

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-83-09**

TELEPHONE: (604) 660-4700
BC TOLL FREE: 1-800-663-1385
FACSIMILE: (604) 660-1102

SIXTH FLOOR, 900 HOWE STREET, BOX 250
VANCOUVER, B.C. V6Z 2N3 CANADA
web site: <http://www.b cuc.com>



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

and

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

BEFORE: A.J. Pullman, Commissioner

June 30, 2009

O R D E R

WHEREAS:

- A. On November 5, 2007 the British Columbia Transmission Corporation ("BCTC") applied pursuant to sections 45 and 46 of the *Utilities Commission Act* (the "Act") for a Certificate of Public Convenience and Necessity ("CPCN") for the Interior to Lower Mainland ("ILM") Transmission Project (the "ILM Project"); and
- B. On August 5, 2008 the British Columbia Utilities Commission ("Commission") issued its Decision accompanied by Order C-4-08 that granted BCTC the CPCN for the ILM Project subject to conditions; and
- C. The Court of Appeal for British Columbia released its decision in *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 on February 18, 2009. Madam Justice Huddart, on behalf of the Court, stated at paragraph 15:

"I would remit the scoping decision to the Commission for reconsideration in accordance with this Court's opinion, once certified, and direct that the effect of the CPCN be suspended for the purpose of determining whether the Crown's duty to consult and accommodate the Appellants had been met up to that decision point"; and
- D. On March 23, 2009 the Commission issued Letter L-20-09 that sought submissions from the parties on a number of issues before scheduling a Procedural Conference. Submissions were received from BCTC and Intervenor; and
- E. On April 7, 2009 the Commission issued a letter that scheduled a Procedural Conference on April 15, 2009; and
- F. After the Procedural Conference the Commission by Order G-38-09 issued a Regulatory Timetable that included BCTC and British Columbia Hydro and Power Authority ("BC Hydro") tendering evidence and providing Submissions on its admissibility, Intervenor Submissions on the evidence, and BCTC and BC Hydro Reply Submissions; and

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- G. BCTC filed on May 25, 2009 its supplemental evidence on Aboriginal Consultation, its submission on admissibility of supplemental evidence on the adequacy of Crown consultation and accommodation, and Brief of Authorities. BC Hydro on May 22, 2009 submitted its submission on the admissibility of the supplemental evidence on Aboriginal consultation; and
- H. The Commission by Letter L-35-09 issued a Revised Regulatory Timetable extending the timeline; and
- I. Intervenor submissions were received from Hwlitsum First Nation ("Hwlitsum"); British Columbia Old Age Pensioners Organization *et al.* ("BCOAPO"); Kwikwetlem First Nation ("Kwikwetlem"); Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance and the Upper Nicola Indian Band (collectively, "NNTC"); Coldwater, Cook's Ferry, Ashcroft, and Siska Indian Bands ("Nlaka'pamax Bands"); Sto:lo Tribal Council ("STC"); and the Province of British Columbia; and
- J. On June 19, 2009 BCTC and BC Hydro filed their Reply Submissions on the admissibility of supplemental evidence; and
- K. The Commission in a letter dated June 23, 2009 determined that an Oral Phase of Argument for Thursday, June 25, 2009 was not required and therefore cancelled the tentative phase of Oral Argument; and
- L. On June 25, 2009 counsel for Kwikwetlem wrote to the Commission asking how the Commission proposes to deal with the outstanding matters on advance funding (interim award) for First Nation intervenors, scheduling for submission of First Nation evidence and information requests, and scheduling for a hearing including length of hearing that will be required. Hwlitsum and NNTC in their letters noted similar issues they would like addressed; and
- M. The Commission has considered the submissions on the admissibility of supplemental evidence on Aboriginal Consultation.

NOW THEREFORE the Commission orders with Reasons for Decision attached as Appendix A to this Order that:

- 1. The Commission Panel determines that it will consider Supplemental Evidence existing up to August 5, 2008.
- 2. The Commission Panel determines Appendix OO is admissible.
- 3. The Commission Panel has determined that it will consider evidence existing up to August 5, 2008, and the archaeological impact assessment report contained in Appendix JJ is admissible for the limited purpose of showing the consultation and accommodation efforts undertaken up to August 5, 2008. BCTC is directed to redact the report to eliminate or otherwise identify those portions of the report which reflect work undertaken after August 5, 2008. BCTC is to comply with this directive by July 9, 2009.
- 4. The Commission Panel determines that those comments in Appendix NN that were received by August 5, 2008 are admissible but those which post-date August 5, 2008 are inadmissible.

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5. Intervenors intending to apply for participant assistance must submit a budget estimate by July 9, 2009, consistent with the Commission's Participant Assistance/Cost Award Guidelines ("Guidelines") and Order No. G-72-07. Copies are available upon request or can be downloaded from the Commission's web site at <http://www.bcuc.com>. In accordance with the Guidelines, participants applying for an Interim Award should explain in detail the reimbursement request and provide justification for an accelerated approval process. The Commission will address requests, if any, for Interim Awards after they are submitted.
6. The next Procedural Conference is scheduled for August 6, 2009 commencing at 9:00 a.m. in the Commission Hearing Room on the 12th Floor, 1125 Howe Street, Vancouver, B.C. The Procedural Conference will address scheduling for Intervenor Evidence and Information Requests; further review process through a written or oral hearing or other process; scheduling of that further review process; and any other issues that may arise.
7. The Revised Regulatory Timetable is attached to this Order as Appendix B. The timetable sets out the deadlines for information requests on the Supplemental Evidence. It also includes tentative dates for Intervenor Evidence, information requests, and responses.

DATED at the City of Vancouver, in the Province of British Columbia, this 30th day of June 2009.

BY ORDER

Original signed by:

A.J. Pullman
Commissioner

Attachment

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

REASONS FOR DECISION

1.0 Introduction

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

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

A procedural conference was held on April 15, 2009. One of the issues addressed at the procedural conference was whether BCTC or BC Hydro should be able to file additional evidence on consultation and accommodation efforts to supplement the evidentiary record or whether the Commission Panel should review only the evidence previously filed in the proceeding leading to the granting of a Certificate of Public Convenience and Necessity ("CPCN") to BCTC for the Interior to Lower Mainland Transmission Project (the "ILM Project").

By Order G-38-09 dated April 17, 2009 the Commission Panel directed British Columbia Transmission Corporation ("BCTC") and British Columbia Hydro and Power Authority ("BC Hydro") to tender additional evidence on consultation and accommodation of First Nations related to the ILM Project together with a submission setting out why the Commission should accept it. Intervenor other than BC Hydro were invited to provide submissions in response to the submissions of BCTC and BC Hydro. BCTC and BC Hydro were invited to file reply submissions to the submissions of Intervenor.

