on evidence interveners will not have seen.<sup>8</sup>

British Columbia Old Age Pensioners' Organization et al. (BCOAPO) is not able to take a position on the specific basis upon which PIB's application for its oral evidence to be heard *in camera* has been made. However, BCOAPO notes the CEC's submission offers a possible albeit imperfect roadmap for interveners.<sup>9</sup>

In reply to FEI, PIB submits FEI provides no explanation for its position. PIB provides several reasons for its oral evidence to be kept confidential. PIB submits the disclosure of Indigenous Knowledge can lead to real physical

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<sup>4</sup> Exhibit C5-13, p. 2.

<sup>5</sup> Ibid.

<sup>6</sup> Exhibit B-30, p. 1.

<sup>7</sup> Exhibit C1-9, p. 1.

<sup>8</sup> Exhibit C4-12, p. 1.

<sup>9</sup> Exhibit C3-6, p. 1.

harm to PIB's rights and title, including competition for resources and use and abuse of PIB's culturally important areas. Additionally, PIB submits that keeping Indigenous Knowledge confidential on a *prima facie* basis is just standard practice in recognition of its sensitive and culturally important nature. PIB states the BCUC has no basis to depart from this established standard practice in regulatory decision-making and its own rules should be updated to reflect the practice. PIB further notes Indigenous Knowledge is PIB's intellectual property and as such, PIB has the right to control the use and dissemination of such information as recognized by Article 31 of UNDRIP, and affirmed by DRIPA.<sup>10</sup>

In reply to the CEC, PIB supports the proposal to allow parties to submit reply arguments to address positions that may impact their interests, and asks the BCUC to revise the regulatory timetable accordingly.

In reply to BCSEA, PIB notes the existing schedule set out in Order G-275-21 provides a deadline to ask PIB information requests on the oral evidence, should the BCUC not respect PIB's intention to keep its oral evidence confidential.<sup>11</sup>

### *Panel Determination*

#### **The Written Confidential Evidence will be held confidential by the BCUC.**

Rule 20.01 of the BCUC's Rules of Practice and Procedure (Rules) states that the BCUC will "have regard to matters that it considers relevant" when determining whether information shall be held confidentially.

In the Panel's view, the Written Confidential Evidence contains sensitive information which might reveal the location of culturally sensitive sites and expose them to land use competition, vandalism, trespass and general disrespect. We consider this to be a relevant consideration for the purposes of Rule 20.01 and find that it is appropriate to maintain the confidentiality of the Written Confidential Evidence to protect the culturally sensitive sites identified therein. Pursuant to rule 20.01(c) we find that the PIB's interest in confidentiality outweighs the public interest in disclosure of the Written Confidential Information.

The Panel's determination that the Written Confidential Evidence will be held confidential is consistent with two specific reasons for maintaining confidentiality of evidence set out in the Rules, namely Rule 20.01(a) (iii) which refers to "harm to individual or public safety or to the environment" and Rule 20.01(b) which refers to information that is personal and "confidential and consistently treated as confidential by the person".

The Panel notes that holding the Written Confidential Evidence confidential is not inconsistent with section 31 of UNDRIP, which states that Indigenous people "have the right to maintain, control, protect and developed their intellectual property over...cultural heritage, traditional knowledge, and traditional cultural expressions."

The Panel also notes that neither FEI nor interveners object to the Written Confidential Evidence being held confidential.

#### **FEI is granted access to the Written Confidential Evidence.**

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<sup>10</sup> Exhibit C5-20, p. 2.

<sup>11</sup> Ibid., p. 4.

Pursuant to Rule 24 of the Rules, it is the BCUC's decision whether to grant parties in the proceeding access to confidential material, after considering the views of the party submitting the confidential material and / or any party affected by its disclosure.

As PIB states<sup>12</sup> it has already provided the Written Confidential Evidence to FEI and that FEI has agreed to maintain the confidentiality of the Written Confidential Evidence, the Panel is satisfied that granting FEI access to the Written Confidential Evidence is appropriate.

**The Oral Hearing will be held *in camera*.**

The Oral Confidential Evidence is expected to consist of the same Indigenous Knowledge included in the Written Confidential Evidence.

For the same reasons as the Panel determined above that the Written Confidential Evidence will be held confidential, the Panel determines that the Oral Hearing will be held *in camera* to avoid compromising the quality of the oral evidence by requiring the witnesses to be vigilant over concerns of disseminating their confidential Indigenous Knowledge.

However, the Panel rejects PIB's request of November 1, 2021 that interveners be excluded from the *in camera* oral hearing for the same reasons as the Panel provided in Order G-262-21, wherein the Panel determined that all participants in the proceeding, including FEI and interveners, may ask questions of PIB's presenters of oral evidence and test the oral evidence by written IRs to PIB to follow.<sup>13</sup>

Notwithstanding the determination that the Oral Hearing will be held *in camera*, as set out in Rule 17.01 the BCUC strives make proceedings as transparent as possible by making evidence publicly available unless there are compelling reasons to the contrary. Therefore, while the transcript from the Oral Hearing will be held confidential, following the oral hearing the Panel will seek PIB's submission on what information, if any, from the transcript may be made publicly available without encountering the risk of harm already noted.

**FEI is granted access to the Oral Hearing and to the unredacted confidential transcript from the Oral Hearing.**

As noted above, pursuant to Rule 24 of the Rules, it is the BCUC's decision whether to grant parties in the proceeding access to confidential material, after considering the views of the party submitting the confidential material and / or any party affected by its disclosure.

As PIB states<sup>14</sup> that it accepts FEI's attendance at the *in camera* oral hearing, the Panel is satisfied that granting FEI access to the Oral Confidential Evidence is appropriate, including the unredacted confidential transcript from the oral hearing.

**Other matters arising / intervener access to confidential evidence**

The CEC raises a concern about evidence to which it has not had access during the proceeding, and submits it will take a position in final argument on the weight the Panel should give to such evidence. The CEC further

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<sup>12</sup> Exhibit C5-9, cover letter, pp. 2 – 3,

<sup>13</sup> Order G-262-21 dated September 7, 2021, p. 5,

<sup>14</sup> Exhibit C5-13, p. 2.

submits that it may be appropriate to allow reply to other parties' final submissions, as it is not known what submissions will be made by PIB on evidence interveners will not have seen.<sup>15</sup>

The Panel previously determined<sup>16</sup> that all participants in the proceeding, including FEI and interveners, may ask questions of PIB's presenters of oral evidence and test the oral evidence by written IRs to PIB to follow. The Panel further explained<sup>17</sup> the process set out in the Rules by which interveners may request access to confidential evidence, and PIB may object to such access being granted.

As no requests by interveners for access to any of the confidential evidence have been declined, it is premature to conclude that any intervener will not have access to the confidential evidence. For this reason, the Panel declines at this time to consider the CEC's suggestion to allow interveners to reply to other parties' final submissions.

**DATED** at the City of Vancouver, in the Province of British Columbia, this                      1<sup>st</sup>                      day of December 2021.

Original signed by:  
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R. I. Mason  
Panel Chair/Commissioner

Original signed by:  
\_\_\_\_\_  
D. A. Cote  
Commissioner

Original signed by:  
\_\_\_\_\_  
A. K. Fung, QC  
Commissioner

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<sup>15</sup> Exhibit C4-12, p. 1.

<sup>16</sup> Order G-262-21 dated September 7, 2021, p. 5.

<sup>17</sup> Exhibit A-21, cover letter to Order G-334-21, dated November 17, 2021.