BCTC filed its Supplemental Evidence on Aboriginal Consultation (the "Supplemental Evidence") on May 25, 2009 (Exhibit B-3-1). BCTC also filed its submission on the admissibility of the Supplemental Evidence on May 25, 2009 (Exhibit B-3-2) and on the same date filed a copy of the Consultation Log, forming part of the Supplemental Evidence, on a confidential basis (Exhibit B-4). BC Hydro filed its submission on the admissibility of the Supplemental Evidence on May 22, 2009 (Exhibit C3-3).

The Commission received Intervenor submissions from the Hwlitsum First Nation (the "Hwlitsum") (Exhibit C1-4), British Columbia Old Age Pensioners' Organization et al. (the "BCOAPO") (Exhibit C2-3), the Kwikwetlem First Nation (the "Kwikwetlem") (Exhibit C4-2), the Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance and Upper Nicola Indian Band (collectively the "NNTC") (Exhibit C5-2), the Coldwater, Cook's Ferry, Ashcroft and Siska First Nations (collectively the "Nlaka'pamux Bands") (Exhibit C6-2), the Sto:lo Tribal Council (the "STC") (Exhibit C8-3) and the Province of British Columbia (the "Province") (Exhibit C11-2).

Reply submissions from BCTC (Exhibit B-6) and BC Hydro (Exhibit C3-5) were filed on June 19, 2009.

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

2.0 BCTC and BC Hydro Submissions

BCTC submits section 40(1) of the Administrative Tribunals Act, S.B.C. 2004 (the “ATA”) allows the Commission to receive and accept any information that is “relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.” BCTC submits the provisions contained in section 40(1) of the ATA are a codification of the common law rule described in *Board of Education v. Rice*, [1911] A.C. 179 (H.L.) and *Cambie Hotel (Nanaimo) Ltd. v. B.C. (General Manager, Liquor Control and Licensing Branch)*, 2006 BCCA 119. Further, BCTC submits section 11(1) of the ATA gives the Commission the power to control its own processes. Therefore, BCTC submits the Commission has a broad discretion to receive and accept information it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.

BCTC submits the Supplemental Evidence is relevant. BCTC references the comments of McLachlan J. (as she then was) in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 609 where she stated:

It is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues. This goal is reflected in the basic tenet of relevance which underlies all our rules of evidence: see *Morris v. The Queen*, [1983] 2 S.C.R. 190, and *R. v. Corbett*, [1988] 1 S.C.R. 670. In general, nothing is to be received which is not logically probative of some matter requiring to be proved and everything which is probative should be received, unless its exclusion can be justified on some other ground.

BCTC relies on the description of relevance endorsed in *R. v. Korol*, 2009 BCCA 118, at para. 34:

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

BCTC submits that the issue before the Commission that determines the scope of relevant evidence is in summary the adequacy of the Crown’s consultation and accommodation efforts up to the point of the Commission’s decision to award a CPCN for the ILM Project. BCTC submits that the Supplemental Evidence is generally directed at:

- (a) Consultation with First Nations regarding the “consideration of alternatives to the ILM Project as a solution to the lower mainland’s anticipated energy shortage” (i.e., the Appellants’ “essential complaint” as found by the Court of Appeal);

- (b) Consultation with First Nations regarding the issues raised by First Nations with respect to the identification and preliminary assessment of any effects by the Project on the physical, biological, and social environments; and proposals for reducing negative effects and obtaining the maximum benefits from positive effects, as identified in section 2(iv) of the Commission's CPCN Guidelines; and
- (c) General evidence of the consultation and accommodation efforts with First Nations that were underway up to the point of the Commission's Decision.

BCTC also submits that the Supplemental Evidence meets the test of necessity. BCTC submits that "necessary" is defined in the Oxford English Dictionary as that which is required for a given situation. If the Commission does not admit the Supplemental Evidence, it will be deprived of the vast majority of evidence related to efforts of consultation and accommodation during the relevant time period which in itself may be a breach of the rules of natural justice.

BCTC submits that the final requirement of section 40(1) of the ATA is that the Supplemental Evidence is appropriate. That requirement is primarily concerned with procedural fairness and whether the Supplemental Evidence will have a prejudicial effect on any of the parties. Amongst other things, BCTC submits that receipt of the Supplemental Evidence will have no impact on procedural fairness as all Intervenors will be provided with an opportunity to test and respond to the Supplemental Evidence.

BC Hydro submits the Commission has the power to and should allow admission of the Supplemental Evidence. BC Hydro notes it relied on past Commission decisions where the Commission declined to assess the adequacy of Crown consultation and accommodation efforts for guidance when filing summary evidence of consultation with First Nations at the original CPCN hearing. It also relied on the Scoping Decision that held the Commission would not make any determinations with respect to the adequacy of consultation and accommodation efforts and therefore BCTC and BC Hydro were not called upon to file any further evidence.

BC Hydro places reliance on the same provisions of the ATA as are referred to by BCTC. It also references section 46(1) of the *Utilities Commission Act* which provides that an applicant for a CPCN must file information that the Commission prescribes and the CPCN Guidelines issued by the Commission in March 2004 which provides that applicants will generally be required to provide further information to supplement the material in filed applications.

BC Hydro submits the Supplemental Evidence is clearly relevant as it canvases the scope and content of the consultation and accommodation that has taken place with First Nations on the ILM Project generally and the selection of the 5L83 Alternative over the UEC Alternative in particular.

BC Hydro also submits the Supplemental Evidence is necessary as without it the Commission would not have a clear picture of the consultation process and would not, therefore, be able to accurately assess the adequacy of the Crown's consultation efforts up to the point of the Commission's Decision.

Finally, BC Hydro submits the admission of the Supplemental Evidence is also appropriate. If the Commission is to make a determination on the merits, it must have before it the best available evidence of those consultation efforts. BC Hydro submits the Intervenor will suffer no prejudice by the admission of the Supplemental Evidence. Parties will have the opportunity to test the evidence and to submit evidence relevant to the issue before the Commission.

3.0 Intervenor Submissions

3.1 British Columbia Old Age Pensioners' Organization

BCOAPO submits BCTC and BC Hydro have correctly described the current state of the law and policy in regards to the Commission's discretionary powers to receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The evidentiary discretion is equally available whether the Commission is hearing a matter upon reconsideration or in the first instance. BCOAPO asks the Commission to accept the Supplemental Evidence on the record. It submits the evidence is relevant as it more fully outlines the consultation and accommodation process that has taken place. The information is necessary to ensure the final decision in this matter is made with the best and fullest evidentiary basis possible. BCOAPO does not see any prejudice to Intervenor which would result provided an adequate discovery process is set and Intervenor are given the opportunity to file their own evidence.

3.2 Province of British Columbia

The Province supports the position of BCTC and BC Hydro. The Province submits the Commission has the power to allow additional evidence and should admit it on the basis that it is relevant, necessary and appropriate for the purpose of the Commission determining whether the Crown's constitutional duty has been met up to the Commission's decision point. The Province submits that a failure to consider the Supplemental Evidence would clearly impact on the fairness of the proceeding.

3.3 Hwlitsum First Nation

The Hwlitsum submits the power of the Commission to admit the Supplemental Evidence is confirmed by a review of the Commission's guidelines and practice, statutory provisions and case law. The Hwlitsum also submits the Commission should admit the Supplemental Evidence. However, the Hwlitsum submits the Commission should give little if any weight to evidence of BCTC and BC Hydro's consultation and accommodation that occurred after March 11, 2008 as it would be

prejudiced. March 11, 2008 is the date of BCTC's Reply Submission to the request of Kwikwetlem to suspend the hearing process. After March 11, 2008 the Hwlitsum participated in the process of the British Columbia Environmental Assessment Office ("BCEAO") on the understanding and with the assurance that the BCEAO process was separate and distinct from the Commission process, and further that participation by the Hwlitsum in the BCEAO process would not adversely affect the Commission process.

3.4 Kwikwetlem First Nation

The Kwikwetlem submits it does not contest the jurisdiction of the Commission to determine its own procedure and to make rulings in respect of admission of evidence. However, evidence should not be admitted (and the Kwikwetlem should not have to expend the effort to respond to such evidence) unless the evidence is both properly admissible in law and necessary and relevant to the issue to be determined. The Kwikwetlem cautions the Commission that it ought to ensure that the nature of the hearing and the nature of the issue or issues to be determined are carefully framed to correspond with the issue as identified by the Court of Appeal. Further, the Commission should be cognizant of the basis upon which the Court of Appeal's decision was made, including the submissions made by BCTC as a Respondent in the Court of Appeal.

The Kwikwetlem submits that in the Court of Appeal BCTC asserted the evidence on the record before the Commission at the original CPCN hearing established that there had been consultation which the Appellants disputed on the basis that the Commission had wrongfully refused to hear evidence from the First Nations. Kwikwetlem submits that but for this evidentiary dispute, the Court of Appeal would have been able to determine the consultation question based on the record, and could have ordered the CPCN to be rescinded. If BCTC and BC Hydro had not wrongly claimed that such evidence was before the Commission, the Court of Appeal would have been entitled to overturn the CPCN rather than returning this to the Commission for reconsideration. Given that this is a reconsideration, it should be done based on the evidence from BCTC that was before the Commission at the Commission's decision point with the addition only of evidence that would have been produced by the Intervenors but for the incorrect scoping decision.

The Kwikwetlem submits that if additional evidence is to be allowed, the Commission should only do so if it is shown to be clearly relevant to the issue upon which the Court of Appeal directed reconsideration. In this regard, the Kwikwetlem notes the Court of Appeal did not determine that the role of the Commission was to determine the adequacy of consultation generally, or for all purposes. A review of the Supplemental Evidence shows that BCTC wishes to put forward evidence of consultation processes directed not at the CPCN decision or choice of options but is explicitly focused on the Environmental Assessment ("EA") decision. The honour of the Crown would be brought into question because BCTC advised the Commission in December 2007 and February 2008 that it had not consulted on the CPCN decision and was not required to do so. Further, BCTC explicitly advised First Nations in January 2008 that any consultation obligations thereafter would be focused on the EA decision. For BCTC to now take the position that evidence from the EA Office ("EAO") process could also

support the CPCN decision would mean a declaration by BCTC that it had misled the First Nations (and the Commission) but nevertheless wished to take advantage of the process.

Further, Kwikwetlem submits in the absence of any evidence linking the EAO processes to the CPCN decision, the Supplemental Evidence is simply not relevant. In this regard, Kwikwetlem notes that BCTC claims the Supplemental Evidence is generally directed at general evidence of the consultation and accommodation efforts with First Nations that were underway up to the point of the Commission's Decision. The Commission's jurisdiction to consider consultation and accommodation efforts arises in respect of the Commission's CPCN decision and any prior decisions by BCTC (i.e. the choice of options) that are inherent in that decision and not the adequacy of efforts in some later decision by another agency.

The Kwikwetlem submits that if the Commission is prepared to accept evidence from BCTC that goes to consultation generally, and in particular the EA certificate, then it must weigh as relevant a much wider body of evidence. If the Commission is required to consider the reasonableness of those other processes, then the Commission is required to consider the reasonableness of the Crown's and BCTC's responses to the issues raised in those processes, and therefore the legitimacy of the EAO decision.

The Kwikwetlem submits there are seven possible key dates for determining the relevance and admissibility of the Supplemental Evidence. The first date is May 2007 when BCTC made a decision on the preferred option it chose to put forward to the Commission (the "Options Decision"). The next date is November 8, 2007 when it filed its CPCN application. The next date is December 20, 2007 when BCTC advised the Commission that BCTC does not accept the duty to consult in respect of the CPCN. Another date is January 9, 2008 when BCTC and BC Hydro advised First Nations by letter that they did not consider that consultation and accommodation efforts had been completed for the ILM Project and that further consultation would be through the EA process and other initiatives (not BCUC). Another date is either February 21, 2008 when the Commission ruled consultation was not relevant or February 29, 2008 when Kwikwetlem filed for Leave to Appeal in the Court of Appeal. Another possible date is March 2008 when the evidentiary phase of the CPCN was closed and BC Hydro advised First Nations that future consultations will be for the purpose of the EA process. The final date is the date of the Commission's decision on August 5, 2008.

Kwikwetlem acknowledges that evidence arising prior to the date of the CPCN application in November 2007 might have a logical probative value for consultation processes at earlier times even where not specifically in relation to the CPCN because the other processes had a dual role or that BCTC incorporated accommodations arising from consultations into the CPCN application. However, BCTC has not made such an assertion. In any event, given that there were no changes to the Application from the time it was filed until the Commission's formal decision in August 2008, there can be no assertion that any consultations between November 2007 and August 2008 were in relation to the CPCN application.

Kwikwetlem submits the failure of relevance is more compelling after December 20, 2007 when BCTC advised the Commission it would not be consulting on the CPCN and after January 9, 2008 when BCTC advised First Nations that it would be consulting through the EA process and not through the CPCN. With regard to the February 2008 dates, no argument can be made that meetings conducted after the Commission ruled on the consultation issue were for the purpose of the CPCN application and certainly not for the Kwikwetlem after February 29, 2008 when Kwikwetlem filed its Leave to Appeal and ceased to participate in the CPCN process. Further, no relevance can be established for meetings and events which took place after the close of the evidentiary record in the CPCN process.

In summary, Kwikwetlem submits the Commission should not admit evidence arising after the date of filing of the CPCN application and no new evidence prior to that date should be accepted unless BCTC can establish relevance to consultation and accommodation for the CPCN decision.

In considering whether to admit evidence, Kwikwetlem submits that the Commission must assess whether the consultation process had been completed and appropriate accommodation implemented in relation to the CPCN application and decision. At the latest, the consultation and accommodation process had to be complete by May 2007 in respect of the choice of options or by November 2007, the time of filing of the Application.

3.5 Nlaka'pamux Bands

The Nlaka'pamux Bands submit that before the evidence can be accepted by the Commission, BCTC must establish the relevance of the evidence to the issue which the Court of Appeal has directed the Commission to reconsider, namely the adequacy of consultation and accommodation in respect of issues relevant to the section 45 [CPCN] proceeding.

Specifically, Nlaka'pamux Bands object to the admissibility of:

- (a) evidence of consultation concerning the EA certificate; and
- (b) evidence concerning consultation:
 - (i) after the May 2007 Options Decision; or
 - (ii) in the alternative after the November 5, 2007 CPCN application; or
 - (iii) in the further alternative after the August 5, 2008 CPCN decision;

without BCTC establishing an interplay based on the evidence between that evidence and issues relevant to the CPCN process.

The Nlaka'pamux Bands submit, with the potential exception of some evidence that pre-dates the Options Decision made in May 2007, the evidence tendered by BCTC does not explain its relevancy to the issues that are relevant in the CPCN process and is therefore objectionable.

With regard to the EA certificate evidence, Nlaka'pamux Bands notes the different mandates of the EA certificate process and the CPCN process. Nlaka'pamux Bands submit that if BCTC seeks to rely on evidence of consultation in the EA certificate process, it must be apparent on the evidence that it also relates to issues relevant to the CPCN process. Without meeting this threshold requirement, the evidence is prima facie irrelevant and inadmissible as it relates to the CPCN process. The Nlaka'pamux Bands submit that the relevancy link is not apparent on the face of the evidence.

The Nlaka'pamux Bands submit it is incumbent upon BCTC to explain the relevance of the EA certificate evidence to the CPCN process in light of BCTC's letter of January 9, 2009 to First Nations wherein BCTC stated that BCTC and BC Hydro did not consider that consultation and accommodation with First Nations had been completed for the ILM Project and both remained committed to working with First Nations through the EA process and through separate initiatives.

The Nlaka'pamux Bands also submit that reliance on evidence in the EA process may, and likely will, open up the adequacy of consultation and accommodation in that process to consideration in the present process. If the hearing on the adequacy of consultation on the CPCN is to incorporate consultation in the EA or any other process, that hearing can only be fair if all the evidence of consultation in the EA process is considered by the Commission.

With regard to evidence arising after the Options Decision, the Nlaka'pamux Bands submit that BCTC has not provided a basis for the relevance of evidence of consultation after the May 2007 decision to select the 5L83 option over other options under consideration to that point. That decision, which was communicated to First Nations in June 2007, effectively ended consultation on the Options Decision. After that point in time, BCTC was not consulting about options. Rather, the focus of BCTC was on the EA process and not issues related to the section 45 proceeding.

With regard to evidence relating to consultation efforts after the date of filing the CPCN application in November 2007, the Nlaka'pamux Bands submit that evidence is not prima facie relevant to issues related to the CPCN proceeding. By that date, both BCTC and BC Hydro had not only long since settled on the 5L83 option, but BCTC had also built its case in favour of that option to the preparation and filing of evidence in support of the CPCN application. The Nlaka'pamux Bands submit that BCTC could not reasonably be expected to have kept an open mind to substantive aboriginal concerns regarding the option or CPCN issues. Rather, BCTC had locked itself into the 5L83 option and could not reasonably have kept an open mind to significant changes to its proposed action based on information obtained through consultation.

The Nlaka'pamux Bands also object to the introduction of evidence related to consultation after the CPCN decision was made. Specifically, BCTC seeks to introduce an archaeological impact assessment dated November 10, 2008 – more than a year after the CPCN application was made and more than three months after the CPCN decision. The Nlaka'pamux Bands refer to s. 2.23 of BCTC's Supplemental Evidence which states:

On June 19, 2008 First Nations were sent hard copies of the drafts of 17 of 18 discipline-specific technical reports that were prepared for the Environmental Assessment process. The 18th report was the Archaeological Impact Assessment report attached hereto as Appendix JJ.

BCTC has not tendered the 17 reports that were delivered in June 2008. However, it attached the 18th report that was not delivered until after the CPCN decision.

The Nlaka'pamux Bands submit that apart from being evidence in respect of the EA process, the Archaeological Impact Assessment, on its face, cannot be relevant to whether the Crown's duty of consultation and accommodation has been met up to the point of the CPCN decision.

Further, the Nlaka'pamux Bands submit that by tendering evidence of some post-CPCN evidence, then potentially all post-CPCN evidence is relevant and admissible. Furthermore, like the evidence concerning the EA process, bits and pieces of post-CPCN evidence is not helpful to deciding the issue of consultation without looking at the full context of that evidence.

3.6 Nlaka'pamux Nation Tribal Council

The NNTC agree with the submissions of the Nlaka'pamux Bands that BCTC has failed to meet the onus on it to demonstrate the relevancy of the Supplemental Evidence. In specific reference to what evidence from the EA process may be adduced as part of a CPCN consideration, the NNTC submits the Court of Appeal recognized that information gathered at the pre-application stage of the EAC process may be relevant to the CPCN hearing. The NNTC submit that the Court of Appeal's direction to the Commission was that evidence that post-dates August 5, 2008 is not relevant; that evidence must relate to the issues which form part of a CPCN proceeding; and that evidence from the EA process may be, but is not necessarily relevant to a CPCN consideration.

The NNTC submit that Appendices JJ, NN and OO of BCTC's Supplemental Evidence post-date August 5, 2008 and therefore are inadmissible. Further, the NNTC submit that BCTC has failed to meet its onus to demonstrate that the remaining Supplemental Evidence is relevant to a CPCN proceeding.

3.7 Sto:lo Tribal Council

The STC submits the Supplemental Evidence should not be accepted to augment BCTC's evidence on First Nations consultation in the original CPCN application or, in the alternative, if accepted, then it should only be accepted up to the

decision of BCTC to file its application for a CPCN on November 5, 2007. In the further alternative, if the Supplemental Evidence is accepted, then the Supplemental Evidence should only be admitted up to the point of the Commission's Decision in August, 2008.

The STC acknowledges the ATA allows the Commission to receive any information that is relevant, necessary and appropriate whether or not the information would be admissible in a court of law. However, the STC submits the Supplemental Evidence should not be admissible as it is not relevant, necessary and appropriate and the onus of relevance rests with BCTC.

STC submits the crucial question as directed by the Court of Appeal is "whether conduct that may result in adverse effects on Aboriginal rights or title will be considered during the CPCN process and not during the EAC process," and that such "adverse impacts" are cumulative in nature and STC should be allowed to introduce supplementary evidence on the adverse impacts of prior hydro transmission lines in STC's traditional territory, and whether the Crown has complied with its consultation and accommodation, constitutional obligations as part of this crucial question.

Finally, STC further submits any supplementary evidence that is admitted should meet the standards at the higher end of the spectrum respecting the constitutional duty to consult and accommodate the aboriginal rights and titles of STC.

4.0 BCTC and BC Hydro Reply Submissions

BCTC's reply submission notes that each of the Intervenors has either expressly or implicitly agreed that the Commission has the power to accept the Supplemental Evidence. However, BCTC notes the submission from Kwikwetlem that the Supplemental Evidence must be "properly admissible in law." BCTC submits although it is not clear whether this is an attempt to narrow the Commission's jurisdiction to only accept evidence that would be admitted in court proceedings, to the extent that submission is being made, it is inconsistent with the provisions of the ATA and the jurisprudence on the power of administrative tribunals to accept evidence.

BCTC states Kwikwetlem appears to submit that regardless of whether the Supplemental Evidence meets the test in the ATA, BCTC should not be allowed to file any further evidence on the adequacy of consultation and accommodation with First Nations.

BCTC states Kwikwetlem's submission is founded on a variety of propositions:

- (1) This is a "reconsideration" of a CPCN that is already been granted;
- (2) that BCTC took the position before the Court of Appeal that its evidence on consultation was adequate for the Commission to assess the adequacy of consultation and accommodation; and

(3) it was upon this evidence that the Commission sought fit to grant the CPCN.

Therefore, BCTC states on the basis of these underlying propositions, Kwikwetlem submits that it would be a deep injustice to allow BCTC to resile from the position it took in the Court of Appeal that there was adequate evidence of consultation before the Commission.

BCTC submits this is not a “reconsideration” as that term is normally used under section 99 of the UCA. Rather, the Court of Appeal directed the Commission to reconsider its Scoping Decision and directed the Commission to consider the adequacy of Crown consultation and accommodation up to the point of its CPCN decision. The Court of Appeal did not place any restrictions on the Commission on how to undertake this task.

BCTC submits that even if this process is considered similar to a reconsideration under section 99 of the UCA, the Commission has the power to admit supplementary evidence on a reconsideration and should do so.

BCTC also disputes Kwikwetlem’s submission that BCTC took the position before the Court of Appeal that the evidence before the Commission was sufficient for the Commission to consider the adequacy of consultation. BCTC states the ILM CPCN application was expressly based on the Commission’s earlier decisions that when an adequate alternative process exists for assessing the adequacy of Crown consultation, the Commission was not required to conduct a separate assessment of the Crown’s consultation efforts. Accordingly, BCTC’s consultation evidence and its CPCN application was solely directed at showing that consultation was underway and that an adequate alternative process exists for assessing the adequacy of this consultation – as required by the Commission in previous proceedings. Accordingly, contrary to Kwikwetlem’s submissions, BCTC did not attempt to file the whole of the evidence on consultation and accommodation and that at no time did BCTC or BC Hydro suggest that they had submitted all of the evidence that they would rely on if the Commission itself were required to conduct a separate assessment of the adequacy of consultation and accommodation.

BCTC further submits it is not correct to suggest the Commission based its CPCN Decision on BCTC’s previously–filed evidence. To the contrary, the Commission determined the adequacy of consultation and accommodation to be beyond the scope of the CPCN hearing; accordingly, it was not necessary for the Commission to consider the evidence which was filed on consultation as part of its determinations.

BCTC also submits with regard to the First Nations Intervenor submissions which, with the exception of the Hwlitsum, object to the whole or portions of the Supplemental Evidence on the basis that BCTC has not established the relevance of the Supplemental Evidence to the issues which the Court of Appeal has directed the Commission to consider, the general basis for the positions appears to be that BCTC and BC Hydro’s consultation efforts were directed at the EA process and not the CPCN process. Therefore, consultation on the former cannot satisfy the requirements for consultation on the latter, or at least needs to be explained.

BCTC submits that contrary to the Nlaka'pamux Bands and Kwikwetlem submissions, it is not correct to say that there were two separate consultation processes associated with the ILM Project for each of the EA and CPCN or, alternatively, only one consultation process solely focused on the EA process. Rather, there has only been one overall consultation process associated with the ILM Project as a whole. BCTC submits that while BCTC and BC Hydro attempted to link their consultation efforts where appropriate with the BCEAO process, this does not mean that consultation was solely undertaken for the purpose of the EA process and is not admissible or relevant to the CPCN process.

BCTC states the commonality of the consultation process and the potential for information from the consultation process to be relevant to both the EA and CPCN processes was expressly recognized by the Court of Appeal at paragraphs 55 and 56 of the decision where it is stated:

[55] As I read the two governing statutes, they mandate discrete processes whereby two decision-makers make two different decisions at two different stages of one important provincially-controlled project. Neither is subsidiary or duplicative of the other. They are better seen the way the respondents treat them and the Commission understands them, as sequential processes that can be coordinated. The CPCN defines the activity that becomes the project to be reviewed by ministers before they grant an EAC. Each decision-maker makes a decision in the public interest, taking into account factors relevant to the question on which they are required to form an opinion.

[56] Information developed for the purpose of the CPCN application and the opinion expressed by the Commission are likely to be relevant to the EAC application, just as information gathered at the pre-application stage of the EAC process may be relevant to the CPCN hearing.

BCTC submits that based on the above, BCTC expressly linked the consultation and accommodation efforts set out in its Supplemental Evidence to matters in issue before the Commission.

BCTC submits it has adequately demonstrated the relevance of the Supplemental Evidence at this stage of the proceeding. It refers to its May 25 submission regarding the three categories to which the Supplemental Evidence is generally directed. BCTC submits that the first two categories are directly relevant to the issues which the Commission addresses under section 45 of the UCA. BCTC submits the third category is directly relevant to the assessment of the consultation which the Commission has been directed to assess. In this regard, BCTC notes Kwikwetlem takes the position that there has been no consultation with them regarding the ILM Project. BCTC disagrees with this position but, in the alternative, will argue at the end of the proceeding that if consultation had not been successful as perhaps would have been preferred by the time of the Commission's decision, this was not a result of the lack of reasonable effort on BCTC's and BC Hydro's part. BCTC expects this issue may also arise with some other First Nations when they set out their positions on the adequacy of consultation with greater particularity. BCTC notes First Nations owe a reciprocal duty to participate in consultation efforts in good faith and without unreasonable preconditions. Therefore, BCTC submits that evidence of its general consultation efforts with First Nations up to the point of the Commission's decision is directly relevant to the issue before the Commission.

BCTC further submits its ability to make these arguments at the end of the proceeding should not be determined by a preliminary evidentiary ruling excluding the very evidence that BCTC would rely on to make these submissions.

BCTC submits with regard to the First Nations Intervenor's submissions that various cut-off dates should be used by the Commission to restrict the admission of supplemental evidence, that approach conflicts with both the Court of Appeal's decision and BCTC's and BC Hydro's approach to consultation with both First Nations and others on the ILM Project. BCTC submits the Court of Appeal specifically directed the Commission to assess the adequacy of consultation and accommodation up to the point of the Commission's CPCN decision, not at some point in time before this. Regarding BCTC's and BC Hydro's approach, BCTC submits it has always remained open to consideration of new information and input as the ILM Project has progressed and provides examples.

With regard to the specific proposed cut-off dates, BCTC submits it is inappropriate to use the Options Decision in May 2007 as a cut-off date. BCTC acknowledges it selected the 5L83 Alternative in May 2007 as the preferred alternative. However, BCTC submits this is not a justification for cutting off any further evidence of consultation after that date. BCTC submits it remained open to further input on the viability of the 5L83 Alternative throughout the ongoing consultation. Further, no First Nations Intervenor had indicated their only concern with the adequacy of the consultation is in relation to the choice between alternatives for the ILM Project.

With regard to the date of the filing of the application of CPCN in November 2007, BCTC submits there is no justification for restricting the Supplemental Evidence to the period prior to the filing of the CPCN application. BCTC notes a November 2007, cut-off date would conflict with the Court of Appeal's direction to consider the adequacy of consultation and accommodation to the point of the Commission's decision in August 2008. The November 2007 cut-off date fundamentally conflicts with BCTC's evidence in the CPCN application that consultation was still being carried on and would be carried on while the CPCN process was underway. Further, BCTC submits that its approach has been expressly indicated that it needed the flexibility to consider and address First Nations and other concerns if necessary and appropriate during the CPCN process. BCTC submits the Commission's expectation is that applicants will keep an open mind to new information which becomes available during the course of a CPCN application and it is not unusual for an applicant to file an evidentiary update during the latter stages of an application to reflect new information which has become available over the course of what can be lengthy CPCN review periods. BCTC submits it was not necessary to file an evidentiary update in the ILM proceeding on further consultation efforts because the Commission had determined these issues to be out of scope.

With regard to the December 2007 cut-off date, BCTC takes issue with the Kwikwetlem submission that BCTC advised the Commission in December 2007 that it had not consulted on the CPCN application and was not required to do so. BCTC submits the December 20, 2007 cut-off date appears to refer to the ILM Procedural Conference which took place on that day. BCTC submits a review of the transcript of the Procedural Conference shows no reference in the transcript to BCTC advising the Commission that it had not consulted on the CPCN application or that it was not required to do so. Rather

BCTC submits its position was the obligation to consultation was engaged on the ILM Project but the Commission did not need to undertake a separate assessment of the adequacy of these efforts.

With regard to the January 9, 2008 cut-off date, when BCTC advised First Nations that any consultation obligations thereafter would be focused on the EA decision, BCTC disputes that characterization. Rather, BCTC submits its letter of January 9, 2008 confirms that consultation on the ILM Project would continue utilizing the EA process and separate initiatives.

With regard to the March 2, 2008 cut-off date, BCTC takes issue with the Hwlitsum's submission that the Commission should give little, if any, weight to efforts of consultation that occurred after March 11, 2008 on the basis that the Hwlitsum would be prejudiced. BCTC submits the weight to be given to any particular piece of evidence should be left until the end of the proceeding. BCTC disputes that its March 11, 2008 reply submission to the request of the Kwikwetlem First Nation to suspend the ILM process contained any submissions which suggested that there would not be any additional evidence filed if the appeal was successful or that it would not rely on additional consultation and accommodation efforts with First Nations if the Kwikwetlem's appeal was successful. Accordingly, BCTC submits there is nothing in its March 11 submission which would cause the Hwlitsum to be prejudiced or would bring the honour of the Crown into disrepute if the Supplemental Evidence was admitted. BCTC submits it is not aware of any other communications with the Hwlitsum that may be relevant to the issue.

With regard to the final proposed cut-off date of August 5, 2008 when the Commission released its CPCN decision, BCTC notes the Nlaka'pamux Bands' objection to the introduction of the archaeological impact assessment report which was attached to the Supplemental Evidence as Appendix JJ. The cut-off date is also relied on by the NNTC and the STC. In addition to Appendix JJ, the NNTC submits Appendices NN and OO of the Supplemental Evidence are inadmissible based on the August 5 date.

BCTC submits it filed a copy of the archaeological impact assessment notwithstanding that it was dated after the Commission's decision because it was the focus of a significant amount of effort with a large number of First Nations prior to the date of the Commission's decision and contains information that was provided by First Nations and directly from the archaeological impact assessment work prior to the point of the Commission's decision. While the report itself was not finalized until after the date of the Commission's CPCN decision, BCTC submits that in and of itself should not make the report inadmissible. In the alternative, BCTC is prepared to review the report and redact those portions of the report which contain information provided after August 5, 2008.

With regard to Appendix NN of the Supplemental Evidence, BCTC submits it is a compilation of responses that BCTC and BC Hydro received from different First Nations Intervenors in response to their requests for comments on section 2.3 of the EAC application. While all but one of these responses are dated after August 5, 2008, BCTC thought the First Nations in

question would prefer these responses were filed rather than leaving it unclear as to whether they had been responded to or not. Based on the objections from the Nlaka'pamux Bands and NNTC to these responses being on the record, BCTC is prepared to withdraw them from the Supplemental Evidence.

BCTC states: "Appendix OO is a compilation of facts, confirmations, etc. ... of the notice which BCTC sent to all First Nations and Tribal Councils regarding the Commission's process and is procedural in nature." BCTC states this Appendix was included in the Supplemental Evidence for convenience. BCTC does not believe there is any basis for excluding this from the Supplemental Evidence.

BC Hydro replies to the Hwlitsum submission that evidence after March 11, 2008 is relevant, and should be submitted but given no weight. BC Hydro submits it is premature to address the distinct question of the weight to be given to any particular piece of evidence at this stage and is properly a matter for final argument.

BC Hydro also submits that submissions of Kwikwetlem, Nlaka'pamux Bands, and NNTC and STC all suggest that some or all portions of the Supplemental Evidence are not relevant and/or the proponent has not discharged the onus of establishing relevance. BC Hydro notes it is sometimes unclear whether the Intervenor's are suggesting that such evidence is either inherently or always irrelevant to a CPCN proceeding or irrelevant in this case because the Supplemental Evidence is not responsive to any complaint or concern raised by an Intervenor. In reply, BCTC submits:

- (a) the consultation evidence submitted is a reflection of the coordinated consultation program that was actually undertaken in this case;
- (b) the evidence is relevant to a section 45 proceeding; and
- (c) the failure or refusal of First Nation intervenors to identify their complaints with the consultation process requires BC Hydro and BCTC to put forward a broad outline of the coordinated consultation process.

BC Hydro submits it is clear from paragraph 55 of the Court of Appeal's decision that the EAO process and the CPCN process were viewed as "sequential processes that can be coordinated." BC Hydro and BCTC ran a coordinated consultation process. They did not set out to consult with First Nations separately on CPCN issues and then on EAO issues. BC Hydro submits that to now try to separate or segregate portions of the consultation record would be to belatedly impose a separation that is artificial.

BC Hydro further submits that in any event the fact that the consultation processes may have included consideration of physical, biological and/or social issues does not make them irrelevant to the section 45 process. BC Hydro notes the Commission's CPCN Application Guidelines state that the Project Description filed with the CPCN application is to include, amongst other things, identification and preliminary assessment of any impacts by the project on the physical, biological and social environments or on the public, including First Nations. Therefore, information on potential environmental and

social impacts is clearly relevant. It follows that information regarding consultation with First Nations on potential environmental and social impacts is clearly relevant.

BC Hydro submits it is artificial to suggest an absolute split can be made such that any consultation evidence that may be relevant to one proceeding must, *ipso facto*, be irrelevant to another proceeding.

BC Hydro also submits Intervenor have generally not sought to describe with any precision which portions of the Supplemental Evidence they say are not relevant to section 45 proceedings. BC Hydro states it initiated contact with First Nations in August 2006 but BCTC did not file the CPCN application until November 2007. Consultation continued up to and following the Commission decision in August 2008. The Supplemental Evidence reflects the topics discussed and issues raised.

BC Hydro also submits in the original CPCN hearing, no party at any time raised any concerns regarding the selection of alternatives, much less suggested their essential complaint was in respect of the selection of alternatives. This is so, notwithstanding the fact that selection of alternatives was clearly an issue that the Commission was considering and on which it was open to hear evidence. It was not until after the Commission's decision in August 2008 that the Appellants identified their concern with consultation in respect of the selection of alternatives. Having now identified the essential complaint that the Commission needs to consider, the adequacy of consultation in respect of the alternatives makes it necessary for the Commission to hear evidence on that issue.

BC Hydro also disagrees with the Kwikwetlem submission that this entire proceeding is a reconsideration of the CPCN application that needs to be done based only on the evidence available to the Commission in the original CPCN application. BC Hydro notes that appellants did not appeal the CPCN decision of August 5, 2008 but instead appealed the Scoping Decision of February 21, 2008, with Reasons issued on March 5, 2008. The Court of Appeal remitted the Scoping Decision to the Commission for reconsideration. BC Hydro submits any reconsideration of the Scoping Decision necessarily leads to a change in the "scope" of evidence that is relevant and admissible.

BC Hydro also disagrees with the Intervenor's submissions that suggest a variety of alternative cut-off dates after which evidence should not be admitted. BC Hydro submits this issue is conclusively determined by the Court of Appeal when the Scoping Decision was remitted to the Commission for reconsideration for the purpose of determining the Crown's duty to consult and accommodate the Appellants had been met up to that decision point. Further, the entered Order from the Court of Appeal states the CPCN "is suspended for the purposes of determining whether the Crown's duty to consult and accommodate the appellants had been met up to the point of the Commission's decision to grant the CPCN."

BC Hydro further submits the cut-off date of May 2007 is inappropriate. It submits BCTC's decision in May 2007 was only the decision to seek approval for the preferred alternative. The consideration of the alternatives continued throughout the Commission process. Information that may also be relevant to the environmental process can also be relevant to the CPCN process.

BC Hydro also submits using a cut-off date of November 2007 when BCTC filed the CPCN application is also inappropriate. BC Hydro submits the evidence that may be relevant to any CPCN is not restricted only to the Application. The Commission has the power to require additional information. BC Hydro notes the evidentiary record is frequently tested and expanded by way of information requests, evidentiary updates and other matters. BC Hydro notes both the Commission and Intervenors, including Kwikwetlem, submitted information requests on the original CPCN application after November 2007. Kwikwetlem elicited evidence through information requests about the consultation process after November 2007 but now seeks to preclude such evidence from the proponent.

BC Hydro submits a proposed cut-off date of January 9, 2008 is also inappropriate. By way of the letter of January 9, 2008 to First Nations, BC Hydro submits that BCTC and BC Hydro were stating their position and expressing their commitment to continue to carry on consultation using both the EA process and separate initiatives. Although BCTC and BC Hydro took the position (which in hindsight was incorrect) that the EAO process and provincial ministers should be solely responsible for assessing the consultation record at the end of the EAO process, it does not follow that all portions of the consultation record after January 9, 2008 should disappear or be disregarded and the Court of Appeal subsequently found the Commission was required to separately assess a portion of the consultation record.

BC Hydro also notes several Intervenors have objected to individual items and appendices that post-date the August 5, 2008 CPCN decision. Specific objections have been made to the admission of Appendices JJ, NN and OO. BC Hydro notes while the archaeological impact assessment report (Appendix JJ) was finalized after August 2008, it is based in part on work undertaken prior to August 5, 2008. BC Hydro submits BCTC and BC Hydro chose to include the report as a convenient summary of work that had been underway prior to August 2008.

BC Hydro submits Appendix NN contains comments received from First Nations on a particular topic. Some of those comments predate and some post-date the CPCN decision. BCTC and BC Hydro chose to include all such comments so as to not present an incomplete record of this portion of the process.

BC Hydro notes Appendix OO is the April 27, 2009 letter to First Nations advising them of the current BCUC process as was required by BCUC Order G-38-09. BCTC and BC Hydro chose to include it in the evidence simply as a matter of convenience as opposed to filing it as a separate exhibit.

5.0 Commission Panel Conclusions and Decision

The Commission Panel concludes it has the power to admit the Supplemental Evidence pursuant to the provisions of the ATA if the evidence is relevant, necessary and appropriate for the purpose of the Commission determining whether the Crown's duty to consult and, if necessary, accommodate has been met up to the Commission's decision point. The Commission is not persuaded that the test for admissibility of evidence is different based on whether or not this is a reconsideration pursuant to the Act or as directed by the Court of Appeal in remitting the Scoping Decision to the Commission.

The Commission Panel agrees with the description of relevance in *R. v. Korol*, 2009 BCCA 118 at paragraph 34 where it is stated:

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

The Commission Panel finds the "issue" before the Commission that determines the scope of relevant information in this proceeding is the adequacy of the consultation and accommodation efforts on the issues relevant to the section 45 proceeding to the time of the Commission's decision.

Several Intervenors have submitted that the Supplemental Evidence should not be admitted because, amongst other things, it relates to information collected for the purpose of the environmental assessment process or was information collected after BCTC had selected 5L83 as its preferred alternative.

The Commission Panel disagrees with these submissions. The Supplemental Evidence, subject to the qualifications raised below, is equally capable of proving that the consultation and accommodation efforts were adequate to fulfill the Crown's duty as has been submitted by BCTC and BC Hydro or were inadequate to fulfill that duty as has been submitted by others. The Supplemental Evidence, subject to the qualifications expressed below, is relevant.

The Commission Panel also finds that the Supplemental Evidence, subject to the qualifications expressed below, is necessary. The Commission Panel agrees with the submission that the Supplemental Evidence is required for the Commission to determine whether the Crown's duty to consult and accommodate has been met up to the point in time of the Commission's CPCN decision. As a result of the Commission's previous Scoping Decision, it was unnecessary for BCTC to file evidence of consultation and accommodation as the Commission determined it need not assess the adequacy of that process. Without the Supplemental Evidence, the Commission will be deprived from examining a large body of evidence related to consultation and accommodation efforts.

The Commission Panel also finds that the Supplemental Evidence is appropriate, subject to the qualifications set out below. The Commission Panel is not prepared to find that the First Nations Intervenors will be prejudiced by the admission of the

Supplemental Evidence. The Commission Panel notes that Intervenors will have an opportunity to submit information requests regarding the Supplemental Evidence. Intervenors will also be provided with the opportunity to challenge the evidence and file contrary evidence if they so choose.

The Commission Panel does not agree with submissions which appear to indicate that the Commission Panel should engage in a weighing of the evidence to determine its admissibility. The Commission Panel is expressly refraining from providing any assessment of the weight, if any, to be given to particular pieces of information until it has examined all of the evidence filed or to be filed in this proceeding and has heard full arguments on the weight that should be accorded to any particular piece of evidence.

With regard to proposed cut-off dates following which portions of the Supplemental Evidence should not be admitted, the Commission Panel agrees with the submissions of BC Hydro and BCTC that the Court of Appeal direction to the Commission to consider the adequacy of consultation efforts up to the point of its decision requires the Commission to consider all evidence of consultation and accommodation up to the point of the Commission's decision on August 5, 2008. In this regard, the Commission Panel notes the Court of Appeal in Kwikwetlem noted that information gained during either the CPCN or EA process may be relevant to either process. The Commission Panel does not conclude that information collected for one process necessarily means that it is not admissible in another process. The Commission Panel is of the view that information collected during the EA process up to August 5, 2008 may be given weight to either prove or disprove that adequate consultation and accommodation efforts have been undertaken. The Commission is not persuaded that the purpose behind the collection of evidence is relevant to its admissibility. **The Commission Panel determines that it will consider Supplemental Evidence existing up to August 5, 2008.**

Specific objections were raised with regard to evidence which post-dates August 5, 2008. Appendix OO contains the notification to First Nations that the Commission directed was to occur in Order G-38-09. This Appendix is directly relevant to the proceeding and is procedural in nature. The Commission Panel does not find that because the notification letter was included as part of the Supplemental Evidence filed, it therefore becomes inadmissible. As noted by BC Hydro, the notification letter could have been filed as a separate exhibit. **The Commission Panel determines Appendix OO is admissible.**

Appendix JJ contains the archaeological impact assessment report. Several Intervenors have objected to its inclusion because the report is dated after August 5, 2008. BCTC and BC Hydro submit that the report was included to indicate the nature of the consultation and accommodation efforts which were underway as of August 5, 2008. BCTC has offered to redact the report to include only information related to work which was underway as of August 5, 2008. **The Commission Panel has determined that it will consider evidence existing up to August 5, 2008, and the archaeological impact**

assessment report contained in Appendix JJ is admissible for the limited purpose of showing the consultation and accommodation efforts undertaken up to August 5, 2008. BCTC is directed to redact the report to eliminate or otherwise identify those portions of the report which reflect work undertaken after August 5, 2008. BCTC is to comply with this directive by July 9, 2009.

Appendix NN contains comments from First Nations, some of which predate and some of which post-date the CPCN decision. **The Commission Panel determines that those comments in Appendix NN that were received by August 5, 2008 are admissible but those which post-date August 5, 2008 are inadmissible.**

British Columbia Transmission Corporation
Reconsideration of
Interior to Lower Mainland ("ILM") Transmission Project

REVISED REGULATORY TIMETABLE

ACTION	DATE
Commission Information Requests	Friday, July 3, 2009
Registration Deadline for Participant Assistance/Cost Award Budget Estimate	Thursday, July 9, 2009
Intervenor Information Requests	Friday, July 10, 2009
BCTC Response to Information Requests	Friday, July 31, 2009
Procedural Conference	Thursday, August 6, 2009 commencing at 9:00 am
Intervenor Evidence (tentative)	Monday, August 24, 2009
Information Requests on Intervenor Evidence (tentative)	Friday, September 4, 2009
Intervenor Response to Information Requests on Intervenor Evidence (tentative)	Monday, September 21, 2009

Location for Procedural Conference: Commission Hearing Room
12th Floor, 1125 Howe Street
Vancouver, BC V6Z 2K